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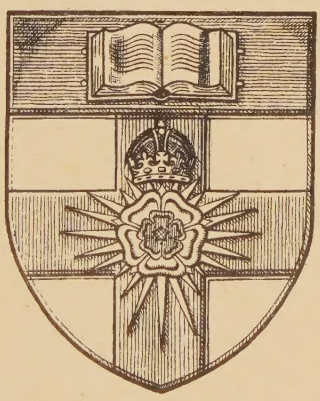

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ECCLESIASTICAL COURTS.

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* ELMS *v.* FOSTER WHEELER LD.
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* BROWN *v.* TROY & CO. LD.
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7. —— *Safety regulations — Scaffold — Safe means of access—Scaffold protruding across access to building site—Safe means of access to "every place at which any person*

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". . . has to work"—Duty limited to employees of contractor—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4 (*ii*), 5.

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* ASSOCIATED BROADCASTING CO. LD. *v.* COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LD.
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* PEOPLE'S REFRESHMENT HOUSE ASSOCIATION LD. *v.* JONES
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3. —— *Hospital—Appeal for funds for erection and maintenance of voluntary hospital —Scheme impracticable after National Health Service Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 81)—*Resulting trust for donors.*
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* *In re* HILLIER'S TRUSTS. HILLIER *v.* ATTORNEY-GENERAL
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* *In re* T. W. CONSTRUCTION LD.
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2. —— *Winding up—Foreign corporation — Russian bank — No branch in England —Assets in England—Dissolution of bank in Russia—Winding-up order in England—Claim against liquidator of English assets for debt due from bank—Claim based on orders by bank payable in England—Transaction illegal by Russian law—Debt situate in Russia—Not a debt provable in winding up—Companies Act,* 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 261.

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3. —— *Eyes — Protection — Provision of goggles or effective screens—Independent contractor using mechanical implement—Duty of normal occupier of factory to employee of contractor—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 49, 139—*Protection of Eyes Regulations,* 1938 (*S.R. & O.* 1938, *No.* 654).

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* WHALLEY *v.* BRIGGS MOTOR BODIES LD.
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4. —— *Floor — Opening — Dry dock — Whether dock an "opening" in a floor—Necessity to fence—Working ledge of dry dock unfenced—Workman returning to work—Fall onto ledge and into dock—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (3), 26 (1).

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* BATH *v.* BRITISH TRANSPORT COMMISSION
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5. —— *Floor — Opening — Meaning of "floor"—Statutory duty to fence—Foundry with sand bed—Unfenced hole in sand—*

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* HARRISON *v.* METROPOLITAN-VICKERS ELECTRICAL CO. LD. SAME *v.* SAME.
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6. —— *Safe means of access — Transient occurrence — Entrance rendered slippery and unsafe by sudden snowstorm—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 26.

* THOMAS *v.* BRISTOL AEROPLANE CO. LD.
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* *In re* GREAVES, DECD. GREAVES *v.* GREAVES - Roxburgh J. 1 W.L.R. **760**

2. ——. *See* PRACTICE AND PROCEDURE.

FATAL ACCIDENTS ACTS—*Costs—Taxation—Taxation as between solicitor and client—Fatal Accidents Acts,* 1846–1908 (8 *Edw.* 7, *c.* 7)—*Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 50—*R.S.C., Ord.* 22, *r.* 14 (9) (11).

* THOMASON *v.* SWAN HUNTER & WIGHAM RICHARDSON LD. THE ALBION (No. 2)
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2. —— *Damages—Benefit to dependant—Claim by widower as deceased wife's dependant—Receipt of voluntary payment from beneficiaries of deceased's estate — Fatal Accidents Act,* 1846 (9 *&* 10 *Vict. c.* 93).

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* PERCIVAL *v.* STANTON
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* FISHER *v.* BARNETT & POMEROY (BAKERS) LD. - - - Divl.Ct. 1 W.L.R. **351**

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* ADLER *v.* DICKSON (PRACTICE NOTE) C.A. 1 W.L.R. **1482**

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2. —— *Divorce—Condonation—Confession of adultery by wife with X—Act of intercourse following confession—Effect of condonation not destroyed by husband later learning extent of adulterous association with X. Restitution of conjugal rights—Desertion—Bona fide offer by deserted but guilty wife to resume cohabitation—Husband paying maintenance — Decree for restitution of conjugal rights — Mutual affection not necessary. Desertion.*
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3. —— *Divorce — Desertion — Constructive desertion — Reasonable belief in adulterous association—Adultery not alleged in petition.*
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4. —— *Divorce — Discretion — Exercise — Review by appellate tribunal—Sanctity of marriage—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.
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5. —— *Divorce—Insanity—Care and treatment—Absence from mental hospital for cure of fractured leg — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*) (*d*).
* SWYMER *v.* SWYMER (BY HIS GUARDIAN AD LITEM)
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6. —— *Divorce—Insanity—Care and treatment—Admission under an "urgency order" — Regrading as voluntary patient — Lunacy Act*, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 11 (1)—*Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*), (*d*).
* CHAPMAN *v.* CHAPMAN (BY HER GUARDIAN AD LITEM)
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7. —— *Divorce — Practice — Answer — Amending to allege desertion by way of cross-petition—Three years not completed at date of original answer.*
* ROBERTSON *v.* ROBERTSON Barnard J. 1 W.L.R. **1537**

8. —— *Divorce—Practice—Answer—Amendment — Petition by husband — Adultery and desertion alleged in answer—Application to amend answer by striking out allegation of adultery — No affidavit filed — Matrimonial Causes Rules*, 1950 (*S.I.* 1950, *No.* 1940), *r.* 15 (3).
* CHEETHAM *v.* CHEETHAM C. A. 1 W.L.R. **990**

9. —— *Divorce — Practice — Intervener — Lesbianism alleged—Allegation not proved—Dismissal of intervener from suit.*
* SPICER *v.* SPICER (RYAN INTERVENING) Karminski J. 1 W.L.R. **1051**

10. —— *Divorce—Practice—Petition within three years of marriage—Exceptional hardship or exceptional depravity — Evidence — Consideration of respondent's affidavit—Discretion of judge—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2.
* SIMPSON *v.* SIMPSON - C.A. 1 W.L.R. **994**

11. —— *Divorce — Practice — Pleading — General cruelty allegation—No particulars—What may be proved—Need for notice.*
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12. —— *Divorce—Practice—Trial—Right to begin—Desertion alleged—Just cause as defence.*
* ARDING *v.* ARDING (PRACTICE NOTE) Karminski J. 1 W.L.R. **944**

13. —— *Justices—Clerk—Interventions by clerk—Notes of evidence based upon proof—Impropriety.*
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* HOBBY *v.* HOBBY - Divl.Ct. 1 W.L.R. **1020**

14. —— *Justices—Practice—Constitution of court—Different justices sitting on adjournments—Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 98 (6).
* MUNDAY *v.* MUNDAY Divl.Ct. 1 W.L.R. **1078**

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15. —— *Justices — Practice — Defence of belief in adultery—Notice.*
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16. —— *Justices—Practice—Dismissal of case at close of complainant's evidence—Desirability of hearing both sides.*
* Ramsden *v.* Ramsden
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17. —— *Justices—Practice—Party in person—Duty of court—Questions to be put to other party—Magistrates' Courts Act*, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 61.
* Fox *v.* Fox - Divl.Ct. 1 W.L.R. **1472**

18. —— *Maintenance—Agreement—Change of circumstances—Whether wilful neglect to maintain — Jurisdiction of court to review agreed terms—Whether reasonable at time of application — Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.
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19. —— *Maintenance—Agreement—Foreign divorce—Agreement purporting to oust jurisdiction of foreign court—Enforceability in England—Public policy.*
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* Addison *v.* Brown. Same *v.* Same
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20. —— *Maintenance—Agreement—Maintenance inadequate—Wife receiving national assistance—Liability of husband to National Assistance Board—National Assistance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 *and* 43.
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* National Assistance Board *v.* Prisk
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21. —— *Maintenance—High Court—Application for injunction to restrain husband from dealing with property — No arrears under current order—Application for further provision pending.*
* Wright *v.* Wright
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22. —— *Maintenance—High Court—Children—Periodical payments—Whether court has power to make order for payment direct to children—Matrimonial Causes Act*, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23 (1).
* Logan *v.* Logan
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23. —— *Maintenance—High Court—Committal order—Duration—No longer limited to one year—Debtors Act*, 1869 (32 *&* 33 *Vict. c.* 62), *s.* 5—*Matrimonial Causes (Judgment Summons) Rules*, 1952 (*S.I.* 1952, *No.* 2209/*L.* 21)—*Bankruptcy Rules*, 1952 (*S.I.* 1952, *No.* 2113/*L.* 14), *r.* 383.
* Sichel *v.* Sichel
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24. —— *Maintenance—Justices—Adultery by wife—Evidence—Variation of original order after adultery—Subsequent application to discharge—"Fresh evidence"—Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.
* Brammer *v.* Brammer
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25. —— *Maintenance—Justices—National assistance—Husband in receipt of national assistance — Living with another woman — Wife not "member of the same household" —Discretion of court to order maintenance—Quantum—National Assistance Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 7.
* Ivory *v.* Ivory Divl.Ct. 1 W.L.R. **604**

26. —— *Maintenance — Justices — Second marriage of husband—Maintenance for first wife—Second wife's capabilities—Possibility of letting rooms.*
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* Grainger *v.* Grainger
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27. —— *Maintenance — Justices — Wilful neglect to maintain—Separation by consent —No neglect to maintain wife—Finding of neglect to maintain child—Power to make order in favour of wife—Discretion as to amount in such circumstances.*
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28. —— Maintenance. *See* Practice and Procedure.

29. —— *Property — Matrimonial home — Desertion by husband—Right of wife to remain enforceable against husband's successor in title with notice—Right not lost by incomplete agreement to accept alternative accommodation —Right not superseded by express licence.*
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2. —— *Dangerous premises—Causation—Injury caused by concurrent causes—Factory —Fire—Failure to turn off main switch—Other switch turned off—Wires transposed unknown to occupier—Fireman electrocuted —Whether occupier liable—Relevance of statutory duty regarding switches.*

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* HARTLEY *v.* MAYOH & CO.
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3. —— *Railway station—Patch of oil—Injury to pedestrian—Standard of duty—Steps taken to render premises reasonably safe.*

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2. —— Appeal. *See* HUSBAND AND WIFE.

3. —— *Case stated—Case stated by consent—Application for declaration under National Parks and Access to the Countryside Act,* 1949—*Original jurisdiction of quarter sessions to make declaration—Jurisdiction in High Court to hear application on case stated —Quarter Sessions Act,* 1849 (12 *&* 13 *Vict. c.* 45), *s.* 11—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31.

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5. —— *Committal warrant — Affiliation order—Order made against American soldier—Arrears of payments—American forces' immunity from arrest—Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 64 (1) *and* 74—*Army Act,* 1881 (44 *&* 45 *Vict. c.* 58, *as re-enacted*), *s.* 145—*United States of America (Visiting Forces) Order,* 1942 (*S.R. & O.* 1942, (*No.* 966) *I, p.* 844).

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* REGINA *v.* BIRKENHEAD BOROUGH JUSTICES. *Ex parte* SMITH - Divl.Ct. 1 W.L.R. **471**

6. —— Constitution of court. *See* HUSBAND AND WIFE.

7. —— *Costs—Penalty in guise of costs —Order for costs exceeding costs of prosecution.*

* REGINA *v.* HIGHGATE JUSTICES. *Ex parte* PETROU - - Divl.Ct. 1 W.L.R. **485**

8. —— Information. *See* WAGES.

9. —— Licensing jurisdiction. *See* LICENSING.

10. —— Retirement of clerk in matrimonial case. *See* PRACTICE—Husband and wife.

11. —— *Submission of no case—Application by prosecution to call further evidence —Road traffic—Dangerous driving—Prosecution's omission of evidence identifying defendant as driver — Prosecution's case closed—Justices' refusal to allow case to be reopened—Whether judicial exercise of discretion—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11.

*MIDDLETON *v.* ROWLETT
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12. —— *Summons—Issue of — Decision as to appropriate charge—Whether matter for justices or prosecution—Police applying for summons for careless driving—Justices insisting on summons for dangerous driving—Road Traffic Act,* 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 11, 12.

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* REGINA *v.* NUNEATON JUSTICES, *Ex parte* PARKER - Divl.Ct. 1 W.L.R. **1318**

13. —— *Warrant — Sunday — Observance —Search warrant—Issue of warrant to search club premises — Execution on Sunday — Whether lawfully executed — Sunday Observance Act,* 1677 (29 *Car.* 2, *c.* 7), *s.* 6—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 102 (3)—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 152 (1).

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14. ——. *See* HUSBAND AND WIFE.

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— *Interest only in proceeds of sale — Not registrable as land charge—Law of Property Act*, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 1 (6), 42 (6) —*Land Charges Act*, 1925 (15 *Geo.* 5, *c.* 22), *ss.* 10, *Class C* (iii), (iv), 20 (6), (8).
* *In re* Rayleigh Weir Stadium
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* Richmond *v.* McGann
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2. —— *Act of* 1954 — *Notice to quit — Validity—Notice given on August* 31, 1954, *expiring October* 4—*Act coming into force on October* 1—*Notice not in form prescribed by Act—Landlord and Tenant Act*, 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 24 (1) (3) (*b*).
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3. —— *Forfeiture of lease — Mortgage — Relief for underlessee — "Underlessee" — Agreement to execute legal charge—Whether mortgagee an "underlessee"—Assignment of lease—Guarantee for sum lent by bank to assignee—Deposit of documents relating to the property by assignee with guarantor — Bankruptcy of assignee—Action by landlord against trustee in bankruptcy and assignee for forfeiture — Intervention in action by guarantor—Application under Law of Property Act*, 1925, *for order vesting property in guarantor—Law of Property Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 87 (1), 146 (4) (5) (*d*).
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* *In re* Good's Lease. Good *v.* Trustee of the Property of W., a Bankrupt, and W. - - Harman J. 1 W.L.R. **309**

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5. —— Rectification. *See* Vendor and Purchaser.

6. —— *Rent restriction—Death of tenant —Widow occupying as statutory tenant—Acceptance of new rent book containing new conditions of tenancy—Statutory tenancy converted into contractual tenancy — Death of widow—Daughter's right to remain in possession—Increase of Rent & Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).
* Bungalows (Maidenhead) Ld. *v.* Mason
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7. —— *Rent restriction—Mortgage—Interest in arrear for more than twenty-one days—Arrears subsequently paid—Whether statutory protection revived—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 7 (*a*).
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* Nichols *v.* Walters - C.A. 1 W.L.R. **1**

8. —— *Rent restriction—Personal occupation—Shop and dwelling-house let together—Dwelling-house made uninhabitable owing to war damage and failure to repair—Occupation of dwelling-house abandoned—Shop still occupied—Whether any animus possidendi on part of tenant.*
* Bushford *v.* Falco - C.A. 1 W.L.R. **672**

9. —— *Rent restriction—Rent Act avoidance —Agreement in writing—Letting for twelve months—Consideration sum of £47 and weekly rent of 2s. payable monthly—"Thereafter "(should tenant be desirous of continuing "tenancy) on monthly tenancy at rent of 2s. "per week"—Rent less than two-thirds of rateable value — Tenant holding over — Tenant's claim to protection of Rent Acts as statutory tenant—Evidence that written agreement did not accurately record the intention of the parties.*
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* O'Connor *v.* Hume - C.A. 1 W.L.R. **824**

10. —— *Rent restriction — Shared accommodation—Shared use of kitchen—One tenant vacating premises—Right of other tenant to remain in occupation—Landlord and Tenant (Rent Control) Act*, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 8.
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* Isaacs *v.* Titus - C.A. 1 W.L.R. **398**

11. —— *Rent restriction — Sublease — Subtenancy with right of sharing living accommodation granted by statutory tenant—Statutory tenant's surrender of possession—Rights of subtenant determined—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15.
Landlord and Tenant—Sublease—Surrender of head tenancy—Effect on sublease. Rent restriction — Statutory tenant — Nature of rights.
* Solomon *v.* Orwell - C.A. 1 W.L.R. **629**

12. —— *Rent restriction—Standard rent—Meaning of "rent"—Tenant performing services for owner—Tenant paying as rent difference between quantified value of services and rental value of house—Subsequent increase in tenant's wages—No pecuniary rent paid after increase in wages—Character of tenancy not affected by wage increase—Increase of Rent and Mortgage Interest (Restrictions) Act*, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2), (7)—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (1).
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13. ——. *See* Agriculture; Execution.

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2. ——. *See* Criminal Law.

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* BAMPTON *v.* COOK (PRACTICE NOTE)
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2. —— *Costs—House of Lords—Assisted person in court below—Appeal to House of Lords—Former assisted person unsuccessful respondent—Appearance not in forma pauperis.*
* ANDERSON *v.* LAMBIE AND ANOTHER (PRACTICE NOTE)
H.L.(Sc.) 1 W.L.R. **303**

3. —— *Costs — Order against aided person —Form of order — Payment by instalments —Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 2 (2) (*e*)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17.
* PRACTICE DIRECTION (COSTS AGAINST AIDED PERSON)
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4. —— *Costs — Security for costs — Plaintiff out of jurisdiction — Security for defendant's costs — Action for account — R.S.C. Ord.* 65, *r.* 6A—*Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).
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2. —— *Construction—Annuity—One third of income of residuary trust fund payable to widow for life—If insufficient to provide £6,500 in any year "free of English income "and super-tax" trustees to pay balance "out "of the income of the trust fund"—Whether annuity a continuing charge on income.*

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3. —— *Construction — "Children" — Whether including issue—Trusts for "child-"ren . . . and . . . issue"—Ultimate trusts for "children . . . similar to the trusts here-"inbefore declared so far as may be and the "law will allow" — Whether "issue" included in ultimate trusts. "Similar" trusts.*

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* *In re* LYBBE, DECD. KILDAHL *v.* BOWKER
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4. —— *Construction—Omission—Clause ungrammatical and illogical unless words supplied from precedent—Judicial notice that precedent available—Words inserted.*

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5. —— *Construction—Protected life interest —Trustee's power to "resort to and spend "any part of the capital . . . and apply the "same for . . .[beneficiary's] maintenance "and general benefit . . ."—Beneficiary's claim for entire capital rejected—Transfer of capital subject to trustee's discretion.*

Trust and Trustee.

* *In re* POWLES, DECD. LITTLE *v.* POWLES
Harman J. 1 W.L.R. **336**

6. —— *Construction—Testamentary character—Gifts to executor and trustee—To be disposed of in accordance with memorandum signed by testator—Such memorandum not to have testamentary effect—Gifts expressed not to create a trust—Whether executor entitled beneficially.*

* *In re* STIRLING, DECD. UNION BANK OF SCOTLAND LD. *v.* STIRLING
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7. —— *Construction—Uncertainty—Condition subsequent—Gift of freehold house and contents and "any possessions I may have" to one daughter "on condition that she will "always provide a home for" another daughter—Condition subsequent—No gift over— "Possessions" — "Provide a home" — Whether condition valid—Precatory trust.*

Trust and Trustee—Precatory trust. "Pos-"sessions"—Cash at bank—Proceeds of policy —Arrears of pension.

* *In re* BRACE, DECD. GURTON *v.* CLEMENTS
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8. —— *Interlineation—Interlineation in codicil — Validity — Examination of circumstances.*

Executor and Administrator—Executor—Remuneration—Bank—Bank appointed as executor and trustee by codicil — No charging clause—Bank entitled to charge.

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THE
WEEKLY LAW REPORTS
Volume I

Containing those cases of value to practitioners which are not intended to be included in The Law Reports and also practice notes and directions.

[COURT OF APPEAL.]

C. A.

1953
Nov. 25.

Evershed M.R., Jenkins and Morris L.JJ.

* NICHOLS AND ANOTHER *v.* WALTERS.

[1952 N. 2326.]

Landlord and Tenant—Rent restriction—Mortgage—Interest in arrear for more than twenty-one days—Arrears subsequently paid—Whether statutory protection revived—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 7 (*a*).
Mortgage.

By section 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as "(a) interest at the rate permitted under this Act is paid and "is not more than twenty-one days in arrear . . . to take any steps "for . . . enforcing his security. . . ."

Where a mortgagor has defaulted for more than twenty-one days in making payment of interest due on a mortgage to which the Act of 1920 applies, his subsequent payment of the arrears does not revive the protection given by section 7 of the Act.

Evans v. *Horner* [1925] Ch. 177 applied.

Decision of Danckwerts J. affirmed.

APPEAL from Danckwerts J.

In 1951, Miss Walters, the tenant of premises within the Rent Acts known as 302 Westbourne Grove, London, purchased the freehold reversion, part of the purchase money being provided by means of a mortgage to the plaintiffs dated September 28, 1951, for the sum of £2,200, repayable as provided in the charge with interest at 5½ per cent., reducible to 4½ per cent. on punctual payment. After the purchase was completed Miss Walters carried on business on the ground floor and lived in part of the upper floor, the other part of the premises remaining vacant. In June, 1952, the mortgagees served a notice calling in the principal moneys. At that date no interest was in arrears, but in

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September, 1952, Miss Walters failed to pay the interest due from her and allowed it to get considerably more than 21 days in arrear, and she also did not pay a premium due on a life insurance policy.

On December 17, 1952, the plaintiffs issued a summons asking for an order for possession against Miss Walters. The summons came before Master Hawkins on February 3, 1953, and, on Miss Walters undertaking to pay off the arrears "at once," he directed that the summons should stand over with liberty to restore if default was made. Miss Walters said, and her evidence on this point was not challenged, that she paid the arrears on February 7 (a Saturday). The summons was, however, restored on February 10, and the master having made the order asked for by the plaintiffs, Miss Walters appealed to Danckwerts J., who upheld the master's order.

Miss Walters appealed.

The appellant in person.

C. B. Guthrie for the plaintiffs.

In addition to the case cited in the judgment the following cases were referred to in argument (on the point, left open in the judgment), whether section 7 of the Rent and Mortgage Interest (Restrictions) Act, 1920, applies as between mortgagor and mortgagee to a dwelling-house once within the Rent Acts whilst the house is occupied by the freeholder: *Portman Building Society* v. *Young* [1]; *Schaffer* v. *Ross*.[2]

EVERSHED M.R. We are indebted to Miss Walters for putting her case clearly to us, but, in my judgment, there is no ground upon which we can disturb the order made by Danckwerts J.

[His Lordship stated the facts and continued:] The first part of Miss Walters's argument is that she is protected, as against the mortgagees, by the Rent Restriction Acts, and, in particular, by section 7 of the Act of 1920, which provides: "It "shall not be lawful for any mortgagee under a mortgage to which "this Act applies, so long as—(*a*) interest at the rate permitted "under this Act is paid and is not more than twenty-one days in "arrear; and (*b*) the covenants by the mortgagor (other than the "covenant for the repayment of the principal money secured) "are performed and observed; and (*c*) the mortgagor keeps the "property in a proper state of repair . . . to call in his mortgage "or to take any steps for exercising any right of foreclosure or "sale, or for otherwise enforcing his security. . . ."

A mortgage to which this Act applies is defined in section 12 of the same Act. Subsection (4) states: "Subject to the provi-"sions of this Act, this Act shall apply to every mortgage where

[1] [1951] W.N. 10; [1951] 2 T.L.R. 369; [1951] 1 All E.R. 191.

[2] [1940] 1 K.B. 418; 56 T.L.R. 126; [1939] 4 All E.R. 363.

"the mortgaged property consists of or comprises one or more "dwelling-houses to which this Act applies, or any interest "therein," with certain exceptions which it is not necessary for me to read. Subsection (2) reads: "This Act shall apply to a "house or a part of a house let as a separate dwelling, where" and then follow the financial limits imposed by the Act, on which nothing now turns. Finally, Miss Walters draws attention to subsection (6), which provides: "Where this Act has become "applicable to any dwelling-house or any mortgage thereon, it "shall continue to apply thereto whether or not the dwelling-house "continues to be one to which this Act applies." I find these provisions somewhat obscure, and I have seen elsewhere,[1] too, that the adjective "enigmatic" has been applied to subsection (6).

At the date of the mortgage of September, 1951, the premises in Westbourne Grove were not, and have not since been, let to anyone, either in whole or in part. Miss Walters carries on a business on the ground floor and lives in part of the upper floor. It is said by the mortgagees that section 7 is inapplicable as between mortgagee and mortgagor where the mortgaged premises are in the hands of their freehold owner. I think that that question is open to doubt, and I prefer to express no opinion about it.

I will assume that Miss Walters is correct when she states that the mortgage was a mortgage to which the Act of 1920 applies. On that footing, the notice calling in the mortgage in June, 1952, was unlawful; that is, invalid and bad; but Miss Walters did not pay the interest due in September, 1952. She allowed it to get considerably more than twenty-one days in arrear; and she also did not pay an insurance premium which she was bound to pay.

[His Lordship referred to the summons of December 17, 1952, and to the master's direction that the summons should be stood over. His Lordship continued:] According to Miss Walters (and I accept her evidence in the absence of any refutation or challenge) she paid the arrears on February 7. Mr. Guthrie said that that was not paying "at once" [in accordance with the undertaking given to the master], but I should have thought, for practical purposes, that it was. However, the summons was restored on February 10. Miss Walters says that it ought not to have been restored, because the arrears had then been paid, and that, therefore, there was no right of action left in the mortgagees. I think, however, that Miss Walters was not entitled, because she had paid the arrears, thereupon to have the summons dismissed; in fact, the court never lost seisin of the matter. It was considered carefully by the master in February, and was three times before the judge, and it is now, in November, before this court.

Subject to one point, therefore, it seems to me, as a matter of law—whether or not it may be hard on Miss Walters is not

[1] *McKenna* v. *Gray* [1939] Ir.Jur. Rep. 57, *per* Murnaghan J.

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relevant—that the plaintiffs were entitled to ask for an order enforcing their security, and that is what they obtained.

The only question is whether, having paid off the arrears of interest in February, Miss Walters can still claim the benefit of section 7 of the Act of 1920. I think that the answer to that question is provided by *Evans* v. *Horner*,[2] decided by Russell J., who concluded that[3]: "Section 7 (*a*) means that so long as "interest is paid not later than twenty-one days after it is due, "the mortgagee cannot call in his mortgage or take any steps "for exercising any right of foreclosure." Russell J. had earlier said[3]: "In my opinion the section only suspends the rights of "the mortgagee during one continuous period, which lasts so long "as conditions (*a*), (*b*) and (*c*) are complied with, and that when "once those conditions are broken a subsequent compliance with "them does not revive the protection given by the section." That decision has never been questioned in this country during the quarter of a century which has passed since it was delivered, and I should, in any case, be slow to differ upon a matter of this kind from that very learned judge.

In the circumstances, therefore, I think that the answer inevitably is that Miss Walters, having allowed the interest to get more than twenty-one days in arrear (whatever may have been the reason) she ceased to be able to invoke section 7. When that stage is reached I think that everything else follows, and this appeal must fail.

I said during the argument that I felt some sympathy for Miss Walters, and, indeed, I do; but I think also that even if she was able now to postpone an order for possession, it would not in the end make any difference. Ultimately, I have no doubt, from what Miss Walters told me, that an order would have to be made. I should not wish, from anything which I have said, to be treated as criticizing the mortgagees or to suggest that they have not behaved properly in this matter.

In my judgment the appeal fails.

JENKINS L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Farrar Porter & Co.*

E. D.

[2] [1925] Ch. 177.

[3] Ibid. 178.

[CHANCERY DIVISION.]

* *In re* GEORGE WHICHELOW LD. BRADSHAW *v.* ORPEN.

1953
Nov. 24.

Upjohn J.

[1953 G. No. 2722.]

Trust and Trustee—Company—Shares vested in trustees—Interlocutory motion by beneficiaries to direct trustees' method of voting—No order of court to presume beneficiaries past age of child-bearing.
Company. Presumption—Age of child-bearing.

Three blocks of shares in a company were left by a testatrix in trust for each of her three daughters respectively for life, with remainder to their children who should attain 21.

After disputes had arisen regarding the conduct of the company's affairs and the fitness for office of certain directors, a general meeting was called for November 26, 1953, and notices were given of six resolutions to be moved for the appointment to or removal from the board of named persons. The three daughters and their eight children sent a notice to the trustees directing them either to appoint the eldest of the daughters as their proxy, or to vote in a certain way on the resolutions. The trustees declined to take these directions, and stated that they would use their votes in accordance with their discretion.

The beneficiaries then issued a writ against the trustees, and by interlocutory proceedings moved for orders that the trustees should comply with the directions given to them, and should be restrained from voting otherwise. The first three plaintiffs, the tenants for life, were respectively aged 61, 58 and 52; and the plaintiffs contended that the class of beneficiaries was thus closed, so that they had the right to direct the way in which the votes of the trustees should be used:—

Held, refusing interlocutory relief, that the plaintiffs could not be regarded as being all the persons beneficially entitled, because it could not be said in law that the first three plaintiffs were past the age of child-bearing.

In re Thornhill [1904] W.N. 112 distinguished; observation in *Butt* v. *Kelson* [1952] Ch. 197, at p. 207, not applied.

INTERLOCUTORY MOTION.

The facts are stated in the judgment.

Raymond Jennings Q.C. and *K. J. Elphinstone* for the plaintiffs.

W. T. Elverston for the defendants.

The following cases were cited in argument, in addition to those referred to in the judgment: *Piercy* v. *S. Mills & Co. Ld.*[1] and *Kirby* v. *Wilkins.*[2]

UPJOHN J. This is a motion by the plaintiffs asking for an order that the defendants who are shareholders in a company,

[1] [1920] 1 Ch. 77; 35 T.L.R. 703. [2] [1929] 2 Ch. 444.

1953

GEORGE WHICHELOW LD., *In re.*

Upjohn J.

known as George Whichelow Ld., do either appoint the first plaintiff a proxy to vote in respect of those shareholdings, or do themselves vote in respect of those shareholdings in a certain manner at a meeting of the company which is going to be held on November 26 next; that is, next Thursday. The defendants hold the shares as trustees of a will dated July 31, 1922, of Annie Matilda Whichelow.

I am informed that the trusts of that will are complicated, but it is agreed (and I assume for the purposes of this motion) that the trusts can simply be stated in these terms; that the testatrix left a block of shares on trust for each of her three daughters for life with remainder to the issue respectively of those daughters. She had three daughters, the first three plaintiffs, and the remaining plaintiffs are their children.

Coming to details, some 10,093 ordinary shares in the company are held upon trust for Mrs. Bradshaw for life with remainder to her children who attain 21; 8,646 ordinary shares are held upon similar trusts for Mrs. Dale and her children, and 8,043 ordinary shares upon similar trusts for Mrs. Scott and her children. All the plaintiffs have attained the age of 21 and the ages of the first three plaintiffs are respectively 61, 58 and 52.

These trust shares, which aggregate 26,782, are part of the issued ordinary share capital in the company. The capital structure of that company is as follows: There are issued 60,000 7 per cent. cumulative preference shares of 10s. each and 67,000 ordinary shares of £1 each; but each share, whether preference or ordinary, is entitled to one vote at general meetings of the company. Therefore the total voting power in the company is 127,000 votes, and the defendants have voting rights of 26,782 votes. That is a substantial but by no means controlling voting power in this company.

The facts which give rise to this motion are briefly as follows.—A brother of the first three plaintiffs, one Joseph Whichelow, was managing director of the company down to July 17, 1953. He was a joint managing director with Mr. Philip Preston, the latter also being chairman of the company. The other directors were a Mr. George Preston, a Mr. Lyons and Mr. Orpen, the first defendant.

On July 17, Mr. Whichelow was dismissed from his position as managing director in circumstances which I need not describe in detail. It is sufficient to say that he was indebted to the company in respect of sums which he had drawn from the company, not to expend on the company's business but on his own. It is also fair to say that those sums were repaid to the company on July 24 or 25. As a result of that, however, disputes and difficulties arose between the directors of the company and the plaintiffs. I need not go into those in any detail—indeed, it is undesirable that I should—because they will be matters to be discussed fully at the general meeting which will be held on Thursday next.

For that general meeting certain resolutions have been proposed, and the question is how the voting power of the trust shares should be exercised. The resolutions which are relevant are set out in a notice convening the meeting which was sent out on October 30. The first five were given by Mr. Whichelow: (1) that Mr. George Preston be removed from the office of director; (2) that Mr. Orpen be removed from the office of director; (3) that Mr. Philip Preston be removed from the office of director; (4) that the first plaintiff be appointed a director; and (5) a Mr. Stockall also be appointed a director. Then the sixth resolution, which was given by Mr. Lyons, is that Mr. Whichelow be removed from the office of director. The plaintiffs and the defendants cannot agree on the manner in which the voting power of the trust shares should be exercised upon those six resolutions.

In that state of affairs, all the plaintiffs have sent a notice to the defendant trustees requesting them either to appoint the first plaintiff a proxy, or directing them how to vote on those six resolutions. The trustees are not prepared, unless they are so ordered by this court, to vote in that manner. They have indicated in the evidence the manner in which they, if left unfettered by any order, would exercise their voting power.

The question I have to determine is really one of law. What the plaintiffs say is this: "We are all the persons entitled to the "beneficial interest in these trust shares. We are, therefore, "entitled to direct the trustees how they are to vote at the forth-"coming meeting of the company"; and they rely upon a passage in the judgment of Romer L.J., who delivered the first judgment of the Court of Appeal in *Butt* v. *Kelson*.[1] The Lord Justice said this: "What I think is the true way of looking at the matter is "that which was presented to this court by Sir Lynn Ungoed-"Thomas, that is that the beneficiaries are entitled to be treated "as though they were the registered shareholders in respect of "trust shares, with the advantages and disadvantages (for "example, restrictions imposed by the articles) which are involved "in that position, and that they can compel the trustee directors "if necessary to use their votes as the beneficiaries, or as the "court, if the beneficiaries themselves are not in agreement, think "proper, even to the extent of altering the articles of association "if the trust shares carry votes sufficient for that purpose."

The plaintiffs further say that they are all the persons entitled to these shares. Although there is the theoretical possibility of further issue being born, that they say is plainly impossible in the case of the first two plaintiffs, who are aged 61 and 58; and with regard to the third plaintiff, who is 52, her last born child was born over 21 years ago. She is divorced from her husband; and they say, with some force, that the circumstances are really indistinguishable from those in *In re Thornhill*,[2] where the Court of Appeal gave leave for money to be paid out of court, on the

[1] [1952] Ch. 197, 207; [1952] 1 All E.R. 151.

[2] [1904] W.N. 112.

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assumption that the mother was past the age of child-bearing. Further, they say that in *In re Smith*,[3] where all the persons entitled as objects of a discretion directed the trustees how to pay the income, the mother was treated as past the age of child-bearing, and the court made an order on the footing that they were the persons absolutely entitled. Therefore, the plaintiffs say they are entitled to give these directions to the trustees, who must carry out those directions.

On the other hand, Mr. Elverston, for the trustees, says that the trust is still plainly subsisting—that indeed is obvious; there are three life tenants and a number of remaindermen—and the trustees do not desire to surrender their discretion to the court; they are anxious to exercise that discretion themselves; and he submits that, in those circumstances, the court cannot control the bona fide exercise of the trustees' discretion. Pausing there, let me say at once, that on the evidence which I have read it seems to me perfectly clear that the trustees are acting in a manner which is entirely bona fide, in circumstances which they find extremely difficult; and I have no doubt that they have given their very best attention to the difficult question of how best to vote in the circumstances which have arisen. Mr. Elverston relies on a passage in Underhill on Trusts, 10th ed., at p. 427, where the author says: "Even where it is not *absolutely* certain "that no more beneficiaries can come into existence, but it is "morally so (e.g., where the ultimate remainder is in trust for "the children of a woman who is past the age of child-bearing), "the court will, on summons, give the trustees liberty to act "according to the directions of the beneficiaries in esse so long as "the contingent rights of living persons are not prejudiced, "although it is understood that the court will not in such cases "imperatively order the trustees to do so."

He also referred to *In re Brockbank*,[4] *In re Higginbottom*,[5] and *Tempest* v. *Lord Camoys*, where Sir George Jessel M.R. lays down the general principle in these terms[6]: "It is very important "that the law of the court on this subject should be understood. "It is settled law that when a testator has given a pure discretion "to trustees as to the exercise of a power, the court does not "enforce the exercise of the power against the wish of the trustees, "but it does prevent them from exercising it improperly." That, he says, is the principle to be applied in this case.

I think that the case of *Butt* v. *Kelson*[7] is difficult to reconcile with those cases, and I am not prepared to grant any relief upon an interlocutory motion. Furthermore, in my judgment, the right way of looking at the position is that here are trustees, against whom nothing can be said, who are anxious to exercise their discretion. They have not had a direction from all persons beneficially entitled, because it cannot be said in law that the first three

[3] [1928] Ch. 915.
[4] [1948] Ch. 206; [1948] 1 All E.R. 287.
[5] [1892] 3 Ch. 132.
[6] (1882) 21 Ch.D. 571, 578.
[7] [1952] Ch. 197.

plaintiffs are past the age of child-bearing. *In re Thornhill* [8] was, in my judgment, a different case, for there, in the exercise of a well-known and beneficial jurisdiction, leave was given to pay money out of court on the footing that a woman was past the age of child-bearing, but there was in that case no dispute whatever as to the rights of the parties.

The matter before me must, I think, be dealt with as one of strict law, and in law one cannot say that all the beneficiaries are before the court. Accordingly, in my judgment, the principle stated by Romer L.J. in the passage which I have already read does not apply to this case, and on this ground also I refuse the relief asked.

Order accordingly.

Solicitors: *Stilgoes; Bischoff & Co., for FitzHugh, Woolley & Burnand, Brighton.*

F. R. D.

[8] [1904] W.N. 112.

[CHANCERY DIVISION.]

* *In re* HILLIER'S TRUSTS. HILLIER AND ANOTHER *v.* ATTORNEY-GENERAL AND ANOTHER.

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Nov. 6, 10.
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[1952 H. No. 2182.]

Charity—Hospital—Appeal for funds for erection and maintenance of voluntary hospital—Scheme impracticable after National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81)*—Resulting trust for donors. National Health Service — Hospital — Gift — Appeal to public. Trust and trustee—Resulting trust—Charity—Failure of object. Bona vacantia.*

In 1938 and 1939 an appeal was launched for the improvement of hospital services in South Bucks and East Berks, and in particular for the erection and maintenance of a new hospital at Slough.

The appeal was launched by a "council" who issued a brochure calling for subscriptions and donations. This pointed out the serious lack of hospital accommodation in the area, and emphasized at length and in the strongest terms the superior advantages of "the "truly British characteristic of making provision, without force" of voluntary, as opposed to State, hospitals. The brochure was accompanied by forms to be filled in by donors and subscribers, of which "document 1" provided for subscriptions in three forms, viz.: "council's discretion: [for a] Windsor hospital; Slough Hospital." Another form, "document 2," provided for seven years' covenants to subscribe towards the augmentation of the income or capital of (a) such hospitals as the council might nominate; (b) the Windsor hospital; (c) the Slough hospital, and (d) a hospital nominated by the covenantor.

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Substantial sums were received under the terms of these documents, and were also raised locally by concerts, church collections, whist drives, etc.

It never became possible to build the proposed hospital at Slough; first, because of war conditions, and secondly because the provisions of the National Health Service Act, 1946, precluded the erection of new voluntary hospitals. A summons was taken out by the Slough trustees for directions as to what should be done with the property in their hands; and in particular for the determination of the questions whether (a) any charitable trust formerly affecting the same had failed, and if so (b) whether there was a resulting trust in favour of the donors and subscribers:—

Held, (1) that the sums given under documents (1) and (2) to be expended at the trustees' discretion were subject to a general charitable intent, so that the trustees could apply them at their discretion among the existing hospitals in the area;

(2) that, in regard to the sums expressly allocated to the Slough hospital (a) the erection of a voluntary hospital had become impossible; (b) on the true construction of the appeal and of documents 1 and 2, the gifts were to be devoted to the purposes of a voluntary hospital only, so that the object had become impracticable, and (c) that there was a resulting trust in favour of the donors and subscribers;

In re Welsh Hospital (Netley) Fund [1921] 1 Ch. 655, and *In re North Devon and West Somerset Relief Fund Trusts* [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032 distinguished;

(3) that the sums collected by concerts, whist drives, etc., were obtained under such circumstances that the contributors never expected to receive their money back, so that no resulting trust arose.

Quaere whether those gifts became bona vacantia.

ADJOURNED SUMMONS.

The facts are set out in the judgment.

J. L. Arnold for the plaintiff trustee.

Denys Buckley for the Attorney-General.

Peter Foster for the Official Solicitor (representing donors and subscribers).

The cases cited in argument are referred to in the judgment.

UPJOHN J. In 1938 and 1939 an appeal was launched for contributions for the improvement of hospital services in the South Buckinghamshire and East Berkshire area, and in particular for the provision of a hospital at Slough. The appeal met with general support, and the contributions received by way of donations and under seven years' covenants, amounted altogether, with income tax recovered, to about £40,000, apart from sums specially earmarked for King Edward VII Hospital at Windsor.

I have to decide upon what trusts this sum and the investments representing the same are now held, having regard to the changed circumstances since 1938.

The facts are set out in an affidavit by Sir Arthur Noel

Mobbs, who played a leading part in the collection of the subscriptions. In 1938 a council, under the title of the "South Bucks "and East Berks Voluntary Hospital Council," was formed, of which Sir Arthur Noel Mobbs was chairman. The objects of this body, which I will call "the old council," were to develop to the greatest possible extent the efficiency of hospital services in South Bucks and East Berks, and the immediate purpose was to raise funds for two objects. The first was the extension of the accommodation of the Windsor hospital, and the second was the building and equipment of a new hospital at Slough. In the same year a committee of the old council was formed under the title of "The Slough Hospital Committee," with the special object of furthering the purpose of the erection of a new hospital at Slough. On October 28, 1938, Mr. Edward Thomas Bowyer, Mr. William Augustus Hillier and Sir Arthur Noel Mobbs were appointed trustees and they have been generally referred to as "The Slough Hospital Trustees." Mr. Bowyer died before the issue of the summons and Mr. Hillier has died since the issue of the summons, leaving Sir Arthur Noel Mobbs as the sole trustee.

In 1939 the old council issued a brochure which appealed for donations and subscriptions for the purposes which I have mentioned. It was headed "Windsor, Slough and Associated "Hospitals," and contained an extract from what Lord Horder had said at Liverpool in November, 1938, namely: "I believe that "the voluntary hospital is as essential to this country's well-"being today as ever it was. It still stands as a fortress of "teaching, of research, and of efficient treatment; and as a centre "where the spirit of medicine can live in freedom, owing no "allegiance to political doctrine nor State expediency," and it later said: "We commend these words to the residents of South "Bucks and East Berks."

The next page was headed, "The South Bucks & East Berks "Voluntary Hospitals Council." The second paragraph was: "Our voluntary hospital system is the envy of the world. The "truly British characteristic of making provision, without force, "for those in need of medical care is worthy of preservation. "Without adequate finance the work of the honorary surgeons "and physicians cannot go on. It is hoped that all will play "their part in helping us to attain the objects that are detailed "in the following pages. This booklet is intended to explain "the work of the council and to make residents in this district "individually conscious of the value of the voluntary hospitals."

On the next page there was set out the membership of the council, and there followed these words: "With your assistance "the hospitals council hope to accomplish the following." Then there is the paragraph which is headed: "King Edward VII "Hospital, Windsor," and a number of improvements that it is desired to effect to that hospital are set out.

Then there was a paragraph headed: "The Slough Hospital," which said: "The rapid industrial growth of Slough has thrown

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" a heavy extra burden upon King Edward VII Hospital. The " population has doubled in recent years and is still rapidly " growing. To relieve the established hospital and to provide " this industrial area with a hospital near at hand it has been " decided to erect a new building at Slough on a site already " purchased. The hospital, which will have sixty beds at its " commencement, will be worked in close co-operation with King " Edward VII Hospital, and will supply a further urgently " necessary addition to the hospital services of the whole area. " £45,000 is the estimated cost of the new hospital, and it will " cost approximately £13,000 per annum to maintain. The " smaller hospitals in the area also require your help. £47,000 " has already been promised. Please help us with your gift."

Later, there was a quotation from the Rt. Hon. John Burns, who had been President of the Board of Trade: " The voluntary " hospitals had saved in the course of a single generation a " population equal to that of London or Australia."

On a later page there was a further comment upon the worthiness (if I may so describe it) of the voluntary hospital movement. Then these words were used: " You can help the " council by: A donation to the extension fund of King Edward " VII Hospital, Windsor, or the building of the Slough Hospital. " An annual subscription towards the maintenance of hospital " services in the area." It continued: " You can earmark your " help for either of the hospitals, although you may send it to " the council." Finally, there was an extract from the Sankey Report on the future of voluntary hospitals.

There was a pocket in the brochure containing forms for the use of those intending to subscribe to the movement. These forms were addressed to the " South Bucks and East Berks " Voluntary Hospitals Council." The first said: " I have " pleasure in enclosing remittance value (blank) in respect of " contribution as below: Capital Donation," and then there are three alternatives, namely, " Council's discretion; Windsor " Hospital; Slough Hospital." Then there was a column for a maintenance donation with the same three alternatives, and another column for an annual subscription with the same three alternatives. A space is left for the name and address, and there was a note: " This form should accompany the donation and " be sent to " the address of the South Bucks and East Berks Voluntary Hospitals Council. I will call that document " document 1."

There were other documents enclosed. There was, for example, a form with regard to the endowment or maintenance of beds and cots, and there again an alternative was given between giving a sum to the Windsor hospital or to the Slough hospital. I shall treat them as one with document 1.

In addition, many persons subscribed to the movement by means of a seven years' covenant. That covenant was in these terms: " South Bucks & East Berks Voluntary Hospitals Council.

"Deed of Covenant." Then it said: "I/We (blank) of (blank) "do hereby covenant to pay to the Secretary for the time being "of The South Bucks and East Berks Voluntary Hospitals "Council . . . yearly during the period of 7 years from the "(blank) day of (blank) 19 (blank) or during my/our life (which-"ever period shall be the shorter) such a sum as will after "deduction of income tax at the standard rate for the time being "in force leave in the hands of the said Secretary a net yearly "sum of (blank) such sums to be paid on the (blank) day of "(blank) in every year commencing in the year 19 (blank) and "to be paid out of my/our general fund of taxed income and to "be deemed to accrue from day to day. All such sums shall "be received and applied in such proportions as the council "shall direct on my/our behalf for the augmentation of the "income of the following."

Pausing there, I was informed during the argument that these covenants were also used for capital gifts under seven years' covenants, and presumably intending donors altered the words "augmentation of the income" to "augmentation of the "capital." Then certain alternatives were set out, and against those alternatives there was a note that the person entering into the covenant is asked to delete those alternatives which it is not desired should benefit. The alternatives were four in number, namely, "(a) Such hospital or hospitals in South Bucks and/or "East Berks as the council may from time to time nominate on "my/our behalf. (b) King Edward VII Hospital at Windsor. "(c) The Slough Hospital at Slough. (d) The (blank) Hospital "at (blank)." I will call that "document 2."

In addition to those methods to which I have referred of raising money, there were other familiar methods employed in order to obtain finance. There were appeals through the press, and personal applications for donations and subscriptions. Moneys were also collected by local clubs and committees, and by whist drives, dances, flag days, collecting boxes and similar means.

As stated in the brochure which I have read, in 1939 a site of some 10½ acres was purchased in Stoke Road, Slough, at a cost of £6,000, and it was conveyed to the Slough Hospital Trustees, it then being thought that that site would be appropriate for the erection of the intended Slough Hospital.

In 1940 a new council was formed. It was called the "Bucks and East Berks Divisional Hospitals Council," and the funds which had been received by the old council were transferred to the divisional council, and the activities of the old council were merged in the divisional council.

The case has been argued before me on the footing that that was mere administrative machinery, and that nothing turns on the change of body or the transfer of the funds from the old council to the divisional council. The old council and the divisional council I will refer to together as the council. It received

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a large number of subscriptions which had not been expressly allocated to the hospital at Windsor, the hospital at Slough or any other given hospital, but which had been left to be applied at the discretion of the council, that being one of the modes pointed out both in documents 1 and 2.

In 1942, in fact, those unallocated contributions were transferred to the Slough Hospital Trustees. In 1946—there being no trust deed in existence—a trust deed was drawn up whereby the then trustees (that is to say, Mr. Bowyer, Mr. Hillier and Sir Arthur Noel Mobbs) declared themselves trustees of the funds set out in the schedule to the trust deed. I will not, however, refer to that trust deed, because it does not define any trust. Its object was really to define the property which was then held by the trustees.

After the war it was realised that the property which had been purchased in Slough was too small for the proposed hospital. It was, moreover, urgently required by the Bucks County Council as a site for the erection of a school in Slough. It was sold at quite a considerable profit, for it realised some £7,750. Shortly after that the trustees purchased another property, intending, as I understand it, that it should be used as a site for a hospital. [His Lordship stated certain facts regarding the property and continued:] It is now, however, held as an income producing investment.

I have before me a schedule of the sums collected by the various means that I have indicated. I do not propose to go through it in detail, but I shall mention one or two items. Schedule A shows the amount collected under the seven years' covenants. Some £15,000 of capital has been collected under those covenants and specifically allocated to the Slough hospital by the covenantors. Some £1,500 or a little less was collected and was not allocated, but was left to be applied at the discretion of the council. Then there is a long schedule showing the amounts subscribed by other means. It is sufficient to say that those expressly allocated to the Slough hospital by the donors amount to some £14,000. Those not allocated, but given to be applied at the discretion of the council, amount to something under £4,000. The schedule contains not merely gifts made under document 1, but other gifts made through the medium of whist drives, dances, and so on. I will give only one or two examples of the latter. There is, for instance, the Jewels Concert Party. Then there seems to be a Jewish orchestral concert, the Old Crown Hotel Dart Club, a dance at the George Hotel. There was a collection on Good Friday, and apparently the proceeds of the collection were sent in by the Bishop of Buckingham. The examples could be multiplied extensively. That is the manner in which the sums were collected, and they have been substantially invested in the land that I have mentioned, although there are also considerable gilt-edged investments.

I am concerned with two questions. The first is, has it

become impossible or impracticable to carry out the purpose, which is admittedly charitable, of building a hospital at Slough, and if so, secondly, upon what trusts are the investments representing the subscriptions now held? Before, however, dealing with those questions in detail, it may be convenient to deal with one matter quite shortly, namely, the amounts that were subscribed either under documents 1 or 2 where the council was given by the donor a discretion as to the application of the gift amongst hospitals in the South Bucks and East Berks area. In my judgment, no difficulty arises on that matter; for assuming, without for the moment deciding, that the project of erecting a hospital at Slough has become impracticable, there remain of course other hospitals in the area which may be benefitted from the donation within the terms of the discretion given by the donor to the council. In other words, when the whole object of the donation is clearly a charitable one, the failure of one object amongst a number does not bring the charitable gift to an end. The other objects remain capable of being attained. That cannot possibly be affected by the fact that, as I mentioned, in 1942 the council handed over all the unallocated funds to the Slough Hospital trustees, because assuming that it has become impracticable to build a hospital, it means merely that that allocation has failed in its purpose, and that therefore the council must make some other allocation of those funds. Therefore I need say no more about the funds which are not expressly allocated. They are plainly held upon valid charitable trusts, and can be applied at the discretion of the council amongst the existing hospitals in South Bucks or East Berks.

Nor does any question arise with regard to the sums which were specially directed to be given to the Windsor Hospital. Those funds have already been handed over to the appropriate management committee.

I am therefore concerned, and concerned only, with those sums which were specifically directed to be given to the Slough Hospital by documents 1 or 2, or collected for that purpose in the other modes that I have mentioned.

The facts as to the practicability of erecting and maintaining a hospital at Slough are to be found in Sir Arthur Noel Mobbs' affidavit. [His Lordship reviewed the evidence and continued:]

I accept as proved (1) that it would now be quite impracticable for a voluntary body of persons to undertake the erection and maintenance of a voluntary hospital at Slough, and (2) that not only is it possible, but it is contemplated that a new hospital will be erected in the Slough area by the Ministry of Health, and that work is, of course, as much a charitable work as is the erection of a voluntary hospital, because the provision of a hospital does not cease to be charitable merely because it is provided by the State.

That, however, does not determine the question. The question, which is one of construction of documents 1 and 2, is

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whether the donors intended their gifts to be applied in the erection of what was essentially to be a voluntary hospital, or a hospital however erected and maintained. Both documents talk merely of the "Slough Hospital," and as a matter of construction, I should see nothing to exclude the application of gifts given in those terms to a hospital to be erected by the Ministry of Health, but I must look at these documents as a whole, and I must read them in the light of the appeal to which I have already referred. I note in particular that both documents 1 and 2 are headed "The South Bucks and East Berks Voluntary Hospitals "Council." The covenant in the case of the seven years' covenants is indeed with that council, but that, of course, is not conclusive of the matter, because the council, after all, is only in the position of a trustee. Nevertheless, it is, I think, some indication of what the parties intended. But when I read these covenants in the light of the appeal, it seems to me reasonably clear that donors who signed documents 1 or 2 were quite plainly contemplating that their donations would be used, and used only, for the provision, erection and maintenance of a voluntary hospital. The whole tenor of the appeal was directed to the necessity for voluntary hospitals, and in particular for a voluntary hospital at Slough, and in my judgment the whole object of the appeal was to gain funds for a voluntary hospital. Accordingly, in my judgment upon the true construction of documents 1 and 2 the donors intended that their donations should be applied in the erection and maintenance of what was essentially to be a voluntary hospital, and not a hospital to be erected and maintained by the State, which of course at the time when these donations were given was not in the contemplation of any party. I therefore reach the conclusion that the object or the purpose for which these donations were made has become impracticable.

That gives rise to the second question. The purpose having become impracticable, I have to decide upon what trusts are these sums and the investments now representing them held.

I will deal in the first place with sums contributed through the medium of documents 1 and 2. The question is, is there a resulting trust for the donors, the purpose of the donation having failed, or can a general charitable intention be inferred so that, although it has become impracticable to build a voluntary hospital at Slough, nevertheless the donors intended that there was to be a general charitable intention in favour of hospitals existing in the area of South Bucks and East Berks?

Apart altogether from authority, I should have thought that the answer was reasonably clear. When a donor is given the option of applying a donation at the discretion of the council amongst hospitals in the area, or directing that it shall go to the Windsor Hospital or to the Slough Hospital or, in the case of document 2, to some other hospital in the area, and when, exercising the option given to him by these documents, he is careful

enough to exercise it in favour of the Slough Hospital, I should have thought as a matter of principle and, as I say, apart altogether from authority, that the purpose for which he has indicated that his money is to go (that is to say, the Slough Hospital) having failed, it was impossible to infer any general charitable intention to benefit hospitals generally in that area; for he has, by deleting the paragraph giving the council that discretion, negatived any such intention upon his part. Therefore, I should have thought that that gift having failed to take effect at all, there was a resulting trust for the donor.

The case is not unlike that of the *University of London Medical Sciences Institute Fund*,[1] although that case is not in any sense a decision governing the question of construction that I have to consider. In that case the testator bequeathed a legacy of £25,000 to the Institute of Medical Sciences Fund of the University of London. That scheme was abandoned, and the question in that case was whether upon the true construction of the will there was a general charitable intention. Joyce J. said[2]: "As to the return of subscriptions or donations no serious question was or could be raised. But with reference to the legacy given by Mr. Beit's will it has been suggested on behalf of the Attorney-General that the money had been definitely devoted to a charitable purpose, and ought, therefore, to be applied cy-près, the object to which it was originally devoted having failed. I cannot accede to that suggestion. There is not one word in the will upon which to found the theory of the testator having any general charitable intent, or any intention to contribute to any general or other purpose of charity save only the particular scheme of the projected institute."

Speaking for myself, as a matter of construction of these documents I should come clearly to the conclusion that there was a resulting trust for the donors, but it is said that there are two authorities binding upon me, which compel me to come to a different conclusion.

The first of those authorities is *In re Welsh Hospital (Netley) Fund*.[3] The headnote is as follows: "On the outbreak of the war a hospital was erected at Netley, and equipped and run during the war, for the benefit of sick and wounded Welsh soldiers by means of large voluntary subscriptions raised in Wales. In 1919 the hospital was closed, the staff disbanded, and the property sold to the War Office, and after winding up the affairs of the hospital there was a surplus of some £9,000:— *Held*, on the evidence, that there was not a resulting trust of the surplus for the subscribers to the hospital, but a general charitable intention for sick and wounded Welshmen which enabled the Court to apply the fund cy-près. *In re British Red Cross Balkan Fund* distinguished."[4] P. O. Lawrence J. set

[1] [1909] 2 Ch. 1; 25 T.L.R. 358.
[2] Ibid. 4.
[3] [1921] 1 Ch. 655.
[4] [1914] 2 Ch. 419; 30 T.L.R. 662.

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out the terms of the appeal, for in that case as in the next case to which I must refer the question really was one of construction of the appeal, because it was only in relation to the appeal that the intention of the donors in those cases could be ascertained. He then said[5]: "The fund was created by contributions from "various sources and in varying amounts, partly by donations "from private individuals of more or less substantial amounts, "and partly by the proceeds resulting from concerts and other "entertainments given and from collections in streets and at "churches made in most of the towns and villages of Wales. So "far as regards the contributors to entertainments, street collec-"tions, etc., I have no hesitation in holding that they must be "taken to have parted with their money out and out. It is "inconceivable that any person paying for a concert ticket or "placing a coin in a collecting box presented to him in the street "should have intended that any part of the money so contri-"buted should be returned to him when the immediate object "for which the concert was given or the collection made had "come to an end. To draw such an inference would be absurd "on the face of it. So far as regards individual subscribers "of substantial amounts, the proper inference to be drawn is not "quite so plain. In my opinion, however, these subscribers must "be taken to have known that they were contributing to a "general fund which was being raised in the manner I have "described, and that their contributions would be aggregated "with the proceeds of entertainments, street collections, etc., "and would not in any way be ear-marked. They must, I think, "also be taken to have known that the total funds collected "from every source would be applied for the purpose of the "charity without discriminating between the moneys derived "from any particular source. In these circumstances I am of "opinion that the true inference to be drawn is that these "subscribers intended to part with their contributions out and "out, and that they did not intend that the surplus, if any, of "their contributions should be returned to them when the "immediate object of the charity should have come to an end. "In the result I hold that although all the contributions were in "the first instance made for the particular purpose of building, "equipping and maintaining the Welsh Hospital at Netley, the "main underlying object of the contributors was to provide "money for the comfort of sick and wounded Welshmen, and "that all the subscribers intended to devote their contributions "not only to the particular object, but generally to the benefit of "their sick and wounded countrymen."

Before dealing with that case, it will be convenient to refer to the second authority, the very recent case of *In re North Devon and West Somerset Relief Fund Trusts.*[6] The headnote reads: "Floods due to torrential rain in North Devon and West Somerset

[5] [1921] 1 Ch. 655, 660.

[6] [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032.

"caused loss of life and great damage to property in the area. A "relief fund was opened by an appeal in the following terms: 'We "'invite not only the people of the West country, but everyone "'who has known and loved Lynmouth, and the quiet villages of "'North Devon and West Somerset, which have suffered so "'grievously in this disaster, to contribute to a fund for the "'relief of all who have suffered. . . . Many holiday makers . . . "'have suffered grievously. These need help every bit as much "'as our own people and for that reason we do ask the whole "'country to support this fund. . . .' A large sum was collected, "and it was expected that a considerable surplus would remain "after all proper claims under the appeal had been met:—*Held*, "(1) that the trusts of the fund were valid charitable trusts; "(2) that the appeal disclosed a general charitable intention and "that the surplus assets could be applied cy-près. *In re Welsh "Hospital (Netley) Fund*[7] followed."

I am concerned in this case only with the second point that was decided. After referring to the well-known judgment of Parker J. in *In re Wilson*,[8] Wynn-Parry J. said[9]: "It is to be "observed that in that case the court had to construe a will, the "instrument by which a single donor had made the disposition "which gave rise to the question. A number of authorities were "cited to me, most of which arose substantially in that way. I "have to consider a very different type of case, one in which I "have to discover the intentions of many hundreds—it may be "thousands—of donors, and the only document that I have to "assist me is not a document brought into existence by any one "of those donors, but by those who invited them to become "donors." Then he referred to the case of *In re Welsh Hospital (Netley) Fund*[10] and quoted the passage which I have already read.

He later said[11]: "It is impossible, on careful consideration, "to draw a distinction of any substance between the facts of "that case and those of the present case. It appears to me not "in the least decisive that there is a reference in the appeal to "persons other than local residents who suffered distress by the "disaster. The main underlying object of that appeal was to "benefit the people of the district in question. The appeal "proceeds in this case, as it did in the case of the Welsh hospital, "by emphasizing what in the Welsh case was called the "immediate object, but which might quite easily in either case "have been treated, on a strict construction of the appeal, as "the only object. In the case before him, P. O. Lawrence J. "found no difficulty in drawing the conclusion, for the reasons "which he gave, that there was a more extended object than "might be said at first sight to appear on the face of the appeal; "and when I apply his reasoning to the appeal in question in

[7] [1921] 1 Ch. 655.
[8] [1913] 1 Ch. 314.
[9] [1953] 1 W.L.R. 1260, 1265.
[10] [1921] 1 Ch. 655.
[11] [1953] 1 W.L.R. 1260, 1267.

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"this case, I feel driven to exactly the same conclusion, namely "that there was here a general charitable intent. All the reasons "which influenced the mind of P. O. Lawrence J. to the con-"clusion to which he came are present in this case. I find it "impossible, therefore, to distinguish that case from this. In "those circumstances, it is unnecessary for me to travel through "the rest of the authorities.

"I need only say that I find nothing in the judgment of "P. O. Lawrence J. which is in any way inconsistent with the "passage from the judgment of Parker J. in *In re Wilson* [12] "which I have read. It is true that the latter case was not "apparently cited to P. O. Lawrence J., but no doubt he was "well aware of its existence. Indeed, the judgment of Parker J. "in *In re Wilson* [12] did no more than state the effect of the "authorities as it then existed; nor do I find anything in the "later cases which carries the matter further. So far as I am "aware, no adverse comment has ever been passed on the "decision or judgment in *In re Welsh Hospital (Netley) Fund.*[13] "I regard it as authority binding on me in this case and covering "this case."

If I thought that the *Netley* case [13] or the *North Devon* case [14] covered this case I would loyally follow them, but in my judgment they do not. The problem that I have to consider is very different from the problem that was before P. O. Lawrence J. and Wynn-Parry J. They had to consider the true construction of broadly phrased appeals. They felt able to come to the conclusion that, upon the true construction of the documents that were respectively before them, it was right to find that there was a general charitable intention which would take effect after the primary object had been fulfilled. In coming to that conclusion P. O. Lawrence J. felt that he had some assistance from a consideration of the fact that contributors must know that in carrying out the object their moneys would become mingled with moneys from other sources which had been given out and out by contributors. That fact assisted him apparently in coming to the conclusion, on the true construction of the appeal before him, that the real or the main underlying object of the contributors was to provide money for the comfort of sick and wounded Welshmen.

As I have said, I have a very different problem to consider. I have in documents 1 and 2 not appeals by the appeal committee or council, although I must of course read them in the light of the appeal in response to which those documents were executed; but primarily the question is, what is the intention of each donor? That is to be ascertained from the document which he has signed. With regard to that, for the reasons that I have already given, I can find no general charitable intention in the documents. Therefore I do not derive assistance from the two cases to which

[12] [1913] 1 Ch. 314.
[13] [1921] 1 Ch. 655.
[14] [1953] 1 W.L.R. 1260.

I have just referred where different documents altogether were being considered.

There is another matter which appears to me to distinguish this case from the cases that I have just mentioned. In this case there has been an initial failure of the charitable trust because it has now proved to be impracticable to build a voluntary hospital at Slough. In the cases before P. O. Lawrence J. and Wynn-Parry J. the primary object had been fully carried out. In the one case apparently, a profit was made on the sale of property and in the later case the response to the appeal was such that the committee which was administering the fund had more money than they could properly dispose of. Those seem to me to be very different cases. As I understand the reasoning of P. O. Lawrence J., if a donor was asked at the time of making his gift: "Supposing "that the charitable purpose is fully carried out and supposing "that unexpectedly there is a surplus when that primary purpose "has been achieved, what do you want done with your money? "You must remember that it will be mixed with other funds "given by donors out and out whom we cannot possibly trace," it may be proper in such circumstances as a matter of law to impute to the donor an intention that it should be devoted to other charitable purposes; or, at all events, the mixture of moneys may assist in coming to a conclusion upon the construction of the appeals that that is what the donor must have intended when dealing with a surplus after the charitable purpose for which he sent his contribution has been wholly achieved. But supposing that a donor is asked at the time of making his gift: "What do you want done if this charitable purpose cannot be "carried into effect at all?", it becomes, in my judgment, quite impossible to assume that the answer, having regard to the terms of documents 1 and 2, must be: "Give the money for some other "charitable purpose." It appears to me to be an irrelevant consideration to tell him at the time: "Remember that some of "the other contributions that we shall receive will come from "donors whom we cannot trace because it will come through "collecting boxes, dances, whist drives, and so on," for the trustees have in their hands untouched by the charitable purpose, for that has never come into effect, the sums originally subscribed or investments representing the same. Therefore the conclusion that I reach is that upon the true construction of documents 1 and 2, there is in the events which have happened a resulting trust for the donors, and I must declare accordingly.

That leaves two further classes which I must briefly mention. Some contributors may not have contributed upon the terms of documents 1 and 2 but by letter. It is, of course, a question on each letter or document which came from a donor as to whether the donor was giving his donation for a specific purpose or whether he indicated a general charitable intention. I cannot say more about that class.

Then there remain the funds raised through whist drives and

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the like where it is impossible to trace the donors. With regard to that class I respectfully agree with the observations of P. O. Lawrence J., that it is inconceivable that any person paying for a concert ticket or placing a coin in a collecting box that was presented to him, should have intended that any part of the money so contributed should be returned to him if there was a surplus when the immediate object for which the concert was given, or the collection was made, had been achieved. That must, I think, be so even where the object was never achieved, for the simple reason that the circumstances in which the money was given, negative the idea that the donor ever intended that he should receive any of that money back. That, however, in my judgment, does not conclude the matter. The donor has no further interest in the money because he has given it out and out; but where there is an initial failure of the charitable purpose, it seems to be an open matter as to whether the true result is that there is a general charitable intention, or the gifts become bona vacantia. That question has not been argued before me and indeed the Crown has not been joined with regard to it. It may be that the Crown will not desire to argue the point but I do not desire to pre-judge that question in any way. All that I can do is to declare that the original donors of that class no longer have any interest in the money subscribed or contributed by them or the investments now representing the same.

Declaration accordingly.

Solicitors: *Kenneth Brown, Baker, Baker; Treasury Solicitor; Official Solicitor.*

F. R. D.

[CHANCERY DIVISION.]

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Oct. 16, 22.

Vaisey J.

* *In re* HAYES' WILL TRUSTS. DOBIE AND OTHERS *v.* BOARD OF GOVERNORS OF NATIONAL HOSPITAL AND OTHERS.

[1950 H. 804.]

National Health Service—Hospital—Gift—Will—Trust funds to be divided equally between named hospitals—Whether "in existence"—Power of exclusion if "it shall be impracticable or inequitable "that such institution . . . should so share in consequence of . . . "having . . . become amalgamated with some other institution or "institutions"—Effect of National Health Service Act, 1946 (9 & 10 *Geo.* 6, *c.* 81).

Trust and Trustee. "Impracticable"—"Inequitable"—"Amalgamation." Company—Amalgamation—Meaning.

In 1938 a testator by his will bequeathed to trustees a sum on trust to invest and in their absolute discretion to pay the whole or

any part of it for the maintenance and support of his wife, and subject thereto, the legacy and income not required for those purposes was to fall into his residuary estate. By clause 10 he provided that his residuary trust funds were to be divided equally between such of twenty-nine named charitable institutions, which included some hospitals as should be "in existence" at his death, but so that any sum or property falling into those funds after his death should be equally divided between such of the institutions as should be in existence when it fell in. By clause 11 he provided: ". . . my trustees may if they . . . think fit exclude any one or "more of such institutions from sharing in the residuary trust "funds or in any sum or property falling into the residuary trust "funds . . . after my death if in the opinion of my trustees it "shall be impracticable or inequitable that such institution or "institutions should so share in consequence of . . . having before "my death or before such sum or property falls in as aforesaid ". . . become amalgamated with some other institution or institu-"tions. . . ." The testator died in 1940. On July 5, 1948, the National Health Service Act, 1946, came into force and in 1949 the widow died:—

Held, (1) that the twenty-nine institutions were "in existence" within the meaning of clause 10 of the will at the dates of the testator's and the widow's death; (2) that the testator when he made the will could not have had in mind the National Health Service Act, 1946; (3) that there had not been under the National Health Service Act, 1946, or any other enactment any "amalgamation" of such a character as to make it "impracticable" or "inequitable" that any of the hospitals should share in those funds; (4) that the trustees had no power to exclude any of the hospitals from sharing in the residuary trust funds and that clause 11 of the will was inoperative in so far as it purported so to enable them.

Observations of Romer L.J. and of Lord Hanworth M.R. in *In re Walker's Settlement* [1935] Ch. 567; 51 T.L.R. 389 applied.

ADJOURNED SUMMONS.

This summons was taken out by the trustees of the will, dated September 28, 1938, of a testator who thereby created a trust fund ultimately divisible between 29 named institutions. He purported to give the trustees power, if they thought fit, to exclude any one or more of the institutions from sharing in the fund if, in the trustees' opinion, it should be impracticable or inequitable that it or they should so share on the ground of having become amalgamated with some other institution or institutions. On November 13, 1940, the testator died. On July 5, 1946, the National Health Service Act, 1946, came into force and, on March 10, 1949, the testator's widow died.

On February 24, 1950, the trustees of the will took out this summons, before the hearing of which two of the three of them died, and to which there were 20 defendants. By the summons the trustees asked, inter alia, whether all or any of the institutions were in existence at the date of the widow's death; if they were, whether all or any of them had become "amalgamated with some other institution or institutions" within the meaning of the will and, if any of them had, whether the trustees would have under the will a discretionary power to exclude it from sharing, or

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whether that power was not exercisable by reason of any provision in the National Health Service Act, 1946.

H. A. H. Christie Q.C. and *A. H. Droop* for the surviving trustee.

Peter Foster for the Board of Governors of the National Hospital and those of the London Hospital, the North-West Metropolitan Region Hospital Board, the Welsh Regional Hospital Board, the Paddington Group Hospital Management Committee and the Clwyd and Deeside Hospital Management Committee.

E. M. Winterbotham for the Board of Governors of the Hospital for Sick Children.

Sir Lynn Ungoed-Thomas Q.C. and *H. E. Francis* for the Board of Governors of the Royal Cancer Hospital, the North-East Metropolitan Regional Hospital Board, the Royal Cancer Hospital (Free), and the Hospital Management Committee Queen Elizabeth Hospital.

J. A. Brightman for the trustees of the Lord Mayor Treloar Cripples' Hospital and College.

J. G. Strangman Q.C. and *D. H. McMullen* for Dr. Barnardo's Homes National Incorporated Association.

V. M. C. Pennington for the National Hospital Queen Square for the Relief and Cure of Diseases of the Nervous System including Paralysis and Epilepsy, the Governors of the London Hospital, and Queen Elizabeth Hospital for Children.

F. B. Marsh for the Lord Mayor Treloar Orthopaedic Management Committee.

Denys Buckley for the Attorney-General.

The following case, in addition to those referred to in the judgment, was cited in argument: *In re Buzzacott.*[1]

VAISEY J. This summons raises questions on the true construction of the will of the late George Whitley Hayes, dated September 28, 1938. I think the date important, and I emphasize it.

The testator died on November 13, 1940, and on February 25, 1941, his will was proved in the Chester District Registry. The estate was very large, the net value being approximately £207,000. The testator appointed as his trustees Douglas Dobie, a solicitor of Chester, his (the testator's) nephew, William Warburton Hayes, and his cousin, John Higson Hayes; and they are in the will described as "my trustees." I thought at one time that the question might arise whether the power conferred by the testator on his trustees was of such a nature that it could be confined to the three original trustees and would not devolve into the trusteeship; but I am satisfied that there is nothing in that point, and I mention it merely to dispose of it.

[1] [1953] 1 Ch. 28; [1952] T.L.R. (Pt. 2) 884; [1952] 2 All E.R. 1011.

Only one trustee is now alive, namely, Mr. John Higson Hayes; he is the sole surviving plaintiff in these proceedings. Mr. Dobie, the solicitor, died on February 10, 1953, then aged 91 years, and Mr. William Warburton Hayes died a month afterwards, on March 11, 1953.

I have already dealt with two of the questions raised by the summons, the nature of which I will explain in a moment. The will provides: "Clause 5. I bequeath to my trustees the sum of "£80,000, free of duty, upon trust that they shall invest the same "in any of the investments authorized by law for the investment "of trust funds with liberty to vary the investments thereof from "time to time and shall stand possessed of the said sum of eighty "thousand pounds and the investments for the time being repre-"senting the same (hereinafter called 'the wife's trust legacy') "upon the trusts following that is to say upon trust that my "trustees shall during the life of my wife and so long as she "remains my widow at their absolute discretion pay or apply "the whole or any part of the income of the wife's trust legacy "or if they shall from time to time think fit any part of the "capital thereof to or for the maintenance and personal support "or benefit of my wife. . . ."

I may observe here that the wife survived the testator; she died on March 19, 1949, being his widow—she did not marry again.

The will continues: "and subject to the foregoing trust the "wife's trust legacy or such part thereof as shall not be applied "under the foregoing trust and so much of the income thereof as "in the opinion of my trustees shall not be required for the "purposes aforesaid shall sink into and form part of my residuary "estate. . . ."

Clause 10 provides: "I devise and bequeath all my real and "personal estate not hereby otherwise disposed of unto my "trustees upon trust that my trustees shall . . . sell call in and "convert into money the same or such parts thereof as shall not "consist of money and shall with and out of the moneys produced "by such sale calling in and conversion and with and out of my "ready money pay my funeral and testamentary expenses and "debts and pay or retain the legacies bequeathed by this my "will . . . and shall stand possessed of the residue of the said "moneys and of any part of my estate retained unconverted and "of the investments for the time being representing the same "(hereinafter called 'the residuary trust funds') In trust to "divide and distribute the same equally between and among such "of the charitable or other institutions hereinafter named as shall "be in existence at my death but so that any sum or property "which under the terms of this my will or any codicil hereto falls "into the residuary trust funds after my death shall be divided "equally between such of the said institutions as shall be in "existence at the date when the same falls in as aforesaid "namely . . . ."

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Then the testator names 29 charitable institutions. There can, I think, be no doubt that every one of them was a charitable institution, although the testator describes them as "charitable or "other institutions."

The wife being dead, the question is raised whether these 29 institutions were in existence at the testator's death and the widow's death; I have answered that question in the affirmative, so far as it is necessary to answer it, and I direct that the share bequeathed to some of them, as to which there is some doubt, ought to be paid over by the trustees.

I do not think that it matters much, but, during the life of the widow, parts of the income of the legacy were divided up among the 29 institutions; the trustees do not seem to have had much doubt what their position was so long as the widow was alive.

Now we come to the curious feature in this case. Having divided his estate among these 29 institutions, and having declared that the receipts of the treasurers or other proper officers of the said institutions should be sufficient discharges to his trustees, the testator inserted (in advance of certain administrative directions as to which no difficulty arises, and which are contained in clauses 12 and 17 of the will) clause 11, which has seemed to me—and I think admittedly is, extremely ambiguous.

It is very difficult indeed, in fact almost impossible, to ascertain what the testator had in his mind when he wrote it. Whether it was his composition or that of somebody who was advising him, and what he was thinking about when he composed it, I really do not know; but I think it clear that, as the testator made his will in 1938, he cannot have had in his mind the National Health Service Act, 1946. The arguments in the case have turned almost exclusively on the effect of the Act; but the operations carried out by that Act were not apparently regarded as imminent in 1938, and, in fact, I doubt whether they were discussed at all. Sir Lynn Ungoed-Thomas reminded me that the National Health Service Act, 1946, was largely prompted by, and originated from, what is known as the Beveridge Report, which resulted from an inquiry which took place at any rate after the year 1938: it took place during the war.

With that in mind, I find it quite clear that the testator cannot possibly have been thinking of that Act as an Act; and, indeed, it seems rather unlikely that he was thinking of it as a project, an impending proposal, or anything like that. Remembering the date of the will, and also that of the testator's death (which was long before the National Health Service Act, 1946, was in draft or contemplated) I must see what the testator said as an addendum to the perfectly clear words in this clause as to the distribution of the estate among these 29 charitable institutions.

Clause 11 provides: "And I expressly declare that my trustees "may if they in their uncontrolled discretion think fit exclude any "one or more of such institutions from sharing in the residuary "trust funds or in any sum or property falling into the

"residuary trust funds under the terms of this my will or any "codicil hereto after my death"—that is to say, from sharing after his death—"if in the opinion of my trustees it shall be "impracticable or inequitable that such institution or institutions "should so share in consequence of such institution or institu-"tions having before my death or before such sum or property "falls in as aforesaid as the case may be become amalgamated "with some other institution or institutions with power for my "trustees at their absolute discretion in case of any such amal-"gamation to pay or hand over the share of the residuary trust "funds or of such sum or property falling in as aforesaid by this "my will given to any institution to the institution or institutions "with which the same shall have become amalgamated. And I "declare that the receipt of the treasurer or other proper officer "of any such institution shall be a good and sufficient discharge "to my trustees." I think that the words "of any such "institution" must mean some institution with which the first-named institution shall be amalgamated.

Those words seem to me to be not very far short of unintelligible. The trustees have to form an "opinion" that the sharing of a particular institution in the testator's residue is either impracticable or inequitable.

What does "impracticable" mean? It means that something "cannot be done." I looked at the large dictionary, which did not throw very much light on it. I looked at the well-known Chambers' Twentieth-Century Dictionary—which defines "impracticable" as: "not able to be done; unmanageable; "stubborn." "Unmanageable" and "stubborn" do not come in here, so we are left with "not able to be done." Then, what does "inequitable" mean? Again I refer to the small dictionary, and the only definition given for that word in the small dictionary is: "Unfair; unjust."

In this court the word "equitable" is of the very highest importance and carries the very highest implication; the word "inequitable," which is the contrary of it, indicates something against which this court, by its ancient constitution and, I hope, by its application of legal principles, is bound to strive day in and day out. If something is said to be unfair or unjust, it is something against which this court sets its face, and this court will never allow it to be said that that which is inequitable can or should be allowed to be done.

The trustees here have to form an opinion that something is "impracticable"—that is to say, cannot be done—or is "inequitable" in the sense of being unfair or unjust; and I am bound to say that it is rather difficult to see how they can ever form such an opinion; because, after all, they cannot simply say, "We think that this is impracticable," and disregard the court, saying that they have arrived at that agreement and that it is not for the court to cross-examine them on it. It is difficult, also, to see how they can form the opinion that anything is unjust or

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unfair, and that it is not for the court to ask them why. There must, I think, be some ground or reason in the matter, and the preliminary step is that the trustees should form an opinion that the sharing of a particular charitable institution would be either impossible, or unjust and unfair; that is to say, the trustees have to hold the opinion that it would be impracticable or inequitable that the institution should share. What matters, however, is not just the impracticability or "iniquity" (for that is the original meaning, although it has a different meaning now). The sharing must be "impracticable" or "inequitable" in the sense applicable where an institution has become, before the death or before the property falls in, amalgamated with another institution or institutions. The trustees must say that the institution has become amalgamated, and that the result is that it is either impracticable or inequitable that it should share in the testator's estate.

The whole of the argument has really centred round the National Health Service Act, 1946, and it is said that the change in the status of the hospitals which are now among these 29 charities has been so changed by way of amalgamation, that it is no longer possible and no longer fair that the named hospitals should share in the testator's estate. Very little argument was addressed to me on practicability, but a great deal on the question of want of equity.

It has been held in certain cases to which I need not refer—one was a decision of my own—that a hospital affected by the Act is still a charity, and is still capable of being benefited as a charity; and I really cannot see how, disregarding all the other difficulties of this clause, it could possibly be inequitable—that is to say, unfair or unjust—for an executor to persist in the carrying out of statutory obligations. Occasionally—perhaps all too rarely—wealthy testators have bequeathed their fortunes to the relief of the National Debt; and I really cannot see how anybody could say that such a gift would be inequitable. I should have thought that it was praiseworthy and perfectly fair and just, according to the ordinary usage of the English language; and to say that it is unfair and unjust that a nationalized hospital, to put the matter shortly, is just as much a charity and an object of bounty as it was before it was nationalized, is, in my opinion, quite wrong, and indeed that has been so held.

Of course, had the testator said, "in the event of an "institution having before my death been taken over by the "state, or become nationalized," or something of that kind, a very different position would have arisen; but I really cannot see how a man accustomed to the use of the English language, and applying his mind to this as a matter of serious consideration, could possibly say that any kind of amalgamation effected by the National Health Service Act, 1946, can possibly have made it either "impracticable" or "inequitable" that a nationalized hospital should share in the testator's bounty.

I really find it very difficult to picture what the testator had in his mind with regard to this. Take the National Health Service Act, 1946, right out of the picture, because the testator cannot have been thinking of it; the question remains: What was he thinking of? There is a very curious thing at the end of clause 11; the final alternative which is given by the clause is that the trustees may pay or hand over the share given to the institution, not to the institution in which the same shall have become merged, or anything of that kind, but to the institution or institutions "with which the same shall have become amalgamated." It has occurred to me that possibly the testator may have had something in his mind in reference to such a gift, for instance, as the gift to the Royal Society for the Protection of Birds; he may have thought that that would have got mixed up with Anti-Vivisection societies or something of that kind, and he may have been saying, "I do not want anything of that kind to happen"—that may be the sort of thing to which this clause is referring. I think that it is really a complete puzzle. I do not pause to describe the kind of amalgamation that the National Health Service Act has brought about, but I ask whether anybody can say that the amalgamations, and not what follows them but the amalgamations themselves, have had as their consequence the rendering impracticable or inequitable the share of a hospital of this kind. I really cannot see it; and, of course, the principle applies that, inasmuch as the gift under clause 10 is as clear as crystal, clause 11, which is intended to cut it down, stultifies certain parts of it. It gives to certain persons the power of excluding a named charity from the testator's bounty. I think that, unless I can be reasonably certain what this means, I ought to leave the preceding gift unqualified. In my view, there never has been such an amalgamation as produces the consequences of "impracticability" or "iniquity." That, I think, is an end of the case.

I now turn to a very curious situation which arises. These trustees were, one would have thought, entrusted with a most embarrassing, invidious and difficult task, but they are not only submitting to carrying it out if the court thinks fit, but are very vigorously and pertinaciously pressing me to say that this power is or was vested in them and is now vested in the sole survivor. They explain that they are anxious to have what I have described as this embarrassing, invidious and difficult task laid upon them, because they say: "If we have such a power we would wish to exercise that power of exclusion in respect of any of the institutions which have been taken over by the State"; and they say that they take up that position because they are satisfied that the testator would have wished them to do so.

First, I really do not know how they can at this time be "satisfied" except by some process of clairvoyance, or something of that kind, that the testator would have wished them to do so. He cannot, in his lifetime, have said in effect: "If there should

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"be a National Health Service, don't let anyone touching my "estate become implicated in it." Yet these trustees are saying that they are "satisfied," not "inclined to think" but "satisfied," that he would have wished them to do it.

First, I do not think that at all a proper consideration (except, possibly, as one of a number of considerations) to influence the trustees if they have that power. Realising that, one year later they file another affidavit, in which they say, with reference to the first affidavit: "We were at the date of that affidavit "and are of opinion"—this is quite different—"that it will "be inequitable that any institution which at the death of "the testator's widow had become amalgamated with another "or others in circumstances in which, on and from the amalga-"mation, the amalgamated institution became maintainable by "the State should share in the legacy of £80,000 which the "testator bequeathed to be divided equally between institutions "which at the date of his said will and death relied on voluntary "contributions for their support."

Then they say: "We are, however, advised that whether the "effect of the National Health Service Act, 1946, on all or any "of the institutions referred to in paragraph 1 of the originating "summons herein is such as to make the discretionary power of "exclusion conferred by clause 11 exercisable as regards such "institutions or any of them is a question of law depending on "the construction of the testator's will and the effect of the "provisions of the said Act upon such institutions respectively."

Thus, a year later, they realize that they have given a very strange reason for wanting to exercise this power, namely—"as" they are satisfied that the testator would have wished it. They now put it on a different ground, namely, that they do not like the idea of money going to the nationalized hospitals, and that they want to exclude them as far as they can.

It was suggested to me (and I must say that I was somewhat influenced by it) that having regard to the reasons which they have given—the disclosure which they have made as to their mental state—and considering how very important is this fiduciary power, if power it is, they or the survivor ought to be in some way controlled; that he should not simply be allowed to say: "I know that the testator would have wished it, and I approve, "also, so I cut all these hospitals out." As, in my judgment, they have no such power, and as the clause is inoperative, I need not say any more about that. But I have throughout been a little surprised that the trustees should have actively pressed to be entrusted with this difficult task, and I am very glad to feel myself, not entitled, but obliged, to relieve them of any embarrassment in that regard.

We have had, of course, to consider the meaning of the word "amalgamation"; the meaning of that word has been considered

in *In re Walker's Settlement.*[1] From that case, however, I really only get the assistance of a quotation by Romer L.J. of the definition in Buckley on the Companies Acts, 11th ed., at p. 487. Romer L.J. said: "It is a definition which, so far as "it is a definition, I should like to adopt as my own; it is there "stated as follows: 'The word "amalgamation" has no definite "'legal meaning. It contemplates a state of things under which "'two companies are so joined as to form a third entity, or "'one company is absorbed into and blended with another "'company.'"

That is further emphasized by a quotation by Lord Hanworth M.R. of a statement in *Wall* v. *London and Northern Assets Corporation*[3] by Chitty L.J., who said: "I agree that the term "has no fixed meaning in point of law. You have to see how "the term is used in the particular document that has to be "construed."

Applying that, therefore, you have to see how the word "amalgamation" was used in this particular document, and as I have pointed out, it has to be an amalgamation of such a character as to have the consequence of raising a case of impracticability and "iniquity." In my judgment here, in this context, I am not satisfied that there has been any amalgamation of that character either under the National Health Service Act, 1946, or any other statute.

There was brought to my attention a decision of Danckwerts J. in *In re Bawden's Settlement; Besant* v. *Board of Governors of London Hospital,*[4] where he had to consider this question of amalgamation. In that case Danckwerts J. had to consider the words: "In case at any time hereafter any of the charities and institutions ". . . shall attempt to alienate charge or anticipate its share or "proportion of the annual income of the trust fund or shall cease "to exist or shall become amalgamated with or absorbed in any "other charity or institution," then certain consequences may follow. The amalgamation had to be any kind of amalgamation which would have satisfied those words. The reference to "absorption" is also helpful, but is, unfortunately, not very easy to read into clause 11 in the present case, owing to the concluding words which refer to an amalgamated institution, namely: "the institution with which the same shall have become "amalgamated," and not: "into which the same shall have "become merged."

I have read the judgment of Danckwerts J. in that case, and I have also the actual order which was made; and if I had had to construe words so unqualified as those in *In re Bawden's Settlement,*[4] I should, undoubtedly, without hesitation have

[1] [1935] Ch. 567, 583; 51 T.L.R. 389.

[3] [1898] 2 Ch. 469, 481; 14 T.L.R. 547, 548.

[4] Reported in note at end of this report.

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Vaisey J.

followed that decision. These words, however, are very different, and I do not think that that decision has helped me at all.

Apart from the National Health Service Act, 1946, there is a private Act called the Queen Elizabeth Hospital for Children Act, 1942. Under that Act certain hospitals were amalgamated, but my conclusion is that neither under the National Health Service Act, 1946, nor under that private Act has there been, or was there at the date of the death of the testator's widow, which I suppose is the relevant date, any amalgamation in the sense envisaged in clause 11 in the case of any of the institutions mentioned in clause 10.

Taking the two questions together, the first of which asks me to say whether "the institutions aforesaid or any of them were "or was on the death of the testator's widow in existence within "the meaning of clause 10," I have already held that they were all in existence. Then it goes on: "whether on the death of the "testator's widow all or any and if so which of them had become "amalgamated with some other institution or institutions within "the meaning of clause 11." There I declare that none of the institutions has become amalgamated with any other institution within the meaning of clause 11 of the will.

The result is, I think, that the question which asks whether, if there was an amalgamation, the trustees had a discretionary power, does not arise; but I think that I had better say: "and accordingly there is not under the said clause any discretion-"ary power in the surviving plaintiff or any of the trustees to "exclude such institution from sharing in the said legacy."

As I have said, I think this case puzzling. I think that it is a matter of speculation, but it certainly looks as though, had this will been put before me with the date struck out, I should have been rather disposed to think that it had some reference to the National Health Service Act, 1946. That, however, is impossible. I do not think that that Act really has anything to do with it.

I shall answer the two questions left in the way which I have indicated.

Declarations accordingly.

Solicitors: *Rider, Heaton, Meredith & Mills for Brown, Dobie & Rogers, Chester; Linklaters & Paines; Waterhouse & Co.; Farrer & Co.; Trower, Still & Keeling; Boyce, Evans & Sheppard; Hanbury, Whitting & Ingle; Treasury Solicitor.*

K. R. A. H.

NOTE.

In re BAWDEN'S SETTLEMENT.
BESANT AND OTHERS *v.* BOARD OF GOVERNORS OF LONDON HOSPITAL AND OTHERS.

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Jan. 23.

Danckwerts J.

[1949 B. 3164.]

National Health Service—Hospital—Gift—Settlement—Trusts in favour of hospitals—Power to trustees if hospital "amalgamated with or "absorbed in any other charity or institution" to pay its share to or for the benefit of that charity or institution or for "other "objects or purposes of charity or benevolence or amelioration of "human suffering or advancement of knowledge"—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 11 (8), 60 (1).

Charity—Benevolent purposes. Perpetuities, rule against—Charity—Defeasance clause — Non-charitable object. "Amalgamation." Company—Amalgamation—Meaning.

A settlement dated December 21, 1905, provided by clause 4 that the trustees should pay the annual income of the trust fund therein comprised to or between the charities and institutions mentioned, and in the shares and proportions indicated, in the schedule thereto. Clause 8 provided inter alia that if any of those charities or institutions should become amalgamated with or absorbed in any other charities or institutions the trustees might in their discretion pay or apply the appropriate share or proportion of the annual income of the trust fund to or for the benefit of the charity or institution with or in which it should have become amalgamated or absorbed, or might apply it to or for such other objects or purposes of charity or benevolence or amelioration of human suffering or advancement of knowledge as they should in their opinion consider to be in accordance with the original desire and intention of the testator.

On July 5, 1948, the National Health Service Act, 1946, came into force.

Of the charities and institutions mentioned in the schedule to the settlement, the London Hospital and Queen Mary's Maternity Home were, by an order of May 7, 1948, made pursuant to section 11 (8) of the Act, together designated a teaching hospital, and the Poplar Hospital for Accidents become one of a group of three hospitals grouped together as "No. 8. Bow."

By this summons, which was taken out on June 14, 1949, the trustees of the settlement asked whether, on the true construction of the settlement and of the National Health Service Act, 1946, and in the events which had happened, the share of the annual income of the trust fund which before July 5, 1948, was payable to or for the benefit of the London Hospital had been since that date and was at the date of this summons (a) payable to the Board of Governors of the London Hospital (b) payable or applicable according to the trusts declared in clause 8 of the settlement to or between the charities, institutions objects or purposes in that clause referred to or (c) held on a resulting trust for the settlor's estate on the footing that the trusts declared in clause 8 were void or (d) held on any other and what trusts. They asked like questions with regard to the Royal Cancer Hospital (Free) and the Poplar Hospital for Accidents.

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H. E. Francis for the plaintiffs, the trustees of the settlement.

V. M. C. Pennington for the Board of Governors of the London Hospital and the Governors of the London Hospital (Incorporated).

Sir Lynn Ungoed-Thomas Q.C. and *J. A. Armstrong* for the Board of Governors of the Royal Cancer Hospital and the Governors of the Royal Cancer Hospital (Free).

Raymond Walton for the Bow Hospital Management Committee of St. Andrew's Hospital, Bow, and the North East Metropolitan Regional Hospital Board.

D. H. McMullen for Dr. Barnardo's Homes National Incorporated Association.

J. A. Wolfe for the settlor's personal representatives.

N. S. Warren for the Attorney-General.

DANCKWERTS J. The questions which I have to decide in this case arise with regard to the trusts of a settlement dated December 21, 1905, of a fund amounting to some £100,000, and at the present time of a value of over £114,000. The document in question (the settlement) was obviously one over which a great deal of care must have been taken, but unfortunately the result is not entirely happy. It was a settlement made by a Mr. Edward George Bawden, and there are three trustees named in the deed. The personal representatives by representation of Mr. Bawden are parties to this summons, and claim that in the result that happens there is a resulting trust in their favour.

The deed begins with certain recitals expressing apparently the intention of the settlor: "Whereas the settlor for the purposes of "charity and benevolence and the advancement of knowledge especially "in aid of human suffering is desirous of creating a trust fund the "annual income whereof is to be applied for the benefit of such "charities and institutions—" It is a curious feature of this deed that the words "charities and institutions" are used in a number of places as though they were two different things. Whether that was really intended or not, I do not know, and fortunately, at any rate for the purposes of this case, it does not matter. The recital continues: "—and "in such proportions and manner as hereinafter appears and with "that intent has transferred into the names of the present trustees "the investments specified in the first schedule hereto." The second recital reads: "And whereas for the purpose of the distribution of "the annual income of the trust fund intended to be hereby constituted "but for no other purpose the settlor is desirous that the said capital "sum of one hundred thousand pounds shall subject as hereinafter "mentioned be considered as appropriated to or for the benefit of the "respective charities and institutions mentioned in the second "schedule hereto in the respective proportions specified in the same "schedule—" I pause again to observe that that seems to indicate a desire that unless something happens to upset that result, the proportions of the income of the sum are to be appropriated to the different bodies mentioned in the schedule. The recital continues: "—it "being the desire and intention of the settlor that each of the said "respective charities and institutions shall so long as it shall continue "an existing charity or institution and shall not attempt to alienate "charge or anticipate its proportion of the income of the trust fund "receive such proportion of the total annual income of the said "trust fund from time to time distributable between the said respective "charities and institutions as the capital sum appropriated to such "charity or institution as mentioned in the said second schedule hereto "bears to the said total capital sum of one hundred thousand pounds."

Then after certain administrative provisions with which I need not concern myself, the important clauses in the body of the deed, the operative parts, are clauses 4 and 8, and I do not think I shall have to

read any other clauses. Clause 4 is in these terms: "The trustees shall "subject as hereinafter mentioned pay or distribute the annual income "of the trust fund to or between the several charities and institutions "mentioned in the second schedule hereto in the shares and proportions "which the capital sums appropriated to such charities and institu-"tions respectively as mentioned in the said schedule respectively bear "to the total capital sum of one hundred thousand pounds at such "times in the year as to the trustees shall appear most suitable and "convenient but so that such payment or distribution shall not in the "case of any charity or institution be made less often than half-yearly. "And all payments made by the trustees to or for the benefit of any "charity or institution shall be made to the treasurer for the time "being of such charity or institution or such person as shall from "time to time be nominated in writing to receive the same by the "governing body of such charity or institution as defined in cl. 1 of "the third schedule hereto." Then it provides that the receipt of the treasurer or person nominated is to be a good receipt. Then there is a proviso that the trustees are not bound to pay out in excess of income at the rate of 4 per cent. on the proportions of the shares in question. Then there are certain provisions as to what is to happen to the surplus, which I do not think I need read.

I turn now to clause 8, and I think it is plain that though it may, of course, be referring to other clauses, in clause 4 the words "subject as "hereinafter mentioned" do refer to clause 8. Clause 8 is in the following words: "In case at any time hereafter any of the charities and insti-"tutions mentioned in the second schedule hereto or any other charity "or institution which shall under the provisions herein contained "hereafter become entitled to participate under the trust hereby consti-"tuted shall attempt to alienate charge or anticipate its share or pro-"portion of the annual income of the trust fund or shall cease to exist "or shall become amalgamated with or absorbed in any other charity "or institution (whether mentioned in the second schedule hereto or "not) the trustees may in their discretion either pay or apply the "share or proportion of the annual income of the trust fund which "under the provisions hereof was for the time being payable to or for "the benefit of the charity or institution so ceasing to exist or becoming "amalgamated or absorbed as aforesaid as follows (that is to say) in "the case of a charity or institution becoming amalgamated or absorbed "as aforesaid to or for the benefit of the charity or institution with or "in which the same shall have become amalgamated or been absorbed "or as well in the case of any charity or institution so becoming "amalgamated or absorbed as in the case of any charity or institution "attempting to alienate charge or anticipate its share or proportion "of the annual income of the trust fund or ceasing to exist as aforesaid "to or between or for the benefit of such one or more of the other "charities and institutions mentioned in the said second schedule hereto "or any other charity or institution or charities or institutions for the "time being entitled to participate under the trust hereby constituted "and in such shares and proportions as the trustees shall think proper "or may apply such share or proportion of annual income to or "for such other objects or purposes of charity or benevolence or "amelioration of human suffering or advancement of knowledge as the "trustees shall in their opinion consider to be most in accordance with "the original desire and intention of the settlor."

There are a large number of bodies whose names appear in the second schedule, and it appears that they are all of them charitable in nature, notwithstanding that the deed refers constantly to them as charities or institutions. There are certain hospitals included in the list, and in particular there is the London Hospital, Whitechapel, E.,

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the Poplar Hospital for Accidents, 303, East India Dock Road, E., and the Cancer Hospital (Free), Fulham Road, Brompton, S.W.

The questions which I have to decide arise because of the effect of the National Health Service Act, 1946, which came into operation on the appointed day for the purposes of that Act, which was July 5, 1948. Certain things were done by that Act or pursuant to its provisions which affected these three hospitals, or may have affected them. In the case of the Cancer Hospital, an order was made which merely continued the Cancer Hospital as a teaching hospital, but not in association with any other previous hospital, and consequently it is clear that in the case of the Cancer Hospital no question of amalgamation really arises. That was admitted in the course of the case, and consequently, although a question was raised in the summons with regard to the Cancer Hospital, it is not necessary for me to consider the matter any further. Two questions do arise in regard to the London Hospital and in regard to the Poplar Hospital for Accidents.

I will take first of all the London Hospital, which, under the terms of the National Health Service Act, 1946, was made a teaching hospital, and consequently was dealt with in a different way from those hospitals whose property vested in the Minister and which were not treated in the same way as teaching hospitals. For the purposes which I have to consider, primarily, at any rate, the relevant provisions of the Act are to be found in section 11 (8). That subsection provides as follows: "The Minister may, after consultation with the university "concerned, by order designate as a teaching hospital any hospital or "group of hospitals which appears to him to provide for any university "facilities for undergraduate or post-graduate clinical teaching, and "the Minister shall, in the case of any hospital or group so designated, "by order constitute, in accordance with Part III of the Third Schedule "to this Act, a Board of Governors for the purpose of exercising "functions with respect to the administration of that hospital or "group; and any group of hospitals so designated shall, as from the "appointed day or the date of the designation (whichever last occurs), "be deemed for the purposes of this Act to be a single hospital."

By an order dated May 7, 1948 (No. 979 of 1948), and made pursuant to the provisions of that subsection which I have just read, it was provided: "Each of the hospitals or groups of hospitals set out "in the second column of the Schedule hereto is hereby designated "as a teaching hospital and shall be known by the name inserted in "the first column of the Schedule opposite thereto." Referring to the schedule I find that the second group (or whatever you may call it) is described as "The London Hospital," and the hospital or group of hospitals which are designated as a teaching hospital in the right-hand column are these: "The London Hospital, E.1 (including the "Croft Home, Reigate, the Marie Celeste Annexe, Reigate, the Zachary "Merton Annexe, Banstead, the London Hospital Annexe, Brentwood, "and the Herman de Stern Convalescent Home, Felixstowe)." They are all in one paragraph, and as a matter of fact all those subsidiary ones were really small branches of the London Hospital before these recent events. Then, secondly, I have Queen Mary's Maternity Home, Hampstead, N.W.3. It seems to me the result of that order is that the London Hospital and Queen Mary's Maternity Home are designated as one teaching hospital—"a teaching hospital," as the order says—and accordingly that they form one hospital between them, and, indeed, as expressed in section 11 (8) of the National Health Service Act, 1946, there has been an amalgamation in the case of the London Hospital with Queen Mary's Maternity Home. Therefore, it seems to me that one of the events mentioned in cl. 8 of the deed has come into operation in the case of the London Hospital.

In the case of the Poplar Hospital for Accidents the matter is

somewhat different, because it is not a teaching hospital under the new scheme, and different provisions of section 11 of the Act apply in consequence. For instance, subsection (3) provides: "Every Regional "Hospital Board shall, within such period as the Minister may by "direction specify, submit to the Minister a scheme for the appoint-"ment of them by committees, to be called Hospital Management "Committees, for the purpose of exercising functions with respect "to the management and control of individual hospitals or groups "of hospitals, other than teaching hospitals, providing hospital and "specialists services in the area of the Board. (4) The Minister "may approve, with or without modifications, which may include "additions or exceptions, any scheme submitted to him by a Regional "Hospital Board under the last foregoing subsection, and it shall be "the duty of the Board to give effect to the scheme as approved "by the Minister. (5) A Regional Hospital Board may at any time, "and if directed by the Minister shall within such period as may "be specified in the direction, submit a new scheme providing for the "modification of the scheme in force under this section, and the last "foregoing subsection shall apply to any such new scheme. (6) A "Hospital Management Committee shall be constituted in accordance "with Part II of the Third Schedule to this Act."

It is to be observed, and it is very striking, that there is nothing whatever in those subsections corresponding to the provisions to be found in subsection (8), that any group so constituted under a scheme shall "be deemed for the purposes of this Act to be a single hospital"; indeed, there is not a word of any kind on that point at all. In the present case a hospital management committee has been constituted in respect of a number of hospitals, a scheme has been put forward which has received the approval of the Minister of Health, and, therefore, comes into effect. The scheme in question provides for a management committee of a certain character, and it deals with certain hospitals in a schedule. Nothing is very explicit really in this scheme. On the point I have to consider, all it says in the schedule under the heading "Number and Name of Group" is "Bow." Whether it is Bow Group or Bow Hospital that it is to be called, I do not know. Then the next column is headed "Name of Hospital," and I find St. Andrew's, secondly St. Clements, and thirdly Poplar, which is undoubtedly the old Poplar Hospital for Accidents. They, therefore, are grouped together under the number and name, "No. 8 Bow," and the same appears in the letter of the Minister of Health approving the scheme.

Consequently, I find that there is a group consisting of three hospitals, of which the Poplar Hospital is one, but I am unable to see that there is any amalgamation in the same sense that there has been in the case of the London Hospital and in the sense which I think should be applied (albeit with no technical meaning) in the settlement of 1905 that I have to consider. Certainly Poplar Hospital is grouped with two other hospitals for the purposes of management and administration by the committee, but that, it seems to me, is the extent of the nexus between the two, and I do not find, therefore, that there has been an amalgamation in respect of the Poplar Hospital for the purposes of the settlement of 1905. Consequently, so far as the Poplar Hospital is concerned, it is unnecessary to consider the matter any further.

In the case of the London Hospital there are questions to consider. What is the result, and is their share taken away, or may it be taken away, under the discretionary power by the trustees, and is such a trust, if it is intended to operate, valid and effectual?

I propose to dispose first of all of one argument which was put up (not indeed on behalf of the London Hospital actually, but by Mr.

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Walton on behalf of the Poplar Hospital, but I think I should deal with it none the less), namely, that the provisions of section 60 of the National Health Service Act, 1946, overrode any provisions of the trust which would divert the funds in the events which have happened and would require the funds in question to be paid to the Hospital Management Committee.

Section 60 (1), provides: "Where property, other than property "transferred to the Minister or to the Board of Governors of a teaching "hospital or to a Hospital Management Committee under section 6 or "section 7 of this Act, is held on trust immediately before the appointed day." Pausing there for a moment, the property subject to the trusts of the settlement would come within that description of property which is not transferred to the Minister, because under the somewhat peculiar provisions in respect of an endowment fund in section 7 (10), of the National Health Service Act, if the property in question is not held "by trustees solely for the purposes of that hospital" it is not vested in the Minister, and, therefore, comes within this provision which I am considering. Of course, in the case of the trust deed the property is held on trust for a whole number of charities including this hospital, and, therefore, it is plainly not intended to come within section 7 (10), and so it is dealt with by section 60, if it is within that section. Continuing with the section: "and the terms of the trust "instrument authorise or require the trustees, whether immediately or "in the future, to apply any part of the capital or income of the "trust property for the purposes of any hospital to which section 6 "of this Act applies, the trust instrument shall be construed as "authorising or, as the case may be, requiring the trustees to apply "the trust property, to the like extent, and at the like times, for the "purpose of making payments, whether of capital or income—(*a*) in "the case of a hospital designated as a teaching hospital or included "in a group of hospitals so designated, to the Board of Governors "of that teaching hospital; (*b*) in the case of any other hospital, to "the Regional Hospital Board for the area in which the hospital is "situated or to the Hospital Management Committee for the hospital "or for the group of hospitals in which it is comprised. (2) Any "sums paid as aforesaid to any such Board or Committee shall, so "far as practicable, be applied by them for the purposes specified in "the trust instrument." That last part, of course, states merely what is to be done if the first subsection applies.

It has been argued that the result of this section is to prevent any gift over from the hospital for which the property was held and was to be applied from taking effect, and, therefore, that the provisions of the trusts in the settlement of 1905 are overridden by the provisions of this section. It would be a very strong thing, I may observe in the first place, for an Act of Parliament to provide that a condition of defeasance on certain events shall not take effect, and if an Act of Parliament is so intended to operate, one would expect, and indeed require, to find express words having that result; but I do not think that it is the intention of this section to do anything of that kind at all. The object of the section is simply to provide that the funds applicable to a hospital shall continue to be so applicable after the operation of the National Health Service Act, 1946, and provides for the body which takes the place of the former hospital (in whichever class it may fall) continuing the services in question. Consequently, it seems to me it has no operation where, upon the event of the hospital, for instance, becoming amalgamated the trust no longer required the property to be applied and no longer authorized the property to be applied for the purposes of that hospital at all. It seems to me, in consequence, that section 60 has no operation whatever

in the circumstances of this particular case with regard to the London Hospital.

I have now dealt with the Act and I return to the provisions of the settlement of 1905. It is to be observed that in the event of amalgamation, amongst other things, certain trusts are to come into operation. The trustees are given a discretion, in other words, the discretionary trust was created in the trustees which enables them to apply the income of the share which the charity formerly obtained before amalgamation either to the same charity in its amalgamated situation or to some other charity which is within the purposes of the settlement, or it may be applied—this is, of course, the fatal provision—not only for the purposes of charity, benevolence, the amelioration of human suffering and the advancement of knowledge, but for such other objects or purposes of charity as the trustees think fit. It is, therefore, a trust which is not only for charitable purposes, but quite definitely (in view of the number of decisions of the court culminating in *Minister of Health* v. *Simpson*[5]) for non-charitable purposes, and consequently the trustees have liberty to apply it either to charity or not to charity, and in those circumstances there is a trust which is not effective under the rules of our law. It may be it is void for uncertainty, but it seems to me also, in the events that have happened in this case, it is void under the rule against perpetuities.

Before dealing with that more in detail I will refer to an argument that was put forward that the matter was saved by the final words of clause 8, namely: "as the trustees shall in their opinion consider to be "most in accordance with the original desire and intention of the "settlor." The trustees, in my opinion, can discover what the original desire and intention of the settlor was only by looking at the recitals to the settlement. We find at the very beginning that the settlor enumerates the purposes which he has in mind, namely, "charity and "benevolence and the advancement of knowledge especially in aid of "human suffering." So he has enumerated three purposes, any one of which is the purpose which he wishes to advance, and one of those purposes is "benevolence." As I say, in view of the decisions of the court, benevolence is not a charitable purpose. So that reference back under the final provision of clause 8 carries the matter no further at all.

There have been some cases (some on one side of the line, some on the other) where there may be a gift to a charitable purpose which is limited in time and is only to continue for so long, or there may be a perpetual charitable purpose which is cut short by a defeasance provision contained in the trusts. It seems to me that notwithstanding the words, "subject as hereinafter mentioned," in clause 4, the trusts which are contained in clause 4 of the settlement are unlimited in time so far as that clause is concerned, and clause 8, as it seems to me, contains what is quite plainly a defeasance clause, cutting short the trusts which would under the provisions of clause 4 continue indefinitely. Therefore, there is a trust which may come into being in favour of a non-charitable purpose, amongst others, which need not come into being within the time allowed by the rule against perpetuities. Therefore it seems to me that the trust is void under the rule against perpetuities, as was held to be the case in *In re Peel's Release.*[6] The result of the defeasance clause being inoperative by virtue of the rule against perpetuities is that the original trust remains unimpaired, which was the case in *In re Peel's Release.*[6]

Consequently, in the present case the original trust in respect of the income and the share payable to the London Hospital remains unaffected under the provision of clause 8, and continues in favour of the

[5] [1951] A.C. 251: 66 T.L.R. (Pt. 2) 1015; [1950] 2 All E.R. 1137.

[6] [1921] 2 Ch. 218.

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purpose for which it was intended, and, therefore, operates in favour of the purpose of the body at present carrying on the medical teaching work at the London Hospital.

Solicitors: *Bircham & Co.; Hanbury, Whitting & Ingle; Farrer & Co.; E. F. Turner & Sons; Boyce, Evans & Sheppard; Farman, Daniell & Co.; Treasury Solicitor.*

K. R. A. H.

[COURT OF APPEAL.]

C. A.

1953 *Nov.* 30; *Dec.* 1, 2.

Singleton, Birkett and Hodson L.JJ.

* JOHN HUDSON & CO. LD. *v.* KIRKNESS (INSPECTOR OF TAXES).

Revenue—Income tax—Balancing charge—"Sale"—Railway wagons vested in Transport Commission—Compensation—Whether transaction a sale—Liability to balancing charge—Income Tax Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *ss.* 17 (1) (*a*), (3), 68—*Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *ss.* 8, 29, 30, 31; *Sch. VI.*

Transport — Nationalization — Compensation. "Sale." Compulsory purchase—Meaning.

The vesting of a company's railway wagons in the Transport Commission under section 29 of the Transport Act, 1947, with compensation fixed in the form of transport stock under the relevant sections of that Act, does not constitute a sale for the purposes of section 17 of the Income Tax Act, 1945, so as to render the company liable to a balancing charge under that section; nor is the transaction a compulsory sale, by analogy with compulsory acquisitions of land, since the provisions of the Transport Act distinguish between the procedure for such acquisitions and that for the transfer of wagons. Nothing in the taxing Acts displaces the ordinary meaning of "sold" at common law which is to be attributed to its use in section 17 (1) (*a*) of the Income Tax Act, 1945.

Newcastle Breweries Ld. v. *Inland Revenue Commissioners* (1927) 43 T.L.R. 476; 12 T.C. 927 distinguished.

Decision of Upjohn J. [1953] 1 W.L.R. 749; [1953] 2 All E.R. 64 affirmed.

APPEAL from Upjohn J.

The taxpayers, John Hudson & Co. Ld., appealed to the commissioners for the special purposes of the Income Tax Acts against an assessment made on them for the year 1948/49 under Case I of Sch. D to the Income Tax Act, 1918, in the sum of £29,021. The assessment was made in order to give effect to a balancing charge on the company under section 17 of the Income Tax Act, 1945,[1]

[1] Income Tax Act, 1945, s. 17: "(1) Subject to the provisions of this "section, where, on or after the "appointed day [April 6, 1946], any "of the following events occurs in the "case of any machinery or plant in "respect of which an initial allowance "or a deduction under Rule 6 of the "Rules applicable to Cases I and II "of Schedule D has been made or "allowed for any year of assessment "to a person carrying on a trade, that "is to say, either—(*a*) the machinery "or plant is sold, whether while still "in use or not; or (*b*) the machinery "or plant, whether still in use or not, "ceases to belong to the person carry-"ing on the trade by reason of the

the Crown alleging that such a charge arose by virtue of the receipt by the taxpayers of compensation under section 30 of the Transport Act, 1947, in respect of a number of railway wagons belonging to the taxpayers which vested in the Transport Commission under section 29 [2] of that Act.

The question was whether or not the transfer of the wagons under section 29 of the Transport Act, 1947, was a sale for the purpose of making the above-mentioned balancing charge.

The following facts are taken from the case stated: The company, which was incorporated on April 6, 1920, for the purpose of carrying on the business of coal merchants, owned railway wagons, which were used for the transport of coal in which the company and its subsidiary companies were dealing.

On September 3, 1939, the Minister of Transport gave notice under the Defence (General) Regulations, 1939, requisitioning the wagons of the company and its subsidiary companies.

"coming to an end of a foreign "concession; or (*c*) the machinery or "plant is destroyed; or (*d*) the "machinery or plant is put out of "use as being worn out or obsolete "or otherwise useless or no longer "required, and the event in question "occurs before the trade is per-"manently discontinued, an allow-"ance or charge (in this Part of this "Act referred to as 'a balancing "'allowance' or 'a balancing "'charge') shall, in the circumstances "mentioned in this section, be made "to, or, as the case may be, on, that "person for the year of assessment in "his basis period for which that event "occurs. . . . (3) If the sale, in-"surance, salvage or compensation "moneys exceed the amount, if any, "of the said expenditure still un-"allowed as at the time of the event, "a balancing charge shall be made, "and the amount on which it is made "shall be an amount equal to the "excess or, where the said amount "still unallowed is nil, to the said "moneys."

[2] Transport Act, 1947, s. 29: "Where, immediately before the date "of transfer, any privately owned "railway wagon is under requisition "by virtue of an exercise of the "powers in that behalf conferred by "Regulation 53 of the Defence "(General) Regulations, 1939—(*a*) the "property in that wagon shall vest in "the Commission on the date of "transfer, free from any mortgage "or other like incumbrance, and the "requisition shall then cease; and "(*b*) the Crown shall not be liable for "any compensation under the Com-"pensation (Defence) Act, 1939, or "otherwise in respect of any damage "to the wagon occurring during the "period of requisition."

S. 30: "(1) Where under the last "preceding section the property in "any wagon vests in the Commission, "the Commission shall, subject to the "provisions of the three next succeed-"ing subsections, pay as compensation "in respect thereof an amount deter-"mined, by reference to the type of "wagon and the year in which the "wagon was first built, in accordance "with the Table set out in the Sixth "Schedule to this Act. . . . (6) No "compensation, other than that pay-"able under this section, shall be "payable in respect of the vesting, "under the last preceding section, of "the property in any wagon in the "Commission."

S. 31: "(1) Subject to the pro-"visions of this section, the compen-"sation payable by the Commission in "respect of a privately-owned wagon "vesting in them on the date of "transfer shall be paid to the person "who, immediately before the date "of transfer, was the owner of the "wagon."

S. 32: "(1) The amount payable "by way of compensation in respect "of a wagon the property in which "vests in the Commission on the date "of transfer shall be satisfied in the "manner provided by Part VI of "this Act by the issue to the person "entitled thereto of British transport "stock."

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On January 1, 1948, the property in the requisitioned wagons was transferred to and vested in the British Transport Commission under section 29 of the Transport Act, 1947. Section 32 of that statute provided that the amount payable under section 29 by way of compensation should be satisfied by the issue to the person entitled thereto of British Transport stock.

The company in due course received compensation for its wagons, the property in which was vested in the commission. The amount of the compensation was substantially higher than the written down value of the wagons for income tax purposes as appearing in the company's books. This written down value was substantially lower than the original cost of the wagons. The balancing charge of £29,021, given effect to in the assessment to income tax for 1948/49 under appeal, represented (with the exception of £963 referable to other matters and not in dispute) the excess of the original cost over the said written down value. The provisions under which the balancing charge was made on the company were those of section 17 of the Income Tax Act, 1945, and the wagons in the present case fell within the description of the machinery or plant in the opening words of the section.

It was contended on behalf of the company (1) that, for a transaction to constitute a sale, there must be mutual assent between the parties (reference being made to Benjamin on Sale, 8th ed., p. 2); (2) that the law with regard to exchange was the same as that with regard to sale, mutual assent being equally required (reference being made to Halsbury's Laws of England, 2nd ed., vol. 25, para. 367, and vol. 29, para. 1); (3) that the compulsory vesting of the wagons in the commission was not a sale within the meaning of para. (*a*) of section 17 (1) of the Income Tax Act, 1945, nor (by reference to the fact that the company received its compensation in transport stock) an exchange within the said meaning, as extended by section 58 (3) of that statute; and (4) that the transaction did not fall within any of the events specified in section 17, and that, therefore, no balancing charge could be raised in respect thereof.

It was contended on behalf of the Crown (1) that sale was the transfer of the ownership of a thing from one person to another for a money price (reference being made to Halsbury's Laws of England, 2nd ed., vol. 29, para. 1); (2) that such a transfer took place on the compulsory vesting of the property in the company's wagons in the commission under section 29 of the Transport Act, 1947; (3) that the mere fact that the vesting of the property in the wagons was compulsory in no way negatived a sale; and (4) that consequently the transfer was a sale within the meaning of section 17 (1) (*a*) of the Income Tax Act, 1945, and was an "event" within that subsection, which, on the facts of the case, required a balancing charge to be made on the company under subsection (3) of section 17.

The Special Commissioners were of the following opinion: "What took place was in our opinion 'a transfer of the ownership "'of a thing from one person to another for a money price' "(Halsbury's Laws of England, vol. 29, p. 5, para. 1), and we "hold that it was a sale. We do not doubt that the wrongful "confiscation of a chattel, although accompanied by a subsequent "payment of a sum called 'compensation' would not constitute "a sale. In this case, however, section 29 of the Transport Act, "1947, vested the property in the company's wagons, which were "already lawfully in the possession of the Minister of Transport "under S.R. & O. No. 1085 of 1939, in the commission, and the "same enactment, by section 30, provided compensation, to be "computed under the provisions of the Sixth Schedule, which we "hold was a money price. We think also that, if assent is "necessary to the conclusion of a valid sale, it must be assumed "to be present when a statute, such as the Transport Act, 1947, "becomes law, since the company as a person living within the "jurisdiction of the British Crown must assent to all such laws "as are duly enacted, including the enactments contained in "sections 29 and 30 aforesaid. We are to some extent fortified "in this opinion by reference to section 8 of the Transport Act, "1947, which deals with the 'compulsory purchase of land,' as in "our opinion the assent necessary in the vendor to give a valid "title in land to the commission as purchaser is therein assumed "to be compatible with a 'compulsory' sale of real property. . . ."

The company appealed, by case stated, from that decision, and Upjohn J., on April 29, 1953,[3] held that the transfer of the railway wagons to the commission under section 29 of the Transport Act, 1947, with compensation under section 30 (1) (in the form of British transport stock, as provided by section 32) was not a "sale" either for the purposes of section 17 of the Income Tax Act of 1945 or at common law, and that, accordingly, the company was not liable to a balancing charge. He also held that on a proper construction of the relevant sections of the Transport Act, 1947, read in the light of section 8 of that Act (which conferred on the commission powers to purchase land compulsorily), the transaction in question could not properly be described as a compulsory purchase and a compulsory sale. He dismissed the appeal.

The Crown appealed.

Cyril King Q.C. and *Sir Reginald P. Hills* for the Crown.
John Senter Q.C. and *Anthony Barber* for the company.

The following cases were cited in the argument: *Regent's Canal Co.* v. *Ware*[4]; *In re Eccleshill Local Board*[5]; *In re Pigott and Great Western Railway Co.*[6]; *Great Western Railway Co.* v.

[3] [1953] 1 W.L.R. 749; [1953] 2 All E.R. 64.
[4] (1857) 26 L.J.Ch. 566.
[5] (1879) 13 Ch.D. 365.
[6] (1881) 18 Ch.D. 146.

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Inland Revenue Commissioners[7]; *John Foster & Sons* v. *Inland Revenue Commissioners*[8]; *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.*[9]; *Inland Revenue Commissioners* v. *Wolfson*[10]; *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[11]; *Bramford's Road Transport Ld.* v. *Evans (Inspector of Taxes)*.[12]

SINGLETON L.J. The Transport Act, 1947, by section 1, set up a public authority to be called the British Transport Commission, referred to in the Act as "the commission." Part II of the Act provided for the acquisition by the commisssion of railway and canal undertakings and of certain railway wagons. The acquisition of railway wagons is dealt with in sections 29 to 32 of the Act. [His Lordship read sections 29 (*a*) and (*b*), 30 (1), 31 (1) and 32 (1) and continued:] The amount which was to be paid for railway wagons which were acquired by the commission under those sections was subject to subsections (2), (3) and (4) of section 30, which I have not thought it necessary to read.

The amount specified in the Sixth Schedule to the Act, which is headed "Compensation for Acquisition of Privately-"owned wagons," and shows the amount payable for the different types of railway wagons, varies according to the year in which the wagon was built without reference to its condition, and the payment was to be made in British transport stock.

The company, John Hudson & Co. Ld., had 663 wagons to which section 29 of the Transport Act applied, and on January 1, 1948, the property in those wagons was transferred to and vested in the commission under that section. [His Lordship read from case stated the paragraph referring to the amount of compensation and the assessment of the balancing charge, read section 17 (1) (*a*) and (3) of the Income Tax Act, 1945, and continued:] The object of section 17 is this: if plant and machinery have been depreciated in the company's books and income tax allowances have been made, and the plant or machinery is subsequently sold at a higher price than its depreciated price, then the excess of the one over the other is subject to a balancing charge on which income tax may be levied. If the price for which the plant or machinery is disposed of is less than its written down price, there is to be a balancing allowance. Although, so far as I know, no case of a balancing allowance has reached this court as yet, there have been one or two cases in which a balancing charge has been made.

[7] [1894] 1 Q.B. 507; 10 T.L.R. 128.

[8] [1894] 1 Q.B. 516; 10 T.L.R. 152.

[9] (1925) 42 T.L.R. 185, 609; sub nom. *Newcastle Breweries Ld.* v. *Inland Revenue Comrs.* (1927) 43 T.L.R. 476; 12 T.C. 927.

[10] (1949) 65 T.L.R. 260; [1949] 1 All E.R. 865; sub nom. *Wolfson* v. *Inland Revenue Comrs.* 31 T.C. 141.

[11] [1952] A.C. 401, 426; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[12] [1953] 1 W.L.R. 1385; [1953] 2 All E.R. 1308.

It is claimed by the Crown that a balancing charge of £29,021 falls to be made on the company on the basis that the wagons which were acquired by the commission under section 29 of the Transport Act, 1947, were sold to the commission within the meaning of the word in section 17 (1) (*a*) of the Income Tax Act of 1945. The real question for decision is whether, by reason of sections 29 to 32 of the Transport Act, 1947, there was a sale to the Transport Commission of the wagons in question.

The Special Commissioners held that the assessment on the company was properly made. [His Lordship read from their opinion, and in particular the passage: "We think also that, "if assent is necessary to the conclusion of a valid sale, it "must be assumed to be present when a statute, such as the "Transport Act, 1947, becomes law, since the company as a "person living within the jurisdiction of the British Crown "must assent to all such laws as are duly enacted, including the "enactments contained in sections 29 and 30 aforesaid." His Lordship continued:] That was not sought to be supported by counsel for the Crown in this appeal.

The company appealed, and Upjohn J. allowed their appeal, holding that there was no sale. The inspector of taxes appeals to this court.

It is desirable that I should say a little more as to the Transport Act, 1947. The first thing to notice is that the word "sale" is not used in relation to the acquisition by the commission of property of one kind or another. Sections 12 to 16 provide for the acquisition by the commission of railway and canal undertakings. I read subsection (1) of section 12: "Subject to the "provisions of this Act, the whole of the undertakings of the "bodies of persons specified in the Third Schedule to this Act, "being the bodies who fall within the class described in the next "succeeding section, shall, on the first day of January, nineteen "hundred and forty-eight (hereafter in this Part of this Act, "and in the other provisions of this Act so far as they refer to "the acquisition by the commission of the said undertakings, "referred to as 'the date of transfer'), vest by virtue of this "Act in the commission." It is in section 12 that one gets the date of transfer, January 1, 1948, which is the date for all purposes of the Act.

Section 16 provides for compensation for the acquisition of the railway and canal undertakings which are acquired "by "reference to the values of the securities specified in the Fourth "Schedule," which, by section 16 (2), "shall be an amount "equal to the aggregate value (computed in accordance with the "provisions of the next succeeding section) of all the securities, "if any, of that body existing immediately before the date of "transfer"; and under section 16 (3): "The compensation so "payable shall be satisfied . . . by the issue . . . of British "transport stock" in accordance with the provisions of the Fifth Schedule.

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I have referred to the part of the Act with which we are immediately concerned—sections 29 to 32—and I go on to Part III of the Act, which is concerned with the acquisition of certain road transport undertakings, namely, section 39 onwards. Section 49 deals with the assessment of compensation in respect of road transport undertakings which are acquired, and the mode of compensation there is on quite a different footing from that contained in Part II as to railway and canal undertakings, and as to wagons. For instance, in compensation under Part III of the Act there has to be a consideration of a number of different circumstances, one of which, in section 47 (2), involves consideration of the amount which the property would fetch if sold in the open market.

The real contest throughout this case has been whether or not there was a sale of the wagons to the commission; in other words, whether the plant was sold. But the argument has developed a little, and I think that the questions for the consideration of the court may be stated in this way. First, was there a sale in the ordinary understanding of the word? Secondly, is there anything in the provisions of the Transport Act which ought to lead one to say that that which took place must, for the purposes of section 17 (1) of the Income Tax Act, 1945, be regarded as a sale? Thirdly, was there a compulsory sale? It is not admitted by the company that a compulsory sale would have the effect for which the Crown contends; and it is disputed that there was a compulsory sale. The fourth question which has been put for our consideration arises on sections 34 and 35 of the Finance Act, 1948, from which it is claimed, on behalf of the Crown that, by analogy, one ought to say there was a sale, even if that did not appear elsewhere.

First, was there a sale in the ordinary understanding of the word? The word "sold" assumes a seller and a buyer. Unless there is some reason for giving a special meaning to the word, it must be given its ordinary meaning. Did Hudsons sell their wagons to the commission? I am quite sure what the answer of Hudsons would be, but that is not much help. What would anyone accustomed to the use of the words "sale" or "sold" answer? It seems to me that everyone must say "Hudsons did "not sell." Did the commission buy from Hudsons? Equally, on the ordinary meaning of the word, I should find it difficult to say that the commission bought or purchased the wagons. In other words, there was not in this case a seller or a buyer, and that leads me to think that there was not a sale of the wagons in the sense in which the word is ordinarily understood. The wagons were acquired, as the Act says, and on January 1, 1948, the property in those wagons vested in the commission. I refer to a passage in Benjamin on Sale, 2nd ed., p. 1, which I think may be regarded as an authority on this subject: "By the "common law a sale of personal property was usually termed "a 'bargain and sale of goods.' It may be defined to be a

"transfer of the absolute or general property in a thing for a "price in money. Hence it follows that, to constitute a valid "sale, there must be concurrence of the following elements, viz: "(1) parties competent to contract; (2) mutual assent; (3) a "thing, the absolute or general property in which is transferred "from the seller to the buyer; and (4) a price in money paid or "promised." Mr. Senter, who relied on that passage, pointed out to the court that in the circumstances of this case there was no mutual assent; nor, as he submitted, was there a price in money paid or promised; and on that he based his argument that here there was no sale—no sale according to the ordinary use of that word, nor according to the definition of "sale" as accepted in the courts of this country generation after generation. I think that that is right.

The next point for consideration is whether there is anything in the provisions of the Transport Act which ought to lead this court to say that that which took place ought to be regarded as a sale within section 17 (1) of the Income Tax Act, 1945. Again, if I may say so with respect to the very full and complete argument which has been addressed to the court, I cannot see that there is anything in the Transport Act which should lead this court to take a view of the word "sold" in section 17 (1) (*a*) of the Income Tax Act, 1945, other than that which it normally bears. An examination of the whole of the Transport Act, and in particular of sections 29 to 32, shows this. By section 29, "Where, immediately before the date of transfer, any privately "owned railway wagon is under requisition," the property in that wagon shall vest in the commission on the day of transfer. It is a statutory vesting, a change of ownership brought about by statute. There is nothing in that section which has the appearance of bargain and sale, or of sale. Section 30 is: "Where under the last preceding section the property in any "wagon vests in the commission, the commission shall, subject "to the provisions of the three next succeeding subsections, pay "as compensation in respect thereof an amount determined, by "reference to the type of wagon and the year in which the wagon "was first built, in accordance with the table set out in the "Sixth Schedule to this Act." The value, in accordance with the method of arriving at it which is set out in the Sixth Schedule, is something which has to be paid, but, Mr. Senter submitted, it is not a price. I am not sure that that part of Mr. Senter's argument has quite as much force as his earlier submission that this is not a sale in any sense of the word. Then there is the provision that the mode of satisfaction of the compensation is to be by British transport stock. I do not find in these provisions anything which leads me to think that one ought to give the word "sold" in section 17 (1) (*a*) of the Income Tax Act, 1945, any meaning different from that which it normally has. So, on the second point, it seems to me that the argument of the Crown fails, too.

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The next point raised by Mr. King was that if there was not a sale in the ordinary sense there was a compulsory sale; that all the elements of a compulsory sale were present; and that this court ought to hold that consequently there was a sale for the purposes of section 17 (1) of the Income Tax Act, 1945. In support of that submission, a number of authorities were cited to the court on the compulsory acquisition of property, showing that when one had reached a stage at which value had been fixed in the way provided by the statute, the position of vendor and purchaser was created, so that the rights of the parties could be determined on a vendor and purchaser summons.

I do not propose to refer to those authorities. I do not think that they apply to the circumstances of this case. If one has a compulsory acquisition of land, it may be that one reaches something in the nature of a compulsory contract. Thereupon, if the parties' rights have to be determined, that may be done on a vendor and purchaser summons. That is not this case. I draw attention in the first place to section 8 of the Transport Act, 1947. That is the section which authorizes the commission compulsorily to purchase land for its own purposes. It appears to me that the section draws a clear distinction between compulsory purchase and that which is done by the commission when it acquires railway undertakings or canal undertakings or railway wagons, or road haulage undertakings under later sections. Section 8 says: "The Minister may authorize the "commission to purchase compulsorily any land which they "require for any purpose connected with the discharge of their "functions, and the Acquisition of Land (Authorization Pro-"cedure) Act, 1946 (except section 2 thereof) shall apply as if "the commission were a local authority within the meaning of "that Act and as if this Act had been in force immediately "before the commencement of that Act."

Section 8 thus gives the commission power to acquire land compulsorily. If they do that, they have to comply with the provisions of the Lands Clauses Acts embraced in the Acquisition of Land (Authorization Procedure) Act, 1946. They have to give the necessary notices. The owner of the land may then have an opportunity of agreeing what compensation shall be paid, if his land is to be acquired for the purposes of the public; otherwise, the value is fixed by arbitration. That is the procedure under section 8. It is wholly different from the provisions in section 29, under which the ownership in the company's wagons vested in the commission on January 1, 1948; and the provisions as to payment of compensation are wholly different. I do not regard the vesting of the wagons in the commission as a compulsory sale or in the nature of a compulsory sale. It was an acquisition authorized by statute and paid for by way of compensation in the manner provided by the statute.

Mr. King referred to *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.*,[1] in which the Newcastle Breweries Ld. carried on the business of brewers and wine and spirit merchants, and in the course of that business kept large stocks of rum which had to be reduced and blended before sale. The blended product was sold either wholesale or retail in relatively small quantities. In January, 1918, the Admiralty, acting under the Defence of the Realm Regulations, took over about one-third of the stocks in question then owned by the respondent company. Payment of £10,315 was offered by the Admiralty, based on the actual cost of the rum and allowing a profit of about 1s. per proof gallon, and that amount was accepted on account by the respondent company, without prejudice to its claim for a larger amount. Thereafter there was much litigation. The company proceeded by petition of right, but in the events which happened that was useless; and ultimately they had to claim before a tribunal which assessed the amount due to the brewery company as £5,309 10s. 0d., and that amount was paid to the brewery company some years after the rum had been taken. Thereupon, it was claimed by the Inspector of Taxes that the £5,309 10s. 0d., the second payment, which was a payment by way of compensation in one sense, ought to be included in the company's accounts for the year 1918/19. But the company contended that the sum was not a receipt of the company's trade or a profit arising from its trade or business, and that the rum taken over by the Admiralty in the foregoing circumstances was not, and could not be said to have been, sold by the respondent company in the course of its trade or business or at all.

Rowlatt J. held, and the Court of Appeal held, and the House of Lords held, that the sum was a sum properly taken into consideration in the company's earnings for the year in which the rum had been taken. Rowlatt J. said[2]: "The brewery company "had a large quantity of rum, not yet refined or reduced or "prepared for sale, which was requisitioned by the Admiralty." And later[3]: "Now the Admiralty took these goods at the "beginning of the company's year which ended in 1918, and "towards the end of the year, or in the summer, they paid "£10,000, which they said was the cost, and some other allow-"ances, plus one shilling a gallon profit. What was done upon "that is perfectly clear to my mind. Neither party gave up "anything. The Admiralty said that was what they thought "the sum was, and they were not prepared to pay any more, "and the brewery company said it was not enough, but they "took that sum; the Admiralty raised no objection. The "brewery company said: 'We do not take it in satisfaction; we "'will reserve our rights to make any further claim which we "'may be advised to make,' and the Admiralty said, 'Very "'well; we have no objection. You are at liberty to make any

[1] 12 T.C. 927.
[2] Ibid. 934.
[3] Ibid. 935.

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"'further claim.' That is what took place. Now if they had "gone under the regulation they would have got, to put it "shortly, the cost to them plus the pre-war profit, as a price. "That would have been a price. However, what they said "was that this part of the regulation is invalid, and they went "by petition of right to Salter J. and obtained a judgment from "him which said that the price was not to be so determined or "so limited; their right was to have the market value, to be "assessed by the county court judge. Now, if they had got "that, they again would have got a price. But at that period "the Indemnity Act came into effect, which avoided the judg-"ment of Salter J., as well as other judgments in pari materia "or within the ambit of the Act; and instead of that, it gave "people in the position of the brewery company a right to go "before a commission presided over by Sir Francis Kyffin "Taylor." The judge added that they went before the tribunal, and he said, in a passage relied on by Mr. King [4]: "Now what "is that except a compulsory sale of the rum? It seems to me, "when you really look at the substance of the thing, it is in a "very small compass. That is all it is, a compulsory sale of "the rum."

As I have said, that judgment was upheld in the other courts, and Viscount Cave L.C. said [5]: "Two points are made on behalf "of the appellants. First, it is said that the £5,300 is not a "profit from the appellants' business at all, but is a sum payable "by way of compensation for the compulsory taking by the Crown "of a part of the appellants' capital. I cannot agree with that "contention." So the gist of the decision was that, though the rum was acquired by the Admiralty, it was equivalent to a contract of sale; that there was certainly a profit earned by the company in respect of £5,309; and that that must be taken into the company's accounts. From that, Mr. King submits that where one has, as in this case, a compulsory acquisition, the vesting of the property of the company in the commission on January 1, 1948, and payment made therefor, that ought likewise to be treated as a sale. I think that the two things are wholly different, and the difference is, indeed, made clear by reference to the compulsory powers of purchase of land given in section 8 of the Act of 1947. In my view, that which took place cannot be held, and ought not to be held, to be a compulsory sale.

The next point arises on sections 34 and 35 of the Finance Act, 1948. There is this side-note to section 34: "Remission "of balancing charges and other provisions, in case of certain "undertakings absorbed under nationalization schemes." The section does not apply in this case directly; that is shown by subsection (1) (*b*). It does, or might, apply to the provisions as to the taking over of an undertaking under section 12 of the

[4] Ibid. 937. [5] Ibid. 953.

Transport Act; it does not apply to section 29. It provides: "The provisions of this section shall have effect where—(*a*) "under any statutory provisions to which this section applies, "property is transferred to a commission, authority, board, body "or person; and (*b*) under the statutory provisions in question, "the liability of the transferor arising from any balancing charge "falling to be made on the occasion of the transfer becomes a "liability of the transferee. (2) The transfer shall be treated "for income tax purposes as a sale of property to which para-"graph (*a*) of subsection (1) of section 59 of the Income Tax "Act, 1945, applies and as if the parties to the sale had given "notice of election under subsection (4) of that section."

The submission of Mr. King on that section is that it shows that in other cases the draftsman of the Finance Act, 1948, had probably assumed that there would be, or might be, balancing charges, and if that was his view it provided some guidance or some help towards a true interpretation of the Transport Act, 1947; and he submitted that the position was carried further by section 35 which, like section 34, ends in this way: "This "section shall be deemed always to have had effect," so that both sections have retrospective effect. Section 35 (1) is: "The "question whether any and if so what balancing allowance or "balancing charge falls to be made to or on the National Coal "Board on the occasion of the transfer to the British Transport "Commission under section 29 of the Transport Act, 1947, of "any railway wagons which the said board acquired under the "Coal Industry Nationalization Act, 1946, shall be determined "as if section 29 of the Finance Act, 1947, and the Seventh "Schedule to that Act, had not been passed." That shows, said Mr. King, that at the time of the passing of the Act of 1948 the question had arisen whether there should be made, or whether there fell to be made, a balancing charge or allowance as between the National Coal Board and the British Transport Commission. Of course, balancing charges and balancing allowances had been first mentioned in the Income Tax Act, 1945, and I have no doubt that by the time the Finance Act, 1948, was passed someone had seen that section 17 of the Act of 1945 might lead to a harvest one way or the other. I have no doubt that someone in the National Coal Board and someone in the British Transport Commission had discussed it; but that by no means shows that a balancing charge falls to be made.

Mr. Senter submitted that nothing in those two sections of the Finance Act, 1948, helped towards a true interpretation of the provisions of the Transport Act, 1947, and it seems to me that that submission is right.

I would humbly repeat that which Lord Radcliffe said in *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*, in one line[6]: "The beliefs or assumptions of those who

[6] [1952] A.C. 401, 426; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

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"frame Acts of Parliament cannot make the law." I believe it to be the duty of this court to determine the effect of the Transport Act from the wording of that Act itself. I do not find myself greatly helped by references to sections 34 or 35 of the Finance Act, 1948, nor from references to the changes made by the Income Tax Act, 1952, s. 292, nor by the Finance Act, 1952, Sixth Schedule.

On the view which I take of the provisions of the Transport Act, 1947, namely, that there was in the circumstances of this case no sale, it seems to me that the judgment of Upjohn J. is right and that this appeal should be dismissed.

BIRKETT L.J. I am of the same opinion, and it would really have been enough for me to say that I agree with my Lord's judgment, but, having formed a clear view of the critical points in issue, perhaps I may add a word or two from my own point of view.

The only question in this case in this court—though it was otherwise elsewhere—related to the meaning of the words in section 17 (1) (*a*) of the Income Tax Act, 1945, and the construction of certain sections in the Transport Act, 1947. The Income Tax Act, 1945, in section 17, laid down the events on which a balancing allowance or a balancing charge would fall to be made, and those events were stated in this form: [His Lordship read section 17 (1) and continued:] There were four clear, distinct events, and on the happening of any one of them certain consequences respecting a balancing charge or a balancing allowance followed. In the present case the company had been assessed to a balancing charge of £29,021 in respect of certain wagons which had belonged to them, and which, by the provisions of the Transport Act, 1947, had been in fact vested in the Minister.

The only other part of section 17 which I think has a bearing is this: after setting out the events clearly, it continues: "(2) "Where there are no sale, insurance, salvage or compensation "moneys"—that clearly has reference to the events set out in subsection (1) (*a*), (*b*), (*c*) and (*d*)—and goes on to deal with the balancing allowance; and the words are similarly used in subsection (3): "If the sale, insurance, salvage or compensation "moneys exceed the amount, if any, of the said expenditure still "unallowed as at the time of the event," then the balancing charge comes into being. And my last quotation is from section 68 of that Act, the definition section, because there it is said that "'sale, insurance, salvage or compensation moneys' "mean, in relation to an event which gives rise or might give "rise to a balancing allowance or a balancing charge to or on "any person, or is material in determining whether any, and, "if so, what, annual allowance is to be made to a person under "Part III of this Act—(*a*) where the event is a sale of any "property, the net proceeds to that person of the sale; (*b*) where

"the event is the coming to an end of an interest in property "on or by reason of the coming to an end of a foreign concession, "any compensation payable to that person in respect of that "property; (*c*) where the event is the demolition or destruction "of any property, the net amount received by him for the "remains of the property, together with any insurance moneys "received by him in respect of the demolition or destruction and "any other compensation of any description received by him "in respect thereof, in so far as that compensation consists of "capital sums; and (*d*) where the event is that a building or "structure ceases altogether to be used or that machinery or "plant is put out of use, any compensation of any description "received by him in respect of that event, in so far as that "compensation consists of capital sums."

That is the machinery of section 17, and I think that it is important, because all that we are really concerned with here is to say whether the event which took place under the provisions of the Transport Act, 1947, was a sale as distinct from any of the other events in subsection (1). Of course, it is easy enough to say: "Well, it is a simple question: were the wagons sold or "were they not? Was this a sale or not?" We have heard a most interesting and learned argument on that simple matter, and it would be idle to pretend that the solution of the problem is a simple matter at all; it is not. I think that it is a complicated and difficult matter.

Originally the company took various objections to the assessment made on them, and appealed to the Special Commissioners, who decided against the company. Many of the matters which they decided are no longer relevant to this appeal; and the only matter left is: were the wagons sold? The Special Commissioners on that issue found in favour of the Crown. Though the reasons which they gave for their decision are not accepted wholly by the Crown in this court, their decision that it was a sale is sought to be affirmed by the Crown here. The company thereupon appealed to Upjohn J. We have had the advantage of reading his very clear exposition of the matter. He reversed the findings of the Special Commissioners and said that this was not a sale. As I understand it, in this appeal no question of figures arises. If this was a sale, the assessment stands; if it is not held to be a sale, the assessment does not stand.

[His Lordship referred to sections 29, 30, 31, 32 of, and the Sixth Schedule to, the Transport Act, 1947, and continued:] So that was the scheme in the Act of 1947: "These wagons which "admittedly are your property, though they have been "requisitioned by us for use, shall now vest in the Transport "Commission, and you shall receive," says the Act, "by way "of compensation those sums which we have arbitrarily fixed" (I use the word "arbitrarily" in no sinister sense at all) "and "you shall be paid that sum and no other."

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If the test be, as I think it is, and as my Lord stated: is that a sale within the ordinary connotation of the word "sale"?—the first answer would appear to be clearly "No." The vendor had no choice whether he would sell or not; that is admitted. He had no choice about the price or sum or compensation which he was to receive; that was fixed by the Schedule. He had no choice whatever as to the form in which he would get his payment. He was to have it by way of British transport stock; and from that point of view it would have seemed, using the language in its ordinary sense, that a compulsory acquisition, compulsory transfer, or some such phrase, was more appropriate to that particular transaction or event than the word "sale." But Mr. King and Sir Reginald Hills addressed to us a very forcible argument on this matter, saying: "Although the outward "form of it may not appear to be a sale in the ordinary sense "of that term, as it is customarily used, nevertheless, for the "purposes of the Income Tax Act, 1945, it is a sale," and they relied on the words in Halsbury's Laws of England, 2nd ed., vol. 29, p. 5, the author of which, we were told, was the late Scott L.J. The words are: "Sale is the transfer of the owner-"ship of a thing from one person to another for a money price." The sidenote to that paragraph reads: "Sale and exchange or "barter distinguished."

Both Mr. King and Sir Reginald Hills relied on that, and said: "If that is right, we come fairly and squarely within it, "because there is a transfer of the ownership of a wagon from "one person to another for the money price set out in the Sixth "Schedule to the Transport Act, 1947." It is true that the article in Halsbury's Laws of England proceeds to consider in very much more detail what a contract of sale may be, but great insistence was laid on that definition as being conclusive. Both Mr. King and Sir Reginald Hills pressed this matter very forcibly indeed, particularly Sir Reginald, who said in terms: "Of course, "there is also the definition stated by the late Mr. Benjamin, "but you should not really follow that; you should follow this "plain, simple declaration." The late Mr. Benjamin admittedly was a very great lawyer, and on the subject of the sale of goods a very great authority; and the definition which has been cited first by Upjohn J. and then by my Lord here today is Mr. Benjamin's own; it comes from the edition which he himself prepared for publication; and I think that very great respect ought to be paid to the definition, which has been incorporated in every subsequent edition of Benjamin on Sale. In that definition Mr. Benjamin lays great stress on the question of mutual assent.

The argument which was addressed to us on this point, particularly by Mr. King, was that mutual assent really does not matter; and he cited *Inland Revenue Commissioners* v. *Newcastle Breweries Ld.*[7] It is plain that in the judgments in

[7] 12 T.C. 927.

that case the Lords Justices in the Court of Appeal and the Lords of Appeal in the House of Lords referred to this matter in this way: Lord Phillimore in the House of Lords said [8]: "The "rum was purchased for trade purposes, and the particular sale "was none the less a trade sale because the trade was forced "upon the appellant company." Viscount Cave L.C. said [9]: "If the raw rum had been voluntarily sold to other traders, the "price must clearly have come into the computation of the "appellants' profits, and the circumstances that the sale was "compulsory and was to the Crown makes no difference in "principle." And there are other observations to the like effect. What that case was really seeking to establish was that a compulsory sale—as that was held to be—made no difference to the point then in issue, which was: "Had profits been made? "If so, into what year of assessment did they fall?"; and the House decided that profits had been made, and they said that the fact that it was a compulsory sale made no difference. That case was pressed on us very strongly, as were cases under the Lands Clauses (Consolidation) Act of 1845, particularly *Regent's Canal Co.* v. *Ware* [10] and *Great Western Railway Co.* v. *Inland Revenue Commissioners.* [11]

With great respect to Mr. King's argument, I do not propose to discuss the matter at length, but I cannot think that those cases and the analogy sought to be drawn have any true application to the facts with which we are concerned. Under the Lands Clauses (Consolidation) Act, 1845, most elaborate machinery is set up for the taking of land, machinery concerning the question of arbitration as to the price, machinery dealing with agreement as to the price, machinery dealing with the verdict of a jury in default of agreement, and so on; and I can very well understand that in the machinery of that Act one does clearly reach a point where one can say: "The position of vendor and purchaser is "here created," and if it be a matter of specific performance, that can be done. But I cannot think that those cases and the principles applicable to them are really of very much assistance on the question of the taking of these wagons. I do not propose, therefore, to discuss them. The question to be determined comes back to the one simple matter: was this a sale?

There is one further matter which I should like to mention. In *Wolfson* v. *Commissioners of Inland Revenue,* [12] Lord Simonds said, on the question of construction in that case [13]: "It was "urged that the construction that I favour leaves an easy loop-"hole through which the evasive taxpayer may find escape. "That may be so; but I will repeat what has been said before. "It is not the function of a court of law to give to words a "strained and unnatural meaning because only thus will a taxing

[8] Ibid. 954.
[9] Ibid. 953.
[10] 26 L.J.Ch. 566.
[11] [1894] 1 Q.B. 507; 10 T.L.R. 128.
[12] 31 T.C. 141.
[13] Ibid. 169.

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"section apply to a transaction which, had the legislature thought "of it, would have been covered by appropriate words. It is "the duty of the court to give to the words of this subsection "their reasonable meaning." It is argued here by Mr. Senter that when one takes the event in this case, the taking of the wagons, and the awarding of compensation under the Sixth Schedule, it is giving a strained and unnatural meaning to the word "sold" in section 17 (1) (*a*) to call that event a "sale"; and he referred to two statutes, one of which I will cite, the Income Tax Act, 1952, s. 292: "(1) Subject to the provisions "of this section, where any of the following events occurs in the "case of any machinery or plant in respect of which an initial "allowance or an annual allowance has been made for any year "of assessment to a person carrying on a trade, that is to say, "either" where the machinery or plant ceases to belong to the person carrying on the trade, where there is a sale of the machinery or plant, or in any other circumstances of any description. Mr. Senter's purpose in citing that section was to reinforce the words of Lord Simonds in the case which I have just cited, and to say: "The legislature could, in section 17, have devised "and inserted words which would have covered this transaction "completely, as they do in section 292 of the Act of 1952, but "you must not, in construing section 17 (1) (*a*) of the Act of "1945, construe it by putting in words which the legislature "themselves did not do."

On the first point in this case—was there here a sale of the wagons?—I am of the same opinion as my Lord and Upjohn J., that there was no sale within the meaning of section 17 (1) (*a*). I do not propose, therefore, to go into a great many of the matters which were submitted as supporting arguments to that main point. For example, Mr. Senter said, with a great deal of force, that one must have a price, and there was no price here in any true sense of the word at all, because the term "price" must connote some agreement or some assessment according to the value. I am bound to say that at one stage in the argument I thought that the assessment of value, crude though it might be, was still an assessment of value in the Sixth Schedule, because there one is taking wagons according to their year, according to their tonnage, and according to their structure, and placing a fixed value or sum on them. But it is plain that, so far as the wagons were concerned, it did not matter one iota what their condition was; they might have been in the last stages of decay; but if it could be said that that was the year of the building and the tonnage, then automatically the sum laid down in the columns of the Sixth Schedule was to be applied. And many arguments on both sides dealing with assent, the construction of the word "price," and of the word "compensation" were used before us. It is enough for me to say that I agree with what my Lord said about them, and I content myself by saying that I do not think that the event of the taking over of these wagons,

in the circumstances that we know, was within the words "the "machinery or plant is sold."

Finally, on sections 34 and 35 of the Finance Act, 1948. I understood that the argument, particularly from Sir Reginald Hills, was that if one looked through the Acts one would find there a consistent scheme, and that this transaction or event quite properly could be comprehended under the term "sale," and that only if the standard set out by Benjamin was adopted did one fall into error: "Follow the Acts, follow the consistent scheme, "and all will be well." Under section 34 of the Finance Act, 1948, which by subsection (6) was to be deemed always to have had effect: "The provisions of this section shall have effect where "—(*a*) under any statutory provisions to which this section "applies, property is transferred to a commission"—covering this case—"(*b*) under the statutory provisions in question, the "liability of the transferor arising from any balancing charge "falling to be made on the occasion of the transfer becomes a "liability of the transferee. (2) The transfer shall be treated for "income tax purposes as a sale of property to which paragraph "(*a*) of subsection (1) of section 59 of the Income Tax Act, 1945, "applies and as if the parties to the sale had given notice of "election under subsection (4) of that section."

I will not trouble now to read the relevant parts of section 59; but it is plain that the purpose which is in subsection (2) of section 34 could perfectly well have been achieved without any mention of the word "sale" at all. To argue that, because in the Act of 1948 one finds the words "treated for income tax "purposes as a sale" within the meaning of section 59, one ought to say that therefore under the Income Tax Act, 1945, this was a sale, is a step which I myself find it extremely difficult to take. Similarly, with regard to section 35, it may very well be that that section impliedly says that there is to be a balancing charge on an occasion of this sort, but I do not think that that of itself lends very much assistance to the determination of the simple question in this case: were the events as we now know them, which took place by virtue of sections 29, 30, 31 and 32, and the Sixth Schedule of the Act of 1947, a sale for the purposes of section 17? With great respect to the arguments which have been addressed to us by the Crown, I am of opinion that they were not, and that the judgment of Upjohn J. ought to be affirmed.

HODSON L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Solicitor, Inland Revenue; Willis & Willis, for Taynton & Son, Gloucester.*

M. M. H.

[COURT OF APPEAL.]

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Somervell, Denning and Romer L.JJ.

* DUNSTER *v.* ABBOTT.

[1952 D. No. 1220.]

Invitor and Invitee—Canvasser—Invitee or licensee—Duty of occupier to licensee—Averment of concealed or unusual danger—Darkness—Light switched off by occupier.
Licensor and Licensee. Trespass.

The plaintiff, a canvasser, called on the defendant, a builder, in order to sell him advertising space on the covers of telephone directories. He had no appointment with the defendant but earlier in the day had been informed by the defendant's wife that her husband would be home in the evening. The defendant was not interested in the offer made by the plaintiff, and saw him out on to the pathway which led from the house and across a bridge over a ditch to the public road.

It was a dark and rainy night but the pathway was to some extent illuminated by an electric lamp attached to the defendant's garage. This lamp was not switched off until such time as the defendant estimated that the plaintiff had reached the roadway. In fact, the plaintiff had only reached the bridge, and misjudging his position he turned to the right and fell into the ditch, sustaining injury. He sued the defendant for damages:—

Held, that the plaintiff, being on the defendant's premises on his own business and not on any business in which the defendant was interested, was a licensee and therefore must take the premises as he found them, apart from any concealed source of danger; but that on the facts it was immaterial whether he was an invitee or a licensee, because the static condition of the defendant's premises was not such as to constitute any unusual or concealed danger, and the defendant was not in breach of any duty.

Decision of Ormerod J. reversed.

Dicta of Asquith L.J. in *Pearson* v. *Lambeth Borough Council* [1950] 2 K.B. 353; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682, and of Hamilton L.J. in *Latham* v. *Johnson (R.) & Nephew Ld.* [1913] 1 K.B. 398, 411; 29 T.L.R. 124, applied.

Per Denning L.J. A canvasser who comes without your consent is a trespasser. Once he has your consent he is a licensee. Not until you do business with him is he an invitee. What is the position when you discuss business with him, and it comes to nothing? No confident answer can be given to that question. Such is the morass into which the law has floundered in trying to distinguish between invitees and licensees.

APPEAL from Ormerod J.

The defendant, Stephen Abbott, a builder, occupied one of a row of houses along the road from Canterbury to Whitstable. The houses are separated from the road by a ditch, the property of the local council, and access to the defendant's house was by a concrete bridge, having a six-inch concrete wall, which continued up the drive or pathway to the house. The defendant's premises also included a garage, office and builder's yard. The plaintiff, Thomas Dunster, an advertising canvasser in

the employment of the Bristol Printing and Publishing Co., who happened to be staying in the neighbourhood, conceived the idea that the defendant might care to take advertising space on the outside of covers of telephone directories. He therefore, on the afternoon in question, called at the defendant's premises. The defendant was not there, but the plaintiff was informed by the defendant's wife that her husband was expected back at about 6 p.m. The plaintiff returned at that hour and proceeded, although it was then dark, safely up the drive to the house, the defendant, in anticipation of the visit, having left switched on an outside electric lamp which to some extent illuminated the path. The plaintiff saw the defendant, but the latter was not interested in the proposed advertising and accompanied the plaintiff to the door and out on to the drive. According to what he said was his usual practice, the defendant did not switch off the light until such time as he estimated would enable the plaintiff to reach the road. In fact the plaintiff had only reached the concrete surface which began with the bridge, but thinking he had reached the pavement of the road he turned to the right, tripped over the concrete ledge of the bridge and fell into the ditch, sustaining injury. He sued the defendant for damages. Ormerod J. held that the plaintiff was an invitee and awarded him damages, subject to a deduction in respect of what he found was the plaintiff's own negligence.

The defendant appealed, contending that the plaintiff was only a licensee, that as such he must take the premises as he found them, and that there was no trap or unusual danger against which the defendant had to warn the plaintiff.

The plaintiff cross-appealed on the question of contributory negligence.

Montague Berryman Q.C. and *Martin Jukes* for the defendant.
Gerald Gardiner Q.C. and *Howard Sabin* for the plaintiff.

The following cases, in addition to those cited in the judgments, were referred to: *Coleshill* v. *Manchester Corporation* [1]; *Indermaur* v. *Dames* [2]; *Hayward* v. *Drury Lane Theatre Ld. and Moss' Empires, Ld.* [3]; *Stowell* v. *Railway Executive* [4]; *Hawkins* v. *Coulsdon and Purley U.D.C.* [5]

SOMERVELL L.J., having stated the facts, continued: There was a debate below and before us whether the plaintiff was an invitee or a licensee. The judge, I think, did not consider that it made much difference. He found in favour of the plaintiff, subject to a deduction from the damages for the plaintiff's own

[1] [1928] 1 K.B. 776, 779; 44 T.L.R. 258.
[2] (1866) L.R. 1 C.P. 274, 287.
[3] [1917] 2 K.B. 899, 903; 33 T.L.R. 557.
[4] [1949] 2 K.B. 519, 523; [1949] 2 All E.R. 193; 65 T.L.R. 387.
[5] [1953] 1 W.L.R. 882; [1953] 2 All E.R. 364.

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negligence, and there is an appeal and cross-appeal. As it was argued on both sides I will say a word or two about it. The judge came to the conclusion that the plaintiff was an invitee. Mr. Gardiner says, with force, that one ought not to distinguish between the house and the business premises as they were connected. Although we did not hear Mr. Berryman in reply, I will assume for the purposes of what I am going to say, without deciding it, that that distinction in the circumstances of this case does not avail the defendant. On that basis Mr. Gardiner submitted that anyone who comes to business premises with the hope that business in which he is interested will result, should be regarded as an invitee. I think that that is defining the character much too widely. In *Pearson* v. *Lambeth Borough Council*[1] Asquith L.J. said: "It is more exact to say that an "invitee is a person who comes on the occupier's premises with "his consent on business in which the occupier and he have a "common interest." I do not think that when the plaintiff came on the defendant's premises that night he and the defendant had a common interest. He hoped, no doubt, wrongly as it turned out, that a common interest might result, but they had not at that time a common interest.

It is said that there is very little authority on this point and in particular no cases dealing with commercial travellers. It may be that if a case arose about commercial travellers, evidence might be given about the practice and custom in the particular trade, which might or might not bring them within Asquith L.J.'s words. But I am dealing with this particular case. Here was a man who was hoping that he might find that the defendant was interested in this advertisement. I think that he was a licensee. If he was a licensee—to take words from a judgment of Hamilton L.J. in *Latham* v. *Johnson (R.) & Nephew Ld.*,[2] "The "rule as to licensees, too, is that they must take the premises as "they find them apart from concealed sources of danger; where "dangers are obvious they run the risk of them. In darkness "where they cannot see whether there is danger or not, if they "will walk they walk at their peril."

I do not think that this case raises what may be a difficult question about the effect of darkness on unusual dangers because I do not think that this was an unusual danger at all. I think that this is an ordinary means of access to a house over a ditch which is an extremely common feature of roads in the country; that there was no unusual or concealed source of danger in respect of which the occupier was under any duty to give warning. Indeed, Mr. Gardiner during argument, having developed his proposition that the plaintiff was an invitee, in my opinion rather threw it over because he based his main argument on the proposition that as the plaintiff had come with the defendant's knowledge

[1] [1950] 2 K.B. 353, 366; 66 T.L.R. (Pt. 1) 561; [1950] 1 All E.R. 682.

[2] [1913] 1 K.B. 399, 411; 29 T.L.R. 124.

and without objection on to his premises, the defendant was guilty of ordinary negligence in a failure to take reasonable care in relation to his exit from those premises. It was analogous on Mr. Gardiner's argument to a case where a man comes to see X at his house and as he is leaving X negligently runs into him as he is driving his motor-car. On that basis I do not think it would matter whether he was an invitee or a licensee.

The judge having held that the plaintiff was an invitee, and that the bridge amounted to a dangerous situation of unusual danger—that is where, with respect, I differ from him—also said: "He did not in the circumstances take reasonable care, by "leaving the light on for a sufficiently long time, to prevent the "plaintiff from falling into danger."

There was some discussion before us whether the lamp on the garage actually did, on that dark night, give any effective light when the plaintiff had reached the gate. Mr. Gardiner drew a picture (though there was not any evidence to the effect that those were the circumstances) of the sudden difficulty of vision which comes over a man who, having been standing in a bright light, finds himself in darkness. The plaintiff's own evidence was that this light was a very dim affair, and I think that that was probably right by the time a person reached the gate. As against that, the defendant said that it helped people. I have no doubt that on any view it helped people because it gave them a sense of direction as to where the house and garage were. The question therefore, I think, is whether the plaintiff can bring himself within the ordinary negligence principles having regard to the circumstances. In my view of this bridge and ditch I do not think that he can do so. I do not myself think that the defendant is under any obligation to turn the light on. But having turned it on, it seems to me he performed such duty as he owed by leaving it on for what he thought a reasonable time, and, indeed, as the plaintiff himself says, he had almost reached the entrance.

One is, naturally, sorry for the plaintiff. He is a man of 61 and, apart from the shock, he suffered considerable injury; but it does seem to me that this was an accident which he brought entirely on himself. He said that he never took a torch with him. I should have thought that in these days anyone who goes about on a dark unlighted road in a country district without a torch is asking for trouble, or, at any rate, that if a person finds himself in that position he must proceed with very great care, or he may find that something which was no danger by daylight and quite usual may result in an accident to him. For these reasons I would allow the appeal.

DENNING L.J. A canvasser who comes without your consent is a trespasser. Once he has your consent, he is a licensee. Not until you do business with him is he an invitee. Even when you have done business with him it seems rather strange that

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your duty to him should be different when he comes up to the door than when he goes away. Does he really change his colour in the middle of the conversation? And what is the position when you discuss business with him and it comes to nothing? No confident answer can be given to these questions. Such is the morass into which the law has floundered in trying to distinguish between licensees and invitees.

In the present case the canvasser came to the door, the householder asked him in, the canvasser stated his business; the householder was not interested, and the canvasser left. Upon those facts I am clearly of opinion that the canvasser was not an invitee but only a licensee, because he was there on his own business and not on any matter in which the householder had an interest. We all know that a guest whom the householder invites to dinner is only a licensee, even though the householder has an ulterior business motive in asking him. It would be strange if a householder owed a higher duty to a canvasser who comes unasked than he does to a guest who comes on his express invitation.

In this case, however, it does not matter whether the plaintiff was an invitee or a licensee. That distinction is only material in regard to the static condition of the premises. It is concerned with dangers which have been present for some time in the physical structure of the premises. It has no relevance in regard to current operations, that is, to things being done on the premises, to dangers which are brought about by the contemporaneous activities of the occupier or his servants or of anyone else. The instance was put by my Lord in argument of the driving of a vehicle, but many others can be imagined. In regard to current operations, the duty of the occupier—or of the person conducting the operations—is simply to use reasonable care in all the circumstances. This duty is owed alike to all persons lawfully on the premises who may be affected by his activities: and it is the same whether the person injured is an invitee or a licensee, a volunteer or a guest. Negligence causing damage gives a cause of action, and it is not proper nowadays in this regard to draw any distinction between negligent acts of commission and negligent omissions.

Bearing this distinction in mind, it is tolerably plain that the static condition of these premises was not a danger to anyone who used reasonable care for his own safety. The bridge over the ditch was not an unusual danger, nor was it a concealed danger, either by day or night. No matter whether the plaintiff was an invitee or licensee, the householder was in no breach of duty in regard to it.

The case for the plaintiff depends, therefore, entirely on the action of the householder in putting out the light. That was a contemporaneous activity—a current operation—on his part in respect of which his duty to the plaintiff was simply to use reasonable care. The judge seems to have thought that the

householder was negligent in turning the light off too soon: but I cannot agree with this view. The householder said that he left the light on for the usual time to enable people to get on to the public footpath. The plaintiff said that he walked slowly down the drive. The trouble seems to have been that the plaintiff made a mistake himself. Even before the light went off, he thought he had reached the public footpath whereas he was still on the bridge. He turned to the right and at that moment the light went off. The light, however, at that distance was not sufficient for him to see by, and I doubt whether it made any difference whether it was on or off. I do not think that the evidence is sufficient to warrant a finding of negligence by the householder. I agree that the appeal should be allowed.

ROMER L.J. I also agree and have very little to add. The case presented to us in this court was that this unfortunate plaintiff fell into the ditch because the defendant turned off the light which was attached to the garage. He did turn it off, but in my opinion that had little, if anything, to do with the accident. I say that because in effect the plaintiff said so himself. It was suggested to him in cross-examination that the light behind him was really no good to him and he said: "Very little, and it was "out just before I got there," that is, to the bridge. Then he was asked again: "The light was not any good at all?" and he said, "Not much." The truth of it was, I am sure, that it was the merest glimmer of light which was available to him when he got to the place where the accident happened and when he said it went out. Mr. Gardiner said that we ought to have more regard on this matter to the evidence of the defendant, who said that he provided that light for the purpose of guiding people safely, but after all I think that in a case of this sort the plaintiff would know more about what light there was on this particular evening, when it was raining, than the defendant himself. The plaintiff's view was that the light was very little good to him.

I am sure that what caused the accident was the plaintiff's assumption, after he had finished walking along the gravel path and felt the gravel no longer under his feet but a firm foundation, that that was the pavement: whereupon he turned to the right thinking to go along the road in that direction. Unfortunately for him what he felt was the concrete of the bridge, and this led him to turn to the right and caused him to fall into the ditch. For that assumption I can find nothing for which to blame the defendant. He was not responsible for it and neither the bridge itself nor the switching off of the light, nor any act of omission or commission by the defendant, led to the plaintiff making the unfortunate assumption which he did and falling into the ditch. Accordingly I agree with what my brethren have said, that the plaintiff had nobody but himself to blame for this unfortunate occurrence.

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On the question of whether he was a licensee or an invitee I agree that he was a licensee on the same grounds as my brethren have expressed. He is not within the definition of an invitee which Asquith L.J. laid down in *Pearson* v. *Lambeth Borough Council*[3] because the business on which the plaintiff called was not a business in which he and the defendant had a common interest. I accordingly agree that this appeal must be allowed.

Appeal allowed; cross-appeal dismissed.

Solicitors: *Hair & Co.; Miss Betty Harris.*

A. W. G.

[3] [1950] 2 K.B. 353.

[COURT OF CRIMINAL APPEAL.]

C. C. A.
1953
Mar. 31.
Lord Goddard C.J., Byrne and Parker JJ.

* REGINA *v.* WINES.

Criminal Law—Fraud—Accounts—Falsification—Intent to show false profit to avoid dismissal—Intent to induce a course of conduct on part of employers—Whether intent to defraud.
Fraud—Intent to defraud.

The appellant, a departmental manager of a store, was charged with falsification of accounts. The appellant said in evidence that he had falsified the accounts to show a greater profit from his department than had actually been made because he was afraid that if he showed the real profit he would be dismissed:—

Held, that that amounted to an intent to defraud.

Definition by Buckley J. in *In re London and Globe Finance Corporation Ld.* [1903] 1 Ch. 728, 732; 19 T.L.R. 314 of intent to defraud applied.

APPEAL against conviction.

The appellant was the manager of the wireless department of a co-operative society shop at Oxford. He was indicted on seven counts of larceny as a servant of television sets and other articles and one count of conspiring with another man, who pleaded guilty, to steal those goods, and also on five counts of falsification of accounts. At the trial his defence and his own evidence were to the effect that he had bought the goods. He admitted that he had falsified the accounts but said in evidence that his reason for doing so was to make it appear that the gross profit of his department—in fact 16 per cent.—was 24 per cent., because he was afraid that if he only showed 16 per cent. profit he would be dismissed and lose his employment and his wages. The case for the prosecution was that he had falsified the accounts in order to cover up the thefts, and the recorder gave the jury the following direction: "If, therefore, you are satisfied as Wines himself "admitted, first, that he is a servant, which has been proved, "secondly, that he made a false entry in the document, which "is admitted, and thirdly, that the object of it was either, as the

"prosecution ask you to infer, to conceal the depredations which "had been made in the stock, or, as Wines himself says, in order "to keep a job which he would have lost if he had not made these "false entries, if that was the intention, then that is an intent "to defraud and the charge is made out."

The jury, without saying whether they accepted the appellant's evidence about his object in falsifying the accounts, or that of the prosecution, convicted him on all the counts and he received concurrent sentences of four years' imprisonment on each count. He appealed against his conviction on the ground that there had been a misdirection on the charges of falsification of accounts which had affected the minds of the jury with regard to the other offences.

Leo Clark for the appellant.
R. G. Micklethwait for the Crown.

The following cases were referred to in argument: *Rex* v. *Drewett* [1]; *In re London and Globe Finance Corporation Ld.* [2]; *Rex* v. *Bassey* [3]; *Rex* v. *Bennett and Newton* [4]; *Rex* v. *Kritz* [5] and *Kat* v. *Diment.* [6]

LORD GODDARD C.J. stated the facts and continued: There is no ground for disturbing the verdict as to larceny; in fact the case was proved as clearly as any case could be proved. Nor is there any ground for disturbing the conviction on the count for conspiracy, and the only difficulty which has arisen in this case is in connexion with the conviction for falsification of accounts and whether the direction which the recorder gave to the jury was right.

The offence of falsification of accounts is committed if the falsification is done, not by accident or for some given reason, but with intent to defraud; and the recorder in effect directed the jury that it did not matter whether they accepted the version of the prosecution or the version of the defence as to why the appellant had falsified the accounts because, whichever version was true, it amounted to an intent to defraud. He told the jury: "Which-"ever version you take, that amounts to an intent to defraud."

Mr. Clark has argued most clearly that that was a misdirection. If it was a misdirection, we should have to quash the convictions on the counts for falsification, although these thefts were of such a nature that it would not make any difference to the sentence because the recorder passed a sentence on each count to run concurrently. It is therefore an academic point, but one of some importance, whether this was a correct direction on a point of

[1] (1904) 21 T.L.R. 164.
[2] [1903] 1 Ch. 728; 19 T.L.R. 314.
[3] (1931) 47 T.L.R. 222.
[4] (1913) 9 Cr.App.R. 169; sub nom. *Rex* v. *Newton and Bennett*, 109 L.T. 747.
[5] [1950] K.B. 82; 65 T.L.R. 505; [1949] 2 All E.R. 406.
[6] [1951] 1 K.B. 34; 66 T.L.R. (Pt. 2) 474; [1950] 2 All E.R. 657.

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law. The court has come to the conclusion that the recorder's direction in these circumstances can be upheld and is correct. Buckley J., in his well-known definition of the difference between an intent to deceive and an intent to defraud, said in *In re London and Globe Finance Corporation Ld.*[1]: "In both sections 83 and 84 "of the Larceny Act of 1861, and section 166 of the Companies "Act, 1862, the offence is that of making or publishing a false "statement or account, or a false or fraudulent entry with intent "to deceive or defraud." Under the Companies Acts it does not matter whether the intention is to deceive or defraud, but in dealing with accounts it does matter because it is not criminal if the intent is merely to deceive; there must be an intent to defraud. "To deceive is, I apprehend, to induce a man to believe "that a thing is true which is false, and which the person "practising the deceit knows or believes to be false. To defraud "is to deprive by deceit:"—one observes that he does not stop there—"it is by deceit to induce a man to act to his injury. More "tersely it may be put, that to deceive is by falsehood to induce "a state of mind; to defraud is by deceit to induce a course of "action." That is the locus classicus on the subject and it has been often cited with approval. What has to be considered in cases such as this is whether the deceit which has been practised had merely induced, or was intended merely to induce, a state of mind, or whether it induced a course of action.

The appellant himself said what he intended to achieve by this falsification, namely, to remain in the service of the society, or, in other words, to avoid being dismissed by them, because he feared that they would dismiss him if he did not show a proper return. If he had been dismissed because he did not show a satisfactory return, he would have lost his wages, and, therefore, assuming that his object really was what he said it was, the society by his falsification would have been induced to retain him in their service and to pay him his wages, and he would have been getting wages from the society by means of a false representation, that is to say, by falsifying these accounts.

For these reasons we think that the recorder was justified, in view of what the appellant himself said, in directing the jury that whether they thought the object of the falsification was to conceal the thefts—and I should think there was very little doubt that really that was what was in his mind—or whether they thought it was merely to induce the society to keep him in their employ and pay him his wages, it did in the circumstances amount to an intent to defraud. The direction was right and, therefore, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; H. J. Astley, Oxford.*

J. F. L.

[1] [1903] 1 Ch. 728, 732.

[COURT OF APPEAL.]

*MORRIS AND ANOTHER v. SANDERS UNIVERSAL PRODUCTS.

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1953
Dec. 4.

Jenkins and Morris L.JJ.

[1952 M. 2831.]

Libel and Slander—Libel—Statement that defendants had "dismissed" plaintiffs—Whether defamatory.

Practice—Preliminary point—Libel action—Whether statement capable of defamatory meaning not properly taken as preliminary point of law— R.S.C., Ord. 25, r. 2.

"Dismissed."

The two plaintiffs had been employed as sales managers by the defendants until June 20, 1952, when their employment terminated. Shortly afterwards the defendants sent circular letters to certain of their customers in the several areas in which the plaintiffs respectively had been employed, stating in each case that "We have "dismissed" the plaintiff who worked in that area. In this action the plaintiffs each claimed damages for libel, alleging that the words of the circular letters meant that the plaintiffs had respectively been dismissed from their employment against their will, in circumstances which were discreditable. The defendants obtained an order under R.S.C., Ord. 25, r. 2, to have the issue tried as a preliminary point of law whether the words complained of had in their ordinary significance any defamatory meaning. Lord Goddard C.J. held that the point of law failed. On appeal:—

Held, first, that the function of the court in a case of this kind was to endeavour to decide what meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. Looking at the circular letters from that point of view, notwithstanding the various inoffensive meanings which the words "We have dismissed" the plaintiff might be capable of bearing, it was not possible for the court to say that the words complained of were not capable of a defamatory meaning or that a jury might not reasonably hold them to be defamatory. The case must accordingly go forward to trial for determination whether the words in fact bore a defamatory meaning.

Capital and Counties Bank Ld. v. *Henty* (1882) 7 App.Cas. 741. *Lord William Nevill* v. *Fine Art and General Insurance Co. Ld.* [1897] A.C. 68, and *Turner* v. *Metro-Goldwyn-Mayer* [1950] W.N. 83; 66 T.L.R. (Pt. 1) 342; [1950] 1 All E.R. 449 considered.

Held, secondly, that the procedure laid down in R.S.C., Ord. 25, r. 2, was unsuitable for the purpose for which it was used in this case.

Decision of Lord Goddard C.J. affirmed.

Appeal from Lord Goddard C.J.

The plaintiffs, Albert Edward Morris and Jack Blunk, in this action claimed damages for certain defamatory statements alleged to be contained in circular letters issued by the defendants, Sanders Universal Products, who were sued as a firm.

The following statement of facts is taken from the judgment of Jenkins L.J. The plaintiffs were former employees of the defendants. The statement of claim (which, for the present purpose,

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had to be regarded as proved) stated as follows: "Paragraph 1, "The defendants are distributors and retailers of carbon papers, "inked ribbons and similar articles, and until on or about "June 20, 1952, employed each of the plaintiffs as a sales "manager each at a weekly salary of £18 10s. 0d. with com-"mission." In paragraph 2 it was alleged that on or about June 20, 1952, "each of the plaintiffs agreed orally with the "defendants to determine their respective employments by the "defendants, by the plaintiffs tendering their resignations and "the defendants accepting the same." It was alleged in paragraph 3 that at all material times the defendants well knew that it was the intention of the plaintiffs to set up in business together as therein mentioned. Paragraph 4 dealt with the alleged libel in these terms: "On and after June 20, 1952, the defendants "falsely and maliciously wrote and published in a circular letter "of and concerning the first plaintiff and of and concerning him "in the way of his said business the words following, that is to "say: 'Sanders Universal Products. Sanders Carbon Papers, "'Inked Ribbons, Stencils and Duplicating Inks. Dear Sirs, We "'wish to bring to your notice the fact that we have dismissed "'Mr. Morris (meaning the first plaintiff) from our employ, he "'having been our representative in your area, and finally, that "'he has no connection whatsoever with our company. Yours "'faithfully, Sanders Universal Products'." Then followed particulars of the circulation of that document. "The said words "were published by posting the circular letter to" some three or four named people "and to many score others, potential "customers of the first plaintiff in the said business, and whether "or not such publishees were in fact, as alleged in the said circular "letter, situate in the area for which the first plaintiff had been "the defendants' representative." Then paragraph 5 stated: "By the said words the defendants meant and were understood to "mean that they had dismissed the first plaintiff from their "employment against his will, and that the first plaintiff had been "guilty of some conduct entitling the defendants to terminate his "employment without notice or salary in lieu, or that the circum-"stances of the termination of the first plaintiff's employment "were such as to be discreditable to the first plaintiff." Then followed an allegation in paragraph 6 of the same facts mutatis mutandis with respect to the second plaintiff, and paragraph 7 applied what was said in paragraph 5 to his case.

There was an application for particulars under paragraphs 5 and 7 of the statement of claim "of the facts and matters upon "which the plaintiffs rely in support of their allegations that the "words set out in paragraph 4 of the statement of claim were "used in the sense or had the meanings alleged in paragraphs 5 "and 7 thereof." The particulars given were these: "Under "paragraph 5. Under this paragraph the first plaintiff will rely "upon a secondary meaning of the word 'dismissed' and will "contend that such a secondary meaning is 'to dismiss from

" ' an employment against the will of the employee, or to dismiss " ' an employee who has been guilty of some conduct entitling " ' the employer to terminate his employment without notice or " ' salary in lieu, or to dismiss an employee in circumstances such " ' as to be discreditable to the employee ' and, further, that in " the particular facts and circumstances set forth in paragraph 1 " and the first sentence of the particulars to paragraph 4 of the " statement of claim the words complained of were calculated " to convey and did convey such meaning with regard to the dis- " missal of the first plaintiff." The same particulars were relied on under paragraph 7 with respect to the second plaintiff.

On July 27, 1953, the defendants obtained an order under Ord. 25, r. 2, for the trial of a preliminary point of law. The order was " that there shall be tried as a preliminary point of law " the issue whether the words complained of in the statement of " claim have in their ordinary signification any defamatory mean- " ing or are capable of bearing the alleged defamatory meaning " other than their ordinary meaning having regard to the facts " and matters relied upon herein."

Lord Goddard C.J. held that the point of law failed.

The defendants appealed.

Guy Aldous for the defendants.

John F. Marnan for the plaintiffs.

The following cases were cited in argument: *Capital & Counties Bank Ld.* v. *Henty* [1]; *Lord William Nevill* v. *Fine Art & General Insurance Co. Ld.* [2]; *Beswick* v. *Smith* [3]; *Konski* v. *Peet* [4]; and *Turner* v. *Metro-Goldwyn-Mayer Pictures Ld.* [5]

JENKINS L.J. This is an appeal from an order of Lord Goddard C.J. dated October 29, 1953, deciding against the defendants in the action a matter raised as a preliminary point of law under the R.S.C., Ord. 25, r. 2. The action is an action for libel, and the preliminary question raised is not one on which recourse is usually had to that rule.

[His Lordship stated the facts and continued:] The matter came before Lord Goddard C.J. who expressed the opinion that the words " dismissed from our employ " in a letter of this sort were capable of a defamatory meaning: whether they were defamatory or not was not for him to decide, but for a jury. From that decision, the defendants, represented by Mr. Aldous, now appeal.

Mr. Aldous puts his case in this way: He says, in effect, that the particulars given of the facts and circumstances relied on by the plaintiffs as giving the words complained of any meaning other than their usual meaning really add nothing to what is

[1] (1882) 7 App.Cas. 741.
[2] [1897] A.C. 68.
[3] (1907) 24 T.L.R. 169.
[4] [1915] 1 Ch. 530.
[5] [1950] W.N. 83; 66 T.L.R. (Pt. 1) 342; [1950] 1 All E.R. 449.

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alleged in the statement of claim. So far, I am disposed to agree with him. He says further that, taking simply, as it stands, the letter containing the alleged libel and construing the language used according to its ordinary signification, it is incapable of a defamatory meaning. In support of his argument, he has referred us to a number of cases. The first is *Lord William Nevill* v. *Fine Art and General Insurance Co. Ld.*[1] The facts in that case, very briefly, were that the appellant acted for some time as agent to an insurance company at his own offices. After some correspondence about a change of terms upon which the parties could not agree, the company's secretary sent to persons who insured through the appellant a circular stating that the agency of the appellant at his office had "been closed by the directors." The question was whether the statement that the agency at the appellant's offices had been closed by the directors was capable of a defamatory meaning. We were referred by Mr. Aldous to Lord Halsbury L.C.'s speech.[1] His Lordship there adverted to the well-known case of *Capital and Counties Bank Ld.* v. *Henty*[2] and cited a passage from the judgment of Brett L.J. in the Court of Appeal[3] in that case; he said this: "It seems to me unreasonable that, "when there are a number of good interpretations, the only bad "one should be seized upon to give a defamatory sense to the "document. Therefore I am of opinion that this document could "not reasonably be taken in a defamatory sense by those to whom "it was published according to the primary meaning of the "language used in it." After citing that passage, Lord Halsbury L.C. continued[4]: "And in this House Lord Watson affirmed the "same proposition in language to which I think my noble and "learned friend, Lord Shand, has already called attention. It "would not be enough, therefore, in this case to say that some "persons might have understood these words as conveying some "reflection upon the honour or business capacity of Lord William "Nevill. It stands, therefore, as it appears to me, a long way "distant from what was done in *Henty's* case,[5] where a com-"munication was made to the persons who had to make payments "to the brewer in the particular case, and they were informed "that the cheques of such and such a bank were not to be received "in future. That undoubtedly, as Lord Watson points out, "might possibly by some persons have been understood to convey "some reflection upon the solvency of the particular bank upon "which the cheques were drawn, but because some persons may "choose, not by reason of the language itself, but by reason of "some fact to which it refers, to draw an unfavourable inference, "it does not follow that therefore such matter is libellous."

Mr. Aldous also referred to the case of *Capital and Counties Bank Ld.* v. *Henty*,[5] in the House of Lords, and in particular to

[1] [1897] A.C. 68, 73.
[2] (1882) 7 App.Cas. 741.
[3] (1880) 5 C.P.D. 514; 541.
[4] [1897] A.C. 68, 73.
[5] 7 App.Cas. 741.

Lord Watson's speech, from which I think it suffices to quote this[6]: "If I were satisfied that an inference injurious to the "credit of the bank would naturally and necessarily suggest itself "to the mind of any person of average intelligence on reading the "circular, I should hold that it had a libellous tendency, although "the language used is not in itself libellous. But, besides the "one injurious inference suggested by the appellants, there are "many other inferences of an innocent character, which naturally "might, and probably would, suggest themselves to any reader "of the circular who was not induced to put a malignant con-"struction upon it by some cause such as is not proved to have "existed in the case of any one of the persons to whom it was "sent." Lord Bramwell said[7]: "I say, then, that the words are "harmless in themselves, and that they do not import or justify "the inference of the plaintiffs' insolvency. If I am wrong in "this, and if the words do impute or justify the inference of "insolvency as a possible cause of the defendants' refusal to take "cheques on the plaintiffs, I say that that is only one of several "things which they import, or of which they justify the infer-"ence; that no action lies in such a case; that if it would lie "against any one not interested to do and say what the defendants "did and said, it does not lie against them who were so interested "and did and said no more than they had a right to do."

Finally, Mr. Aldous referred to *Beswick* v. *Smith*.[8] There the alleged libel was this, written by former employers: "H. "Beswick is no longer in our employ. Please give him no order "or pay him any money on our account." Lord Halsbury said this[9]: "The words complained of, if taken in their natural "meaning, would not convey to the mind of a person of ordinary "intelligence the impression that any imputation was being made "against the plaintiff. He did not deny that there might be a "publication under such circumstances as to make that which "was prima facie not libellous convey in fact a defamatory impu-"tation. But that was not the case here. It was quite possible, "and it seemed to him to be quite natural, that some of the "defendant's customers might, in the absence of notice, have "sent money or orders to the plaintiff. The ordinary and reason-"able inference to be drawn from the notice which was sent "was, perhaps, that the employment had terminated because "the parties had quarrelled, but certainly not that the defendant "was imputing anything criminal to the plaintiff. Such an "inference seemed to him to be the invention of an imagination "already tainted with the idea that there was something wrong "in the termination of the employment. He thought that the "appeal should be allowed, and judgment entered for the "defendant."

On those authorities, or using those authorities to support his

[6] Ibid. 788.
[7] Ibid. 793.
[8] (1907) 24 T.L.R. 169.
[9] Ibid. 170.

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argument, Mr. Aldous says that the most that can be said against the letter complained of in the present action is that somebody reading it might conceivably draw the inference that Mr. Morris in the one case or Mr. Blunk in the other case had been dismissed for discreditable conduct of some sort; but he says that that is no more than one of a number of possible inferences that a reasonable reader of this letter might draw. Therefore, he says, it would be wrong for the court, having regard to those authorities, to pick from several equally possible meanings the one injurious meaning and say on the strength of it that these words are capable of constituting a libel.

I confess that, on reading these authorities, I find it difficult exactly to appreciate the position in which they leave the matter, for many statements are capable of more than one meaning, and if these authorities are to be understood as ruling that an alleged libel is only to be held capable of a defamatory meaning in a case in which it cannot have any other meaning than a defamatory one, it seems to me that the task of a judge in deciding whether the case was one to be left to the jury would often be very difficult, because, in so many cases, the question what the words complained of might be held to mean by a reasonable person is likely to be a nicely balanced one. But I find assistance in this difficulty from the case of *Turner* v. *Metro-Goldwyn-Mayer Pictures Ld.*,[10] to which we were referred by Mr. Marnan for the plaintiffs, and in particular from the passage cited by Mr. Marnan in the speech of Lord Porter, where his Lordship said this[11]: "Some argument was presented to your Lordships as to "the attitude which the judge should adopt where, in his view, "the only inference which can be drawn from the words com-"plained of is that they lie on the borderline, and it is impossible "to say whether, when properly considered, they are capable of "a libellous meaning or not. It is, of course, the duty of a "judge in the first instance to put an accurate interpretation on "the words used, and, having done so, to make up his mind "whether they are capable of a defamatory meaning or not. "Theoretically, if he is left in doubt, he should rule them "incapable of a defamatory meaning, but this, I think, is a "theoretical and not a practical difficulty. It is the judge's duty "to make up his mind and, save in very exceptional cases, he "can decide on which side of the line the words complained of "are to be placed. If he comes to the conclusion that a reason-"able jury would be justified in finding that they had a libellous "tendency, he must leave it to them even though the words "might also bear an innocent interpretation; or, to put it from "the point of view of an appellate court, the question of libel or "no libel should have been left to the jury if it cannot be said

[10] [1950] W.N. 83; 66 T.L.R. (Pt. 1) 342; [1950] 1 All E.R. 449.

[11] 66 T.L.R. 347; [1950] 1 All E.R. 454.

"that twelve men could not reasonably have come to the conclusion that the words were defamatory. This, I think, is "what Lord Blackburn means in his observations in *Capital and "Counties Bank Ld.* v. *Henty*,[12] when he says, quoting Brett "L.J.[13]: 'It is unreasonable that when there are a number of "'good interpretations the only bad one should be seized upon "'to give a defamatory sense to the document' and is in "accordance with the test put by Lord Selborne L.C., when he "says[14]: 'The test, according to the authorities, is whether, "'under the circumstances in which the writing was made public, "'reasonable men to whom the publication was made, would "'be likely to understand it in a libellous sense.' In the present "case both the court of first instance and the Court of Appeal, "though for different reasons, found the letter capable of a "defamatory meaning, and I proceed to consider the second "question whether there is any evidence of malice on the part "of the respondents on this footing."

The matter, therefore, depends on the question whether a reasonable jury would be justified in finding that the words complained of had a libellous tendency, or, in other words, whether it can or cannot be said that twelve men could reasonably come to the conclusion that the words complained of were defamatory.

Mr. Aldous has suggested to us a variety of different meanings for the word "dismissed," and he says that it does not by any means necessarily have a derogatory connotation; but, in my view, the function of the judge on a matter such as this is to endeavour to decide what meaning the language used could reasonably be held to convey to the persons to whom the communication was addressed. Looking at this letter from that point of view, notwithstanding the various inoffensive meanings which the words "We have dismissed Mr. Morris," or "We "have dismissed Mr. Blunk" might be said to be capable of bearing, I find myself unable to hold that the words complained of are not capable of a defamatory meaning, or that it is not possible that a reasonable jury might hold them to be defamatory. This court at this stage has nothing whatever to do with the question whether they are defamatory or not. That will be a question for the jury when the case comes to be tried.

Accordingly, I would dismiss this appeal; but I cannot part with this case without saying that, in my judgment, the procedure under Ord. 25, r. 2, is a most unsuitable procedure for the purpose for which it has been used in this case. If recourse is to be had to that rule on the question whether the words complained of in a libel action are capable of a defamatory meaning, it seems to me the practice may grow up of splitting libel actions into two stages, the first being concerned with the aspect of the

[12] 7 App.Cas. 741, 786.
[13] 5 C.P.D. 514, 541.
[14] 7 App.Cas. 741, 745.

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case with which we have been occupied today, and the second being the trial of the case itself in the event of the defendants failing to put a summary end to the proceedings on the preliminary issue with which we are now dealing. It seems to me that this would be a most undesirable practice and that a question such as that now raised is not a proper subject for an application under the procedure prescribed by Ord. 25, r. 2.

MORRIS L.J. I am in entire agreement with the judgment which my Lord has just delivered. The matter is, I think, clearly stated in Gatley on Libel and Slander, 4th ed., p. 126, in the sentence: "In determining whether the words are capable "of a defamatory meaning the judge will construe the words "according to the fair and natural meaning which would be given "them by reasonable persons of ordinary intelligence, and will "not consider what persons setting themselves to work to deduce "some unusual meaning might succeed in extracting from "them." Like Jenkins L.J., I also think that great assistance is derived from the passage in the speech of Lord Porter in *Turner* v. *Metro-Goldwyn-Mayer Pictures Ld.*,[15] to which my Lord referred. It seems to me that, in approaching the case at this stage and in deciding therefore whether the words are capable of a defamatory meaning and whether the action should go forward for trial, we are entitled to have regard to facts and events which are of general and ordinary knowledge and to the general and ordinary understanding of words which are in common use. I agree with my Lord that the contest is whether a jury could reasonably come to the conclusion that the words are defamatory. I have no doubt, speaking for myself, that the words are capable of a defamatory meaning, and as that is all that we are asked at this stage to consider, the result is that the case goes forward for determination whether the words bear a defamatory meaning or any defamatory meaning alleged.

I therefore agree that this appeal fails; and I would also add that I am in further agreement with what my Lord has said with regard to procedure and with what was said by my Lord the Lord Chief Justice.

Appeal dismissed.

Solicitors: *Stilgoes; Franks, Charlesly and Leighton.*

B. A. B.

[15] [1950] 1 All E.R. 449, 454.

[QUEEN'S BENCH DIVISION.]

* PARKINSON *v.* H. AND J. PLUMPTON (A FIRM).

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Dec. 10.

Lord Goddard C.J.

[1952 P. No. 3098.]

Master and Servant—Catering Wages Act—Statutory minimum remuneration—Garage with café attached—Joint engagement of man and wife as manager and manageress of garage and café respectively—Joint weekly wage—Full board but no lodging—Not within Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 24), *ss.* 9 (1), 10 (1)—*Wages Regulation (Unlicensed Place of Refreshment) Order,* 1949 (1949 *S.I. No.* 433)—*Wages Regulation (Unlicensed Place of Refreshment) Order,* 1947 (1947, *S.R. & O. No.* 1375).
Catering Wages. "Lodging."

A man and his wife were engaged by the proprietors of a garage with a café attached as manager and manageress of the garage and café respectively, and received a joint weekly wage of £4 10s. for their services. They were required to live in an unfurnished room at the café and were provided with full board. In the wife's action claiming as arrears of wages a sum which she alleged represented the difference between the statutory minimum remuneration required to be paid by the Catering Wages Act, 1943, and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, and the wage which she in fact received:—

Held, that joint engagements such as that of the plaintiff and her husband were not within the ambit of the Act because, under the terms of such an engagement it was impossible to apportion the joint wage—which on its own amounted to not less than the statutory minimum remuneration—between the plaintiff and her husband. Even had the Act applied, the regulation of 1949 did not provide a minimum wage for employees provided with full board but no lodging, and the unfurnished room supplied for the plaintiff's use did not constitute "lodging" within the meaning of the regulation.

ACTION.

The defendants, who were at all material times in partnership, owned several garages with cafés attached in various parts of Lancashire. They sought a married couple to manage one of these, the Hillock Garage and café, and engaged the plaintiff, Mrs. Doris Parkinson, and her husband at a weekly wage of £4 10s. a week plus a commission of 20 per cent. of the net profits. No particular duties were specified except that the plaintiff was to manage the café and her husband was to be manager of the garage. The plaintiff and her husband were required to live in an unfurnished room at the café and they were both to have full board.

In February, 1949, they took up their duties and the plaintiff brought her own furniture into the room at the café. After December, 1949, the plaintiff, without the defendants' knowledge or consent, left the café at about 7 p.m. and went to her own house for the night. Her employment ended in May, 1950, when the business was sold.

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The plaintiff claimed from the defendants the sum of £238 5s. 10d. which she alleged was arrears of remuneration owing to her. This amount represented the difference between what she alleged to be the statutory minimum remuneration laid down by the Catering Wages Act, 1943,[1] and the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, and the weekly wage she in fact received. The defendants denied that there were any arrears.

The proceedings were instituted on the plaintiff's behalf by reason of section 13 (4) of the Act of 1943 by the officer acting for the purposes of that Act.

S. B. R. Cooke for the plaintiff.
W. E. Behrens for the defendants.

LORD GODDARD C.J. This is an exceedingly difficult case and, although I have made up my mind upon it, it is not a case in which I pretend I feel great confidence. However, I am not the court of last resort and I am sure that it will go further unless the parties have the good sense to settle it before expense is incurred. There are great difficulties and an apparently unprecedented state of affairs which I am sure was not contemplated by the draftsman of the Catering Wages Act, 1943, or the draftsman of the regulations.

[His lordship stated the facts as set out above and continued:] Of course, difficulties and complications arise by these various statutes which interfere with the freedom of contract and impose, or purport to impose, terms on the contracts which people in all good faith may make. In this case I am quite satisfied that the defendants did not know of the Catering Wages Act, although they ought to have done if they were running snack bars, nor do I think that the plaintiffs knew anything about the Catering Wages Act, although they ought to have done if they were going to be employed in snack bars and cafés.

A point was taken here, with regard to the Wages Regulation (Unlicensed Place of Refreshment) Order, 1947 [which was revoked on April 1, 1949, by the Order of 1949], that until the regulations of 1949 came into force, the schedules did not apply if sleeping accommodation was provided. I cannot find that an

[1] Catering Wages Act, 1943, s. 9 (1): "If a contract between a worker "to whom a wages regulation order "applies and his employer provides "for the payment of less remunera- "tion than the statutory minimum "remuneration, clear of all deduc- "tions, it shall have effect as if for "that less remuneration there were "substituted the statutory minimum "remuneration clear of all deduc- "tions. . . ."

S. 10 (1): "For the purpose of "determining whether the remunera- "tion paid or agreed to be paid to a "worker to whom a wages regulation "order applies is less than the statu- "tory minimum remuneration clear of "all deductions, the net remunera- "tion obtained or to be obtained by "him in cash from his employer after "allowing for his necessary expendi- "ture, if any, in connexion with the "employment shall, subject to the "provisions of this section, be deemed "to be the remuneration paid or to "be paid to him. . . ."

unfurnished room satisfies the description of sleeping accommodation in the schedule. One must give an ordinary commonsense interpretation to it. Merely because a room can be used as a bedroom I do not think that it can be construed as being sleeping accommodation when one considers that the presence of sleeping accommodation is to prevent the application of the schedules altogether. I think that sleeping accommodation must be a room where there is accommodation for sleeping; in other words, a room furnished at any rate with a bed, although I am not sure that, under such vague drafting, sleeping accommodation is anything more than a bed. There was no bed provided by the defendants and Mr. Plumpton, who gave his evidence very fairly, did not attempt to say that he offered to furnish a room or rooms for them. I think that if he had the plaintiff would probably still have said that she wanted to bring her own furniture. The fact that she did bring her own furniture and did not bring it on account of any refusal of Mr. Plumpton's offer, would prevent me holding that sleeping accommodation had been provided by Mr. Plumpton. I think that sleeping accommodation obviously means that the person is to be provided with a bedroom and it is designed, I think, to cover what I will call living-in assistants to a shop or place of that sort, and does not refer to unfurnished rooms.

[His lordship stated the facts and reviewed the evidence and continued:] Now comes the very difficult question whether there has been an under-payment contrary to the conditions of the Act. It is on this point that I feel very great doubt and difficulty. I have decided that I cannot put my finger on any provision of the Act which shows that this Act has been broken, because I do not think that this question of joint engagement was ever contemplated. [His lordship read section 9 (1) of the Catering Wages Act, 1943, and continued:] The contract provides for the remuneration of two people, a joint remuneration of £4 10s. It is admitted that if that £4 10s. is the plaintiff's remuneration it would fulfil the requirements of the statute. But when an employer engages two people jointly and agrees to pay a joint sum of money, it seems to me that he agrees to pay two people, and in law it is a joint claim; as used to be said in the old real property days, joint ownership was per me per tu. I think that it is very difficult to find any provision in the Act which states that where there is a joint employment the money is to be divided equally or anything of that sort. I am quite satisfied on this evidence that if the plaintiff had sued for £4 10s. she could have recovered that money, although no doubt the defendant might have had a right to have the husband added. This position has never, I think, been contemplated by the Act. The £4 10s. was a joint sum paid jointly, and, as I put it in the argument, it would be an extraordinary thing if, assuming that the plaintiff when employed alone is entitled to £4 a week, she could claim £4 extra when engaged with her husband at a weekly wage of £12 on the

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ground that the agreement did not make provision that £8 was to be her husband's wage and £4 her own.

Although the £4 10s. was not apportioned between husband and wife there was a joint wage which was enough to cover the minimum wage in the statute and which the parties were willing to accept—I know that is not a conclusive matter—together with the proportion of profits. I am not going to assume that there were any profits because, if there had been, they certainly ought to have been paid.

Mr. Cooke, in a very forceful argument, contended that I ought to come to a contrary conclusion because of the provisions of section 10 (1) of the Act. [His lordship read the section and continued:] Mr. Cooke contended that that section concluded the matter in his favour. In this case the husband used to render a weekly account of the takings at the garage and café and he would deduct £4 10s. from the garage takings. I do not think that this section is more than a method of calculating remuneration. The payment in cash is put in to show what is the cash result. The cash result in this case was undoubtedly £4 10s. a week, less health insurance. I think that the words "obtained by him in cash" are meant to emphasize that one must see that the money result is not the result of the money minus something else.

The other difficulty which arises in the case is one which could be very easily put right, but one which I think is an extremely formidable difficulty. It is this. The scale of remuneration is now governed by the Wages Regulation (Unlicensed Place of Refreshment) Order, 1949, S.I. No. 433. That provides, subject to the provisions of certain paragraphs, that "the weekly minimum "remuneration for the workers to whom this schedule applies "(other than occasional workers) shall be . . . (ii) for female "workers (other than manageresses), in accordance with the pro-"visions of paragraph 3." I quite realize that it was intended to cover all wage earners because that is the subject of the Act. The question is whether the draftsman has succeeded or whether he has omitted something which may be per incuriam. Paragraph 3 sets out the grade or description of workers for a week of forty-seven hours. The scale is set out in column 2, "where the employer "supplies the worker with full board and lodging for seven days a "week." Full board and lodging are both defined. "'Full "'board'" means "not less than four meals a day of good "and sufficient quality and quantity. 'Lodging' means 'clean "'and adequate accommodation for eating, sleeping, washing and "'leisure.'" Therefore, washing obviously means furnished lodging: it does not mean a bare room. The contract here was to supply full board. As the defendants did not provide lodging, column 2 does not apply.

Column 4 is headed: "Where the employer supplies the "worker with neither meals nor lodgings." "Meals" means "a "meal of good and sufficient quality and quantity." Therefore one is thrown back on column 3. "Where the employer supplies

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"the worker with neither full board nor lodging, but supplies her "with meals of good and sufficient quality and quantity whilst on "duty." That is obviously meant, I think, to cover the living-out servant who comes in, perhaps, in the morning and wants a meal some time when she is on duty. Some days she may have two meals, some days three meals, some days only one. That is a case where the contract is to supply a person with a meal while on duty, but here the contract was to provide full board and, as this column only applies to cases where the employer does not contract to give full board or lodging, I do not see how I can apply it. I think that it is a casus omissus. I think that the draftsman has forgotten to provide for cases such as this where board is provided but not lodging within the meaning of this schedule. I suppose that it was thought that full board would only be supplied where lodging was supplied, but, as I say, lodging seems to me to be put out of account here. These people were there full time, and so therefore there is this unfortunate hiatus.

Although one always wishes to construe a thing so as to give it a sensible construction and to prevent failure, I do not know of any canon of construction which enables one to construe the words, "Where the employer supplies the worker with neither "full board nor lodging," so as to substitute for them, "Where "the employer supplies full board but no lodging." It would be rewriting the legislation, and I am not a Minister, and cannot do it. For that reason I must enter judgment for the defendant firm.

Judgment for the defendants.

Solicitors: *The Solicitor, Ministry of Labour and National Service; Gregory, Rowcliffe & Co.*

S. C.

[CHANCERY DIVISION.]

*MINISTER OF HEALTH *v.* GENERAL COMMITTEE OF THE ROYAL MIDLAND COUNTIES HOME FOR INCURABLES AT LEAMINGTON SPA.

1953 *Nov.* 24, 25, 26; *Dec.* 9

Vaisey J.

[1953 H. 3762.]

National Health—Hospital—Meaning—Home for incurables—No curative treatment provided—Whether home transferred to Ministry of Health—National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *ss.* 6 (1), 79.

"*Hospital.*" "*Treatment.*"

An arbitrator decided that a certain home for the admission of persons suffering from incurable or chronic diseases, at which no curative treatment but only palliative medical treatment was

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provided, was not a "hospital" within the meaning of the National Health Service Act, 1946; and did not vest in the Minister on July 5, 1948, by virtue of section 6 (1) of that Act. The arbitrator stated his award in the form of a special case:—

Held, affirming the award, that the home was not a "hospital" within the meaning of the Act and was unaffected by its provisions, and that the interests in or attaching to the premises held by the trustees of the home immediately before July 5, 1948, were not transferred to or vested in the Minister of Health since no curative treatment was provided, and the palliative treatment was subsidiary to the main purpose of the home, which was to provide the patients with care and attention in pleasant surroundings with the necessary nursing under adequate medical supervision.

Tendring Union v. *Woolwich Union* [1923] 1 K.B. 121; 36 T.L.R. 512 considered: *Royal Victoria Hospital* v. *Wheatley* (unrep.) distinguished.

SPECIAL CASE stated by an arbitrator.

The Royal Midland Counties Home for Incurables at Leamington Spa (hereinafter called the "home") was established in 1874 and became a charity regulated by a trust deed dated June 27, 1884. By rule 2 of the rules in force in July, 1948, the object of the home was "to give relief by admission to the home or by "pensions as hereinafter provided to persons of good character "of limited or reduced income, who are suffering from incurable "or chronic diseases or incapacity owing to injury or wounds. "No person suffering from insanity, imbecility, epilepsy, cancer "or pulmonary tuberculosis, past or present, shall be eligible "as an in-patient, and no case shall be admitted unless it requires "medical supervision and nursing. Persons suffering from "epilepsy and cancer shall be eligible for pensions." The home was administered by the committee who decided, with the assistance of reports from the visiting physician, all questions relating to the admission or discharge of patients. [Further details of the internal management of the home are set out in the judgment.]

The arbitrator (after stating the facts and saying that the question for decision was—whether or not the home was on July 5, 1948, being the "appointed day" for the purpose of the National Health Service Act, 1946, transferred to and vested in the Minister of Health by virtue of section 6 (1) of that Act [1]) said: "I find as a fact that immediately before the

[1] National Health Service Act, 1946, s. 6 (1): "Subject to the pro-"visions of this Act, there shall, on "the appointed day, be transferred to "and vest in the Minister by virtue "of this Act all interests in or "attaching to premises forming part "of a voluntary hospital or used for "the purposes of a voluntary hospital, ". . . being interests held immedi-"ately before the appointed day by "the governing body of the hospital "or by trustees solely for the pur-"poses of that hospital, . . ."

S. 79 (1): "In this Act unless the "context otherwise requires, . . . "'hospital' means any institution "for the reception and treatment of "persons suffering from illness or "mental defectiveness, any maternity "home, and any institution for the "reception and treatment of persons "during convalescence or persons "requiring medical rehabilitation, "and includes clinics, dispensaries "and out-patient departments main-"tained in connexion with any such "institution or home as aforesaid, and "'hospital accommodation' shall be "construed accordingly; 'illness'

"appointed day the main purpose of the home was to provide "the patients with the care and attention they required in "pleasant surroundings with the necessary nursing under ade-"quate medical supervision. The provision of palliative medical "treatment, treatment for inter-current complaints and physio-"therapy were of course objects of the home, but I hold that "they were subsidiary to its main purpose and could not be "regarded as either independent or co-ordinate purposes."

After referring to *In re Marjoribanks' Trust Deed* [2] and *In re Couchman* [3] the arbitrator considered *Royal Victoria Hospital* v. *Wheatley* [4] and said with regard to that case: "It was held that "under the provisions of the National Health Service (Scotland) "Act, 1947, which are indistinguishable from the English Act, "the Royal Victoria Hospital was a voluntary hospital, the "premises of which vested in the Secretary of State. The Royal "Victoria Hospital was established by Royal Charter for 'the "'reception and treatment of indigent and other persons in "'Dundee . . . who are suffering from incurable disease and are "'thereby rendered incapable of performing ordinary duties. . . .' "Insanity was included but not cancer or tuberculosis. The "evidence showed that a large proportion of the patients were "suffering from inoperable cancer and that only patients with a "short expectation of life, not more than a year, were admitted. "The Lord President referred expressly to such afflictions as "advanced inoperable cancer and thought it would be a startling "flaw in the scheme of the Act if Parliament had omitted to "make provision for so obvious and clamant a need as the care "of the victims of incurable disease during the closing stages of "their illness. The pursuers admitted that on the definition "section alone they could not contend that the Act did not apply "and the Lord President continued: 'This concession could not "'be withheld. Reading only the relevant parts of these pro-"'visions there is transferred to the Secretary of State every "'institution for the reception and treatment of persons suffering "'from . . . any disability requiring . . . nursing.'' On the terms "'of the pursuers' charter and in view of the evidence, it is too "'plain for argument that the Royal Victoria Hospital is such an "'institution.' The rest of the case turned on a point on section "9 (1) of the Scottish Act, on which Mr. Russell, I think wisely, "did not rely so I need not pursue it. The Lord President did "however say that 'a hospital . . . devoted to alleviating the "'suffering and relieving the symptoms of the incurably ill is "'incapable of being described as having any other main purpose "'than "therapeutic," as that expression is used in section 9.'

"includes mental illness and any "injury or disability requiring "medical or dental treatment or "nursing."

[2] [1952] Ch. 181; [1952] 1 T.L.R. 224; *sub nom. Re Marjoribanks' Indenture* [1952] 1 All E.R. 191.

[3] [1952] Ch. 391; [1952] 1 T.L.R. 437; *sub nom. Re Couchman's Will Trusts* [1952] 1 All E.R. 439.

[4] Unreported.

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"If I thought the two cases were really comparable I should feel "that I ought to give great weight to the Lord President's obser-"vations, but I think they were really directed to an institution "which was radically different from the home, and are not applic-"able to the situation with which I have to deal. Even if the "Scottish case were binding on the English courts and therefore "on me I should regard it as distinguishable."

After considering the meaning of the words "hospital" and "treatment" and referring to *Tendring Union* v. *Woolwich Union*[5] the arbitrators held that the home was not a hospital transferred to and vested in the Minister of Health as a nationalized institution on July 5, 1948. He then said "The question "for the decision of the court is whether on the true construction "of the National Health Service Act, 1946, and on the facts as "above stated the home was, immediately before the appointed "day, a 'voluntary hospital' for the purpose of section 6 (1) of "the said Act. If the court should decide that the home was a "voluntary hospital then I award the interests in or attaching to "the premises held by trustees for the home immediately before "the 5th July, 1948, were transferred to or vested in the Minister "on the appointed day by virtue of section 6 (1) of the said Act "and, subject to any order which the court may think fit to "make, I reserve the question of costs."

Geoffrey Cross Q.C. and *Denys Buckley* for the Minister of Health.

Charles Russell Q.C. and *H. E. Francis* for the Committee.

Cases referred to in argument: *Tendring Union* v. *Woolwich Union*[6]; *In re Marjoribanks' Trust Deed*[7]; *In re Couchman*[8]; *Royal Victoria Hospital* v. *Wheatley*.[9]

Cur adv. vult.

Dec. 9. VAISEY J. This case raises a question which is easier to state than to solve, namely, whether the Royal Midland Counties Home for Incurables at Leamington Spa (which I will call "the Home") is a hospital within the meaning of the National Health Service Act, 1946 (which I will call "the Act"), and was, as such, transferred to and vested in the Minister of Health as a nationalized institution on July 5, 1948, by virtue of section 6 (1) of the Act.

That question was, in the first instance, referred to arbitration in accordance with the provisions of the Act and certain regulations made thereunder, and was answered in the negative by the arbitrator in his award, stated in the form of a special case bearing date July 29, 1953. This is, in effect, an appeal from his determination.

[5] [1923] 1 K.B. 121; 36 T.L.R. 512.
[6] [1923] 1 K.B. 121.
[7] [1952] Ch. 181.
[8] [1952] Ch. 391.
[9] Unreported.

The history of the home, its constitution and present and past activities are set out with great particularity in the award and the documents incorporated therein. For the purposes of this judgment I need only, for the moment, say that the home was established in the year 1874; that it is a charity, regulated by a trust deed dated June 27, 1884; and that my decision must largely depend on the rules which were in force on July 5, 1948, that being the appointed day under the Act.

From these rules it appears that the object of the institution was to give relief, by admission to the home and the grant of pensions, to persons of good character and of limited or reduced income who were suffering from incurable or chronic diseases or incapacity through injury or wounds, but so that no person should be eligible for admission if suffering from insanity, epilepsy, cancer or pulmonary tuberculosis, and that no case was to be admitted unless it required medical supervision and nursing. The omission of cancer is, I think, important.

The home was controlled and administered by a general committee, acting largely through a sub-committee called "the House Committee," and it decided, with the assistance of reports from the visiting physician, Dr. Clayton, all questions relating to the admission or discharge of patients. The medical staff of the home consisted of the said visiting physician and a visiting surgeon, Mr. Dingley, both local practitioners, who visited the home on alternate days and were liable to be called in at any time in case of emergency. There was no resident medical officer.

There were three classes of patients, (i) paying patients, (ii) free patients—both of these classes residing on the premises—and (iii) pensioners residing elsewhere. The average number of resident patients during 1947 was 117, of which about one-third were "free" and the remainder "paying," but the latter in fact paid only a fraction of the actual cost of the accommodation. Pensions were limited to £20 per annum, and the number of pensioners on July 5, 1948, was 38. Both free patients and pensioners were elected by votes of subscribers; paying patients, if accepted, were admitted in rotation. There was always a waiting list of all three classes. Each patient, on applying for admission, had to supply a medical certificate that he was suffering from a specified disease, was regarded as incurable, and was otherwise eligible under the rules. His application was then passed on to one of the visiting medical officers and, if suitable, he was accepted by the committee to wait for a vacancy.

In 1948 there were 48 full-time and 29 part-time members of the nursing staff, which appears to be a slightly lower proportion of nurses to patients than in a general hospital, and a smaller number of these were State-registered nurses than in a general hospital. The senior members of the nursing staff appear to have been older than is usual in a general hospital, and, to quote the

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words of the arbitrator, the nursing required was "more routine "and of a slower tempo."

It appears that the policy of the committee was to admit those who were likely to settle down for life and make the premises their permanent home, and only those applicants were accepted whose disease had reached such a stage that no real improvement was to be expected. On the other hand, patients who were likely to die very shortly were not accepted. The average length of time between the admission and the death of a patient would seem to have been about ten years, for the diseases from which the patients suffered were chronic diseases, and not those likely to be the immediate cause of death, which usually came from some other intervening cause or fortuitous disease such as pneumonia, the average death-rate being shown by the records to have been only 10 per cent. per annum. The diseases from which the patients suffered were in the main, either crippling diseases of the joints, such as osteo-arthritis, or diseases of the nervous system, such as Parkinson's disease. Of the 112 patients actually in the home on July 5, 1948, 80 were women and 32 men, and of these 18 were bedridden, most of the others getting about in wheel-chairs or on crutches or with sticks; and no fewer than half of the patients regularly went away on holidays for periods up to a month.

The secretary of the home, when asked "what sort of "treatment" prospective patients would be likely to get, deposed that he was accustomed to say that "no treatment "whatsoever was to be expected there," and this is important in view of the definition of a "hospital" in the Act as hereinafter mentioned. No doubt a great deal of palliative treatment was given at the home and what the secretary was referring to, or thinking of, as not given there, was curative treatment. Treatment for the symptoms of the disease and to relieve pain was undoubtedly available, but the arbitrator held, and I think with justification, that patients were admitted on the footing that, while they would get the care and attention and nursing which they required, they would not get any specific treatment for their complaint, which in every case had to be regarded as one not susceptible to, or capable of, cure. No doubt the medical officers did from time to time prescribe drugs such as sedatives, sleeping-tablets, aperients, and so forth, and notably hyoscine, which was used to reduce the tremors characteristic of Parkinson's disease. Cases of influenza or pneumonia would undoubtedly be treated by ordinary medical methods, but such complaints were not the relevant complaints, that is, were not those in respect of which the patients were admitted, but incidental or inter-current complaints. Considerable use was made of physiotherapy, and many of the patients received massage or radiant-heat treatment, or were given walking exercises. Such treatment was undoubtedly palliative and symptomatic rather than curative in character.

The arbitrator was satisfied, and I also am convinced, that the atmosphere of the home was much less formal and more homelike than that of any hospital. The patients were given a very wide measure of freedom; the rules as to visiting hours were not enforced and, indeed, visitors were encouraged to come at any reasonable time. I think that at and immediately before July 5, 1948, the main purpose of the home was to provide the inmates or residents there with whatever care and attention they required in pleasant surroundings with necessary nursing and adequate medical supervision, and with palliative medical treatment, treatment for inter-current complaints, and physiotherapy, as subsidiary to the main purpose of the home and not properly to be regarded as independent or concurrent purposes.

In my judgment this problem may be summarized thus: Was the institution in truth what it is designated to be, namely, a home, as contradistinguished from a hospital; or was it in truth a hospital although styled a home? The matter does not, of course, depend on mere nomenclature, but on the actual facts of the case, and on the proper method of applying to those facts the provisions of the Act, and in particular the definitions contained in it. Those definitions, however, are in my view rather difficult to interpret, but they must have been framed with considerable care, because there were already some statutory definitions of the word "hospital" which might have been, but were not, adopted for the purposes of the Act. For example, the Road Traffic Act, 1930, s. 36 (2), says that the expression "hospital" means "an institution . . . which provides medical or "surgical treatment for in-patients"; in the Public Health Act, 1936, s. 343, "hospital" is said to include "any premises for "the reception of the sick"; while the Public Health (London) Act, 1936, s. 304, defines "hospital" as meaning "any "premises . . . for the reception of invalids." If any of these comparatively simple definitions had been used in the Act, the position might have been clearer than it is.

I will now turn to the Act and consider the definitions which are relevant, namely, the definitions of "hospital" and "ill-"ness." Section 79 (1) of the Act says—omitting irrelevant words—that "'hospital' means"—not merely includes—"any "institution for the reception and treatment of persons suffering "from illness or mental defectiveness," and "'illness' "includes"—not means—"mental illness and any injury or "disability requiring medical or dental treatment or nursing."

It is obvious that the home is an institution for the reception of persons suffering from illness, but can it be said that it is also an institution for the "treatment" of such persons? Again, does the definition of "illness" (which, unless the context otherwise requires, introduces nursing into the definition) enlarge the meaning of the word "treatment" in the definition of "hospital" so as to include mere nursing? While I think that the question might almost be reduced to the simple one of

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whether this is a case of a "home" in contradistinction to a "hospital," it may well happen that an institution described, not as a "hospital' but as a "home," is in fact a hospital, just as an institution described as a "hospital" may not be a hospital in any sense, statutory or other. (I need only quote the well-known example of Christ's Hospital).

I think that a resident in this home would not, in ordinary parlance, be described as being "in a hospital." On the other hand, the inmate of the Dundee hospital in the Scottish case referred to by the arbitrator and hereinafter mentioned would most certainly be described as "in hospital" and would not be described as being "in a home."

The present case is, I think, rather a borderline case, but, inasmuch as the Act is, in a sense, confiscatory in its operation, interfering with vested interests and rights, I think that I ought not to dispossess the general committee in favour of the Minister of Health unless the latter can convince me that the home necessarily comes within the definition. "Treatment" is probably the key word, and it is to be observed that the definition does not refer to care or attention or nursing of sick persons but only to their treatment, and treatment certainly, to my mind, suggests something more than mere palliation and implies a process directed to the achievement of a complete (or at least a partial) cure. I think that the secretary was right when he said that the residents in the home could not expect treatment, in either a technical or a colloquial sense of the word. They came to live in comfort rather than to be cured, or even to secure improvement in their health.

The Dundee case (*Royal Victoria Hospital* v. *Wheatley* [1]) is superficially very like the present case. It is unreported, but transcripts of the opinions or speeches of Lord Blades and the Lord President are incorporated in the award, and I have perused them with attention. The difference between the facts there and here may be summarised by saying that while the home at Leamington is essentially a place in which its inmates come to live, the hospital at Dundee is one where they come to die. The home deals with cases in which there is a comparatively long expectation of life; the hospital very largely with cases in which death is more or less imminent, and particularly cases of cancer. I have already taken notice of the fact that the Leamington institution is called a home, while the Dundee institution is called a hospital, a fact which, while far from being conclusive, is at least significant.

I need not refer to any of the other authorities mentioned in the award; none of them seems to me to govern this case, or, indeed, to afford me any real assistance in deciding it, except perhaps *Tendring Union* v. *Woolwich Union*,[2] in which the

[1] Unreported.

[2] [1923] 1 K.B. 121.

distinction between "home" and "hospital" was drawn in a manner which appeals to me as quite appropriate.

I may be allowed to say that the arbitrator's award sets out the material facts and relevant circumstances of the case in what seems to me to be a most convenient form, and his conclusions are, in my judgment, well-founded in every respect.

I hold and will declare that the home is not a hospital within the meaning of the Act and is unaffected by the provisions of the Act, and that the interests in or attaching to the premises held by trustees for the home immediately before July 5, 1948, were neither transferred to nor vested in the Minister of Health on that day. [After giving a direction as to the payment of costs his Lordship continued:]

I understand that the home has been taken over and dealt with on the assumption that it is, or was, a hospital, and that steps will be necessary for restoring the respondent committee to possession and control of the premises. The parties can, I am sure, be trusted to act with consideration and in a sensible manner. I will give them liberty to apply in case any difficulty arises. If there is an appeal from this order, matters should be left as they are until a final decision has been reached.

Declaration accordingly.

Solicitors: *Solicitor, Ministry of Health; Farrer & Co., for Field & Sons, Leamington Spa.*

J. L. D.

[COURT OF APPEAL.]

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1953 *Nov.* 23, 24, 25; *Dec.* 9.

Singleton, Birkett and Hodson L.JJ.

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Revenue—Income tax—Succession to trade—Crown—Sale of electricity undertaking to Crown—"Person succeeds to any trade . . ."—Whether "person" includes the Crown—Balancing charge—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Rules applicable to Cases I and II, r.* 11 (2) (*as substituted by Finance Act,* 1926, *s.* 32 (1)—*Income Tax Act,* 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *s.* 17 (1).
Crown—Prerogative—Taxation—Freedom from. "Person."

The word "person" in the phrase "if . . . any person succeeds "to any trade" in rule 11 (2) of the Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, must be construed in its ordinary meaning as a word of widest import, and as such it is apt to include the Crown.

The undertaking of an electricity supply company in India was purchased by the Madras Government, acting as a branch of the Crown, on August 29, 1947. The company received an assessment to income tax for the year 1947–48 on its profits from April 5

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to August 29, 1947, under rule 11 (2), which included an estimated balancing charge of £850,000. The assessment was discharged by the Commissioners for the Special Purposes of the Income Tax Acts on the ground that the word "person" in rule 11 (2) did not include the Crown and that the rule did not therefore apply. On appeal by the Crown by case stated by the Commissioners, Upjohn J. reversed their decision. The company appealed to the Court of Appeal:—

Held, dismissing the appeal, that rule 11 (2) was applicable to the case of a succession to a trade by the Crown, since there was no ground for placing any limitation on the natural and ordinary meaning of the word "person" which in its ordinary meaning was a word of widest import and apt to include the Crown in the absence of express provision to the contrary.

Decision of Upjohn J. [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467 affirmed.

APPEAL from Upjohn J.[1] reversing a decision of the Commissioners for the Special Purposes of the Income Tax Acts on a special case stated by them.

The facts set out in the case (which are more fully detailed in the judgment of Singleton L.J.) were briefly as follows:

The respondent company was incorporated on January 27, 1906, under the Companies Acts, 1862–1900, with the object of carrying on in India and elsewhere the business of an electric light and power company. The company did so under three licences granted by the Government of Madras, each of which provided that on August 29, 1947, the local authorities, failing whom the local government, should have the option of purchasing the electricity undertaking.

The option was duly exercised by the local government, and on August 29, 1947, the company sold and the local government purchased the undertaking for 215 lakhs of rupees, the sterling equivalent actually received being £1,611,437. The company went into voluntary liquidation on September 20, 1950. From the date of the sale the company ceased to trade, and its former undertaking continued to be carried on without interruption under the management of a department of the Government of Madras. Substantially all the company's former staff continued to work in the undertaking. The company received an assessment to income tax under Case I of Sch. D for the year 1947/48 which included an estimated balancing charge of some £850,000.

The Commissioners found as a fact that the trade or undertaking in Madras was not discontinued on August 20, 1947, but continued to be carried on without interruption under a department of the Madras Government. They held, however, that rule 11 (2)[2] of the Rules applicable to Cases I and II of Sch. D of

[1] [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467.

[2] Rules applicable to Cases I and II of Sch. D of the Income Tax Act, 1918, r. 9: "(1) If a person charged "under this schedule ceases within "the year of assessment to carry on "the trade . . . in respect of which "the assessment is made, and is "succeeded therein by another person, "the surveyor shall . . . certify to "the general commissioners for the "division in which the assessment is "made the particulars thereof. . . .

the Income Tax Act, 1918, did not apply to the Crown, and they discharged the assessment. On appeal, their decision was reversed by Upjohn J. from whose decision the company now appealed.

J. Millard Tucker Q.C. and *John Clements* for the company.

Sir Lionel Heald Q.C., Att.-Gen., J. H. Stamp and *Sir Reginald Hills* for the Crown.

The following cases were referred to in argument: *Income Tax Commissioners for City of London* v. *Gibbs* [3]; *Magdalen College, Cambridge Case* [4]; *Tamlin* v. *Hannaford* [5]; *Rex* v. *Cook* [6]; *Mersey Docks and Harbour Board* v. *Cameron* [7]; *Coomber* v. *Berkshire JJ.* [8]; *Attorney-General* v. *Hancock* [9]; *Bombay Province* v. *Bombay Municipal Corporation* [10]; *Bank voor Handel en Scheepvaart N.V.* v. *Slatford (No. 2)* [11]; *Rustomjee* v. *The Queen* [12]; *Inland Revenue Commissioners* v. *Francis West* [13]; *Inland Revenue Commissioners* v. *Reid* [14]; *In re Mason* [15]; *In re Henley & Co.* [16]; *St. Aubyn* v. *Attorney-General* [17]; *Singer* v. *Williams* [18]; *Kelly* v. *Rogers* [19]; *Perry* v. *Eames* [20]; *Wheaton* v. *Maple & Co.* [21]; *Inland Revenue Commissioners* v. *Barr.* [22]

Reference was also made to the following text books: Halsbury's Laws of England, 2nd ed., vol. 6, p. 383, para. 429; Blackstone's Commentaries, p. 153; Hearn, Government of England, p. 18; Dicey's Law of the Constitution, 9th ed., p. 39.

Cur. adv. vult.

"(2) On receipt of the certificate the "commissioners shall cause notice to "be given to the respective persons "of a meeting of the commissioners "to consider it, and after examination "of the said persons, if they attend, "or on other satisfactory proof of the "facts, the commissioners shall adjust "the assessment by charging the "successor with a fair proportion "thereof from the time of his succeeding to the trade . . . and relieving "the person originally charged from "a like amount."

R. 11: "(2) If at any time . . . "any person succeeds to any trade ". . . which until that time was "carried on by another person . . . "the tax payable for all years of "assessment by the person succeeding "as aforesaid shall be computed as if "he had set up or commenced the "trade . . . and the tax payable "for all years of assessment by "the person who until that time "carried on the trade . . . shall be "computed as if it had then been "discontinued."

[3] [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221.
[4] (1615) 11 Co.Rep. 66 (b).
[5] [1950] K.B. 18; 65 T.L.R. 422; [1949] 2 All E.R. 327.
[6] (1790) 3 Term Rep. 519.
[7] (1865) 11 H.L.Cas. 443.
[8] (1883) 9 App.Cas. 61; 2 T.C. 1.
[9] [1940] 1 K.B. 427; 56 T.L.R. 286; [1940] 1 All E.R. 32.
[10] [1947] A.C. 58; 62 T.L.R. 643.
[11] [1953] 1 Q.B. 279; [1952] 2 T.L.R. 861; [1952] 2 All E.R. 956.
[12] (1876) 1 Q.B.D. 487.
[13] (1950) 31 T.C. 402.
[14] Ibid.
[15] [1929] 1 Ch. 1.
[16] (1878) 9 Ch.D. 469; 1 T.C. 209.
[17] [1952] A.C. 15; [1951] 2 All E.R. 473.
[18] [1921] 1 A.C. 41, 65; 36 T.L.R. 659; 7 T.C. 419.
[19] [1935] 2 K.B. 446; 19 T.C. 692.
[20] [1891] 1 Ch. 658; 7 T.L.R. 297.
[21] [1893] 3 Ch. 48; 9 T.L.R. 559.
[22] (1953) 32 A.T.C. 93.

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Dec. 9. The following judgments were read:

SINGLETON L.J. The Madras Electric Supply Corporation Ld., later referred to as the company, was incorporated under the Companies Acts, 1862–1900, on January 27, 1906, with the object of carrying on in India the business of an electric light and power undertaking in all its branches. The undertaking was carried on under three licences granted by the Government of Madras. Under the first two licences the local authority, with the sanction of the local government, had an option to purchase such portion of the undertaking as was in the area for which it was constituted, and a similar option was given to the local government if the local authority did not elect to purchase. Under the third licence the Governor-General in Council had the option to purchase. The option was exercisable in each case on August 29, 1947. The company carried on its business until that date. Notices to exercise the options were duly given.

On August 27, 1947, an agreement was entered into between the Government of Madras and the company, the effect of which is stated in paragraph 11 of the case: "... it was declared and "agreed (inter alia) as follows:—Clause 1: that the Government "of Madras and the company agreed to entrust the valuers with "the work of valuation of the physical assets to be purchased "by the government and to be sold by the company: Clause 2: "that the valuation to be made by the valuers should be in con-"formity with the first proviso to section 7 (1) of the Indian "Electricity Act, 1910. For the removal of doubts, it was "declared that the company should not be eligible for any "solatium to be added to such valuation in accordance with the "second proviso to the said section 7 (1) for determining the "purchase price: ... Clause 7: that the company should 'hand' "over the undertaking to the government and the government "should take over the undertaking from the company at the "commencement of August 29, 1947."

There followed a supplemental agreement of August 29, 1947, by which it was witnessed:—(1) that the company had on the date of execution thereof handed over physical possession of the lands, buildings, works, materials and plant suitable to and used by the company for the purpose of the undertaking; (2) that the company acknowledged receipt of certain moneys (being a payment on account of the purchase price, provided for in the principal agreement of August 27, 1947); (3) that the company undertook to execute and register in favour of the Government of Madras a proper deed of conveyance and assignment of the lands, buildings, fixed machinery and plant.

In due course the valuation forming the measure of the purchase price was agreed at Rs. 215 lakhs, excluding the sum to be paid to the company for service lines paid for by consumers (the valuation of which was reserved for arbitration). The sterling equivalent of this sum of rupees was £1,612,500, and the amount

actually received by the company (due to exchange rates) was £1,611,437. On September 29, 1950, the company went into voluntary liquidation.

On the date of the sale, August 29, 1947, the company ceased to trade. Its former undertaking continued to be carried on without interruption in Madras under the management of a department of the Madras Government. Substantially all the company's former staff continued to work in the undertaking. On March 30, 1951, the company made a formal conveyance and assignment of lands, buildings, fixed machinery and plant to the Government of Madras.

It is claimed by the Crown that the circumstances give rise to an assessment to Income Tax in the sum of £850,000 in respect of balancing charges under Part II of the Income Tax Act, 1945.

The claim is made in this way: Rule 11 (2) of the rules applicable to Cases I and II of Sch. D provides that if any person succeeds to the trade which until that time was carried on by another person, the tax payable for all the years of assessment by the person succeeding shall be computed as if he had set up or commenced the trade at that time, and the tax payable for all the years of assessment by the person who until that time carried on the trade shall be computed as if it had then been discontinued. It is said that on August 29, 1947, the Government of Madras succeeded to the business which the company had carried on until that time.

The next step leads to a consideration of section 17 (1) of the Income Tax Act, 1945, which provides that:

"(1) Subject to the provisions of this section, where, on or "after the appointed day, any of the following events occurs "in the case of any machinery or plant in respect of which an "initial allowance or a deduction under rule 6 of the Rules "applicable to Cases I and II of Sch. D has been made or "allowed for any year of assessment to a person carrying on a "trade, that is to say, either—(*a*) the machinery or plant is "sold, whether while still in use or not; . . . and the event in "question occurs before the trade is permanently discontinued, "an allowance or charge (in this Part of this Act referred to as "'a balancing allowance' or 'a balancing charge') shall, in the "circumstances mentioned in this section, be made to, or, as the "case may be, on, that person for the year of assessment in his "basis period for which that event occurs."

The reason for the introduction of this section is, I think, fairly clear. Under rule 6 of the Rules applicable to Cases I and II of Sch. D a trader is allowed a deduction each year on account of wear and tear of machinery. He may sometimes be allowed less than he ought to be allowed: in other cases he may be allowed more than is warranted. If he continues in trade the matter may adjust itself in course of time. On the other hand, if he sells the plant or machinery before the trade is permanently

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discontinued there may arise a balancing allowance to him or a balancing charge against him, and the section is intended to provide for adjustment accordingly. We are not concerned with figures. It is sufficient to say that the claim of the Crown is that something in the neighbourhood of £850,000 falls to be included as a balancing charge in the Company's assessment to tax.

It was common ground between the parties:—(1) that by reason of section 17 (1) of the Income Tax Act, 1945, the balancing charges forming the subject of the assessment under appeal fell to be made upon the company (if at all) for the year of assessment in the company's basis period for which the sale of its plant and machinery occurred; (2) that for the purposes of the said Act such sale occurred on August 29, 1947; (3) that by reason of section 57 (2) of the said Act the company's basis period for the year of assessment 1947/48 was the period on the profits or gains of which income tax for that year fell to be computed under Case I of Sch. D in respect of its trade.

The contention put forward on behalf of the company is that rule 11 (2) does not apply to the facts of this case and that no balancing charge can be made on the company. This is based mainly, if not wholly, on the submission that the sale of plant, etc., was a sale to the Crown, and it is claimed that the Crown is not a person within the meaning of that word in rule 11 (2). This contention was accepted by the Special Commissioners, from whom Upjohn J. allowed the appeal of the Crown. The company appeals to this court.

Mr. Millard Tucker drew our attention to section 175 (2) of the Government of India Act, 1935, under which it is provided that: "all property acquired for the purposes of the federation "or of a province shall vest in His Majesty for those purposes." He appeared to seek to draw a distinction between this case and other cases in which the state acquires property for the benefit of subjects. I do not see that any such distinction can be drawn. The undertaking was undoubtedly acquired for the public good and it vested in His Majesty for the purpose for which it was acquired. The options to purchase were exercised by the Government of Madras. The two agreements of August 27 and August 29, 1947, were made between the Government of Madras and the company—and the conveyance was to the Government.

Counsel submitted that the Crown acquired the undertaking of the company and that rule 11 (2) has no application to such a case. He put his submission in this way. "The Queen is the "Monarch legislating with the other estates. The Finance Acts "are all addressed to subjects; charging orders cannot include "the Crown itself. Therefore the word 'person' in a charging "order, or section, will not include the Crown. The Crown does "not impose a tax upon itself." He drew our attention to the preamble to the Finance Act, 1947: "Most Gracious Sovereign, "We, Your Majesty's most dutiful and loyal subjects, the "Commons . . . in Parliament assembled, . . . have freely and

"voluntarily resolved to give and grant unto Your Majesty the "several duties hereinafter mentioned; and do therefore most "humbly beseech Your Majesty that it may be enacted, and be "it enacted by the King's most Excellent Majesty, by and "with the advice and consent of the Lords Spiritual and Tem-"poral, and Commons, in this present Parliament assembled, and "by the authority of the same, as follows—". Mr. Millard Tucker added that Sch. D was a charging schedule and the rules under it were charging rules, and it would not be right to read "person" in rule 11 (2) in two different ways: in other words, it could not include the Crown.

The old form of preamble is preserved. It is, however, recognised that the freedom of the Monarch from taxation arises by virtue of the prerogative. In *Rex* v. *Cook*,[1] Lord Kenyon C.J. said: "Now although there is no special exemption of the "King in this Act of Parliament, yet I am of opinion that he is "exempted by virtue of his prerogative, in the same manner as "he is virtually exempted from 43 of Eliz. and every other Act "imposing a duty or tax on the subjects." In *Coomber* v. *Berkshire Justices*,[2] Lord Blackburn cited those words of Lord Kenyon and referred to "the exemption, by virtue of the "prerogative, of property actually occupied or enjoyed for the "Crown."

Now the Crown is a person: see the *Magdalen College* case,[3] where it is said: "And, first, it was resolved, (*a*) that the general "words of the Act extend to the Queen, for the words are, 'To "'any person or persons, body politic or corporate;' and without "question the Queen was a person, as it is said in 10 Henry 7, "page 18*a*." Indeed it has not been disputed that the Monarch is a person, but it is said that he (or she) is not a person within the meaning of that word in the Income Tax Act, 1918, or at least for the purposes of Sch. D. It appears to me that this reasoning fails to draw a distinction between the word "person" and a "taxable person." I cannot see why we should not give the ordinary meaning to the word "person" when considering the provisions of rule 11 (2). Of course, the Crown is not chargeable under Sch. D: that follows from the exemption arising from the prerogative. I draw attention to the words of Wrottesley J. in *Attorney-General* v. *Hancock*[4] where he said[5]: "Section 1 of the Courts (Emergency Powers) Act, 1914, begins "with the words: 'From and after the passing of this Act no "'person shall. . . .' Pausing there, Mr. Murphy said, and "everybody, I think, must agree with him, that the word "'person' clearly can include the Crown, and it is for that "reason that it has been necessary from time to time for the "courts to remind themselves of the rule with which I am "dealing."

[1] (1790) 3 Term Rep. 519, 522.
[2] (1883) 9 App.Cas. 61.
[3] (1615) 11 Co.Rep. 66 (b), 70 (a).
[4] [1940] 1 K.B. 427.
[5] Ibid. 435.

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It would be strange indeed if the provisions of rule 11 (2) were not to apply if the purchaser of a business—the one who succeeded to the trade—was the Crown or a department of state; it is difficult to think of any reason for any such distinction. And when one comes to apply section 17 (1) of the Income Tax Act, 1945, it is worth noticing that there may be a balancing *allowance* or a balancing *charge*: it matters not who the purchaser is so long as the event in question happens before the trade is permanently discontinued.

Mr. Millard Tucker cited the words of Lord Macmillan in *Income Tax Commissioners for the City of London* v. *Gibbs* [6]: "The important thing to ascertain is the meaning of the word "'person' in the vocabulary of the Income Tax Acts. The word "constantly occurs throughout the Acts, and I think that it is "most generally used to denote what may be termed an entity of "assessment, i.e., the possessor or recipient of an income which "the Acts require to be separately assessed for tax purposes." No question such as that arising in the present case was under consideration, and I do not think that the citation really carries us any further unless the submission is that the word "person" throughout means taxable person—and Mr. Tucker did not make that a part of his case.

The submission of the Attorney-General for the Crown was that the word "person" must be given its ordinary meaning apart from some compelling reason to the contrary, and that "person" includes the Crown and servants of the Crown. He argued that there is no difference for the purpose of rule 11 (2) whether the successor is the Crown, or the Transport Commission, or the Post Office, or another company or an individual, and, relying upon the authorities I have mentioned, he submitted that the word "person" includes the Crown though the Crown is immune from taxation by reason of the prerogative. Mr. Stamp, who followed, spoke of the Income Tax Acts as regulating the position between the Crown (a person) and other persons. The Crown, he said, is bound by the Income Tax Acts, but by virtue of its prerogative does not pay tax. He drew our attention to the use of the word "person" in the Act of 1918 as meaning a person other than a person taxable, e.g., section 116, section 132 (2), section 133 (1) (*b*), section 166 (10) and section 190—and there are others.

It appears to me that the contention put forward on behalf of the company fails. I can find nothing to justify the giving of a limited meaning to the word "person" in rule 11 (2). It must, I think, be read in the ordinary way. I agree with the conclusion of Upjohn J. and I would dismiss the appeal of the company.

I do not think that it is necessary for me to add anything to that which was said by Upjohn J. in relation to two cases recently before the Court of Session, except that Mr. Millard Tucker desired to keep open the position arising upon them.

[6] [1942] A.C. 402, 419.

BIRKETT L.J. I agree with the judgment of my Lord which has just been delivered. I have also had the opportunity of reading and considering the judgment which is about to be delivered by Hodson L.J., and with that judgment I also agree. In those circumstances I do not desire to add a judgment of my own.

HODSON L.J. The main question in this appeal is whether in rule 11 (2) of the Rules applicable to Cases I and II of Sch. D to the Income Tax Act, 1918 (as substituted by the Finance Act, 1926, section 32 (1)), the word "person" includes the Crown. If the word "person" includes the Crown the appellant company, it is conceded, is liable to certain balancing charges since the Crown has succeeded to its trade within the meaning of the rule. The balancing charge is borne by the company and the identity of the successor has no effect financially or otherwise.

Upjohn J. held that as a matter of construction there was no ground for placing any limitation on the ordinary natural meaning of the word, and that in rule 11 (2) the word "person" includes the Crown, persons resident abroad, charity trustees and others who for different reasons may be found to be exempt from tax. I agree with his judgment and with the reasons given in support of it.

The appellant company bases its argument on the admitted fact that the purchaser of its undertaking was the Crown, and refers in particular to the Government of India Act, 1935, s. 175 (2), which came into force (other than Part II) by Order in Council on April 1, 1937. The wording of this subsection has been slightly varied by another Order in Council, but the material words remain: "All property . . . shall vest in his Majesty for "those purposes." The argument accordingly is restricted to this narrow proposition, that the successor to the company being His Majesty in person, the word "person" in the charging sections of the Income Tax Acts cannot be construed as including His Majesty. It is said that it is not necessary to examine the nature of the Royal Prerogative which includes exemption from taxation, but that the company is entitled to say that the word "person" in rule 11 (2) cannot, as a matter of construction, include the Crown in its personal capacity.

The court was reminded of the constitutional position set out by Professor Hearn in his Government of England at page 18: "The law places no restriction upon the extent of the Royal "Power but rigorously defines the manner in which the several "branches of that power may be exercised. In every part of "public affairs the expression of the Royal will is conclusive; "but in each case the Royal will must be stated through the "appropriate channel." Thus in theory in the making of a statute "The King is pars agens, the rest" (Lords and Commons)

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"are but consentientes," *per* St. John arg. in *Hampden Ship Money case.*[7]

Emphasis was placed on the preamble to the taxing Acts, which is set out in full in the judgment of Upjohn J. as showing that having regard to the language of this preamble the Crown as grantee of the taxes cannot be a person for tax purposes and that, in the charging provisions of the Income Tax Act, 1918, charging tax upon "persons" cannot sensibly include the Crown. On the other hand it is to be observed that in numerous places in the Income Tax Act, 1918, the word "person" is used to include others than taxable "persons," or, to borrow the language of Lord Macmillan in *Income Tax Commissioners for the City of London* v. *Gibbs*,[8] "entities of assessment." This is the sense in which, as Lord Macmillan said, the word "person" is most generally used throughout the Income Tax Acts.

Some dozen examples were given in argument on behalf of the Crown of places in the Acts where the word "person" does not denote an "entity of assessment," and as a pure question of construction I see no reason why the word "person" in a charging section also should not include the Crown. No question of taxing the Crown arises, so that there is no invasion of the Crown's prerogative by construing the word "person" in its natural and ordinary meaning. That the word "person" in an Act of Parliament is apt to include the Crown there is no doubt. The Crown is a corporation sole, and therefore a person: see section 19 of the Interpretation Act, 1889. The authorities are all one way; the earliest cited being the *Magdalen College* case,[9] where the Year Book, 10 Hen. 7, 189, is in turn cited for the sentence "Rex est persona mixta." One of the latest cases cited was *Attorney-General* v. *Hancock*,[10] where Wrottesley J. stated: "the word 'person' can clearly include the Crown."

The company perforce contended that the authorities drew a distinction between the Crown in its personal capacity and the Crown in its capacity as part of the constitution. In order to mark the distinction reference was made to 39 & 40 Geo. 3, c. 88, s. 6, which provided that Crown lands when bought by private funds of the King are liable to parliamentary and parochial rates; and reference was made to the Crown Private Estates Act, 1862. I can, however, find no justification for the distinction sought to be drawn between the Crown in its personal capacity and the Crown in the constitutional sense, which the company seeks to draw. The Crown usually can act only through its servants, and this consideration must apply to His Majesty as referred to in the Government of India Act, 1935, to which I have already referred.

Thus there is here no practical distinction between the Crown and Crown servants. There are a number of authorities where the claim for exemption from taxation of Crown servants has

[7] (1637) 3 St.J. 826, 863.
[8] [1942] A.C. 402.
[9] (1615) 11 Co.Rep. 66 (b).
[10] [1940] 1 K.B. 427.

been considered. This claim has always been based on the Royal Prerogative that the King is exempted from taxation by virtue of his prerogative.

In *Rex* v. *Cook*,[11] it was decided that the posthorse duty imposed by 25 Geo. 3, c. 51, was not to be paid for horses employed for forwarding public expresses on the service of Government. It was decided that the King was exempt from tax by virtue of his prerogative. The Attorney-General pertinently observed that if the contention of the company were correct the proper question for argument in *Rex* v. *Cook* [11] would appear to have been, not "was there an exemption on the ground of pre-"rogative?" but "were the horses 'royal horses'?". *Rex* v. *Cook* [11] was considered in the House of Lords in *Coomber* v. *Berkshire Justices*,[12] in which Lord Blackburn, in connection with taxation, spoke of "an implied exemption on the ground of "prerogative."

These principles were applied by the Court of Appeal in *Bank voor Handel en Scheepvaart N.V.* v. *Slatford*.[13] The actual decision there was that the office of Custodian of Enemy Property was not such as of itself to confer upon its holder the immunity from tax belonging to the Crown, but there was an elaborate discussion on Crown immunity in the judgments, which proceeded on the basis that the custodian was a person within the orbit of the charge created by Sch. D to the Income Tax Act, 1918. The question was answered adversely to the claim for immunity. Evershed M.R. expressed himself as follows: "The commonly "used formula that the Income Tax Act does not bind the Crown "conceals the true principle, which is that, in the absence of "express provision to the contrary, the Crown and the rights of "the Crown are ot thereby prejudiced." There is no prejudice to the Crown in the present case in construing the word "person" in rule 11 (2) so as to include the Crown, and, as I have already indicated, I cannot distinguish the present case from *Slatford's* case [13] by drawing a distinction between the King in person and servants of the Crown.

The reasoning of all the judgments in *Slatford's* case [13] appears to me to be inconsistent with the claim put forward by the company that the Crown is immune, not because of the prerogative, but because it is not, as a matter of construction, covered by the word "person" in the charging sections of the Income Tax Acts. The common law rule as to the prerogative must be applied, but the Act must first be construed in the ordinary way. When the Act has been construed, the Crown is entitled to set up its right against the construction if prejudiced thereby, and the construction will, when necessary, yield to the prerogative. There is nothing in rule 11 (2) which interferes with the rights of the Crown, so that there is no conflict between the

[11] (1790) 3 Term Rep. 519.
[12] (1883) 9 App.Cas. 61, 71.
[13] [1953] 1 Q.B. 248, 291.

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statute and the prerogative. On the contrary, the Crown is relying on the section, as it is entitled to do.

In my opinion the word "person" is a general word which is apt to include the Crown and it is, as the Attorney-General contended, a question of construction of the Act as a whole whether, in a particular case, the Crown is entitled to claim exemption by prerogative.

As to the subsidiary point taken by the company in reliance on the decision of the Court of Session in *Inland Revenue Commissioners* v. *Barr*,[14] the report of that case appears to show that the concluding words of section 17 (1) of the Income Tax Act, 1945, were overlooked by the court. Counsel for the company recognised this and found difficulty in supporting this decision by independent reasoning. We were informed that *Barr's* case[14] is now under appeal to the House of Lords. In the circumstances I am content to say that as at present advised I can find nothing useful to add to what Upjohn J. has said upon the subsidiary point. I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords.

Solicitors: *Sanderson Lee & Co.; Solicitor of Inland Revenue.*

P. B. D.

[14] (1953) 32 A.T.C. 93.

[PROBATE, ETC., DIVISION.]

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Nov. 17.
Lord Merriman P., and Collingwood J.

* STARKIE *v.* STARKIE (No. 2).

Husband and Wife—Maintenance—Justices—Wilful neglect to maintain—Separation by consent—No neglect to maintain wife—Finding of neglect to maintain child—Power to make order in favour of wife—Discretion as to amount in such circumstances.

Husband and Wife—Justices—Appeal to Divisional Court—Reasons—Justices' liability for costs.

A husband left his wife and their infant child with the wife's consent, and she agreed to the separation without any stipulation, express or implied, that he should maintain her while they lived apart. There was no suggestion that the wife had disentitled herself to an order by matrimonial misconduct such as adultery or desertion. The justices made an order on the ground of wilful neglect to maintain both wife and child, whereby the husband was to pay 20s. a week for the wife, and 30s. a week for the child:—

Held, (1) In view of the consensual nature of the separation, and the absence of any stipulation as to maintenance, there was no neglect to maintain the wife.

Baker v. *Baker* [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81, and *Stringer* v. *Stringer* [1952] P. 171; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373 followed.

(2) The wife's failure to establish neglect to maintain herself did not bar her from proving neglect to maintain the child, and upon the evidence there had been such neglect, and such neglect was wilful.

(3) That since in cases under the Married Women (Separation and Maintenance) Acts, 1895–1949, where the wife is the complainant, any order which is made is an order in favour of the wife, the wife was entitled in view of the finding of neglect to maintain the child to any of the orders permissible under the Act of 1895, including an order for custody, and also an order for the maintenance of herself. But the court in assessing in its discretion the amount of any order in favour of the wife would consider her conduct; and in the circumstances of the present case, where the wife had failed to establish the complaints concerning herself, the proper order would be a nominal one, which might be varied later.

Kinnane v. *Kinane* [1953] 3 W.L.R. 782; [1953] 2 All E.R. 144 applied.

APPEAL from Cockermouth justices.

The parties were married on August 16, 1952, and there was one child, born before the marriage in February, 1952. It was accepted by the Divisional Court that the child was a "child of the marriage" within the meaning of the statute, although there had been some dispute about paternity which had been resolved in favour of the wife. The parties separated on August 31, 1952, in circumstances which were assumed by the Divisional Court to be without the wife's consent. She issued a summons on September 22, 1952, but the hearing was adjourned and the summons finally withdrawn in July, 1953, the parties resuming cohabitation on July 11, 1953. There was evidence that the husband had made payments to the wife during the first separation.

There was a further separation on July 20, 1953. The husband in his evidence before the justices said that they had agreed to separate, and the Divisional Court held that there was abundant evidence to justify a finding that the wife consented to this separation. On July 24, 1953, the wife issued a summons by which she complained that the husband had deserted her on July 20, 1953, and that he had wilfully neglected to provide reasonable maintenance for her and the child from that date. On August 10, 1953, the justices dismissed the complaint of desertion but made an order on the ground of wilful neglect to maintain whereby the husband was to pay £1 a week for the wife, and 30s. a week for the child, the custody of whom was given to the wife.

The husband appealed against this decision on the grounds that there was no evidence upon which the justices could find wilful neglect to maintain, that their decision was against the weight of the evidence, and that they were wrong in law. There was no cross-appeal in respect of the dismissal of the complaint of desertion. The appeal came before the Divisional Court on October 30, 1953, when the matter was referred back to the justices for a proper statement of the reasons upon which their

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decision had been based; and certain specific questions were asked of the justices to which answers were requested.[1]

The following statement of the questions put, and the answers received, is taken from the judgment of Lord Merriman P.: "(a) In respect of the first parting from about August 31, 1952, to "July 11, 1953, did the justices accept the evidence of the "husband in cross-examination by the wife's solicitor that he "agreed to pay maintenance, and, if so, at what rate per week "(i) the wife was working or (ii) not working, respectively." The question was framed with reference to a particular piece of evidence that so much should be paid if the wife was working and another sum if she was not working. The answer to that was: "The justices accepted the evidence of the husband in cross-"examination by the wife's solicitor that he agreed to pay main-"tenance, but did not accept his evidence that any particular rate "per week was agreed, because there was no evidence to support "this statement, and the justices did not believe it in view of the "fact that payments were, in fact, irregular, and the husband "apparently went off to sea without a care as to his respon-"sibilities." That question and answer concerned only the first parting, ended by a short resumption of cohabitation on July 11, 1953.

The next question was: "(b) Did the justices accept the "evidence of both the husband and the wife that the husband paid "maintenance at the rate of £4 10s. per week between the "resumption of cohabitation on July 11, 1953, and July 20, 1953, "the date of the final parting?" To that they said that they accepted the evidence of both that the payment of £4 10s. was made, but that they considered that this was an isolated payment, as supported by the wife's evidence, and not a regular weekly payment.

The justices were also asked: "(c) On what grounds was the "wife's complaint of desertion in respect of the present separation "dismissed?" The question was divided into two main sub-questions: "(1) What did the justices find was the nature of this "parting, and on what evidence did they base their finding?" The answer was "The justices considered that the wife left home "rather on a consensual basis than because of the threats and "conduct of her husband, and that there was for that reason no "constructive desertion," and in answer to the sub-question, "The justices considered that the wife's evidence showed that "that parting was on a friendly basis. The husband also stated "that they agreed to separate. The justices accepted this "evidence, and, therefore, found that the husband had not con-"structively deserted his wife." Sub-question (2) was "If the "justices found that the parting was consensual did they find "that there was any agreement (i) expressed, or (ii) implied, that "the husband should pay maintenance for the support of the wife

[1] [1953] 1 W.L.R. 1396.

"and/or the child," and sub-question (3) "If so, how much?" A note which applied to the whole question followed, namely, that a full statement of the grounds for the answer was required. The answer to that was that the justices found that there was no agreement, expressed or implied, that the husband should pay maintenance for the support of the wife and/or the child. They considered that there was no evidence before them which could support a finding that there was such an agreement, and they then referred back to the previous part of the answer.

The next question was: "(*d*) After the parting on July 20, "1953, did the husband pay the wife any maintenance in respect "of herself and/or the child, and, if so, how much respectively?" The answer was "The justices considered that there was no "evidence from either side that after the parting on July 20, "1953, the husband paid the wife any maintenance, either in respect of herself or of the child."

The final question was this: "(*e*) On what ground was the "wife's complaint on July 24, 1953, that on and after July 20, "1953, the husband had been guilty of wilful neglect to provide "reasonable maintenance for her and her infant child held to be "proved?" and the note to a former question, that a full statement of the ground was required, was repeated. The answer was that on July 20, 1953, any such payment as had been made by the husband did not constitute reasonable maintenance. This, they, considered, was supported by the fact that the wife had been compelled to apply to the National Assistance Board.

Buckley Sneade for the husband appellant.
D. R. Ellison (*H. S. Law* with him) for the wife respondent.

The question was considered in argument whether a wife, by any contractual act on her part, could absolve the husband by agreement from his liability to maintain his infant children, and it was submitted on behalf of the wife that it would be contrary to public policy to recognize such a right (*Bennett* v. *Bennett* [2] was referred to).

The other cases cited in argument are referred to in the judgments.

LORD MERRIMAN P. This is a husband's appeal from the justices for the Cockermouth petty sessional division of Cumberland, who, on August 10, 1953, made an order in favour of the wife for 20s. for her own maintenance, and 30s. in respect of the infant child, of whom she was awarded the custody. They made this order on the ground that wilful neglect to provide reasonable maintenance for the wife, and reasonable maintenance for her infant child whom the husband was legally liable to maintain, had been proved. At the same time they dismissed a complaint of desertion which was also before them.

[2] [1951] 2 K.B. 572; [1951] 1 T.L.R. 873; [1951] 1 All E.R. 1088.

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When the case came before this court on October 30, 1953,[1] we were seriously dissatisfied with the reason for the decision, which was simply, in effect, that the justices had found wilful neglect proved because the husband had wilfully neglected to provide maintenance, which is, of course, no sort of reason at all; and having regard to the fact that they dismissed the charge of desertion while at the same time finding that the wife was entitled nevertheless to maintenance, we sent a series of detailed questions for the justices to answer, so that we might see what facts they had found before disposing of the appeal, and the basis upon which their decision had been made.

I need not emphasize the point that very often, although not necessarily always, the complaints of desertion and of wilful neglect to maintain the wife stand or fall together, so that there was on the face of the decision possibly, but not necessarily, a conflict between the two findings, namely, that desertion was not made out but that wilful neglect was.

We have now received the answers to our questions, which were framed in the light of possible views of the evidence as it was recorded and presented to us. For the moment I say no more than that it seems to me that there is evidence to support the various findings, and we have rejected the application of counsel for the husband to put in affidavit evidence that certain weekly sums of money, which were admittedly paid by the husband to the wife at one period, were actually being paid by him to her at the time in respect of which the complaint of wilful neglect was made.

It is important to point out that this particular parting, out of which the complaint arose, occurred on or about July 20, 1953. But that was not the first parting. They had parted in August, 1952, and there had been a resumption of cohabitation earlier in July, 1953. I am prepared to assume, as was the wife's case, that that first parting was without her consent, and I read the evidence that she had been paid £2 10s. 6d. as referring to the period of that parting. It is that particular interpretation which is now sought to be challenged, and, in face of an express finding that no payment whatever was made by the husband to the wife in respect of the present parting, beginning on July 20, 1953, we are invited to say that the husband was in fact paying £2 10s. 6d. during that parting, from which, combined with the fact that the total amount of maintenance that the justices have ordered is £2 10s., we are asked to say that there could not, in any view, be wilful neglect to provide reasonable maintenance.

Because of what appears on the face of the note regarding the essential difference between the two partings, we began by asking this question about the first parting. [His Lordship then recited the questions put to the justices, and the answers received as set out above, and continued:]

[1] [1953] 1 W.L.R. 1396.

I take that answer to the final question to mean not that the justices had forgotten that there was a period during which £2 10s. 6d. had admittedly been paid, and admittedly one payment, which they described as an isolated payment, of £4 10s. at about this time, but that they did not consider that, as at July 20, 1953, before which those payments had been made, or at or about which date the last of them was made, they constituted reasonable maintenance; secondly, that after July 20, 1953, there was no evidence that any payment at all had been made; and then, in conclusion, for these reasons the justices considered that on and after July 20, 1953, the husband had been guilty of wilful neglect to provide reasonable maintenance for the wife and her infant child.

This court has more than once recently laid stress upon the point that where the wife is the complainant under the Summary Jurisdiction (Married Women) code (and I emphasize now, to avoid any confusion, that I do realize that there are special circumstances in which the husband may be the complainant, but I am speaking for the rest of this judgment of cases in which the wife is the complainant) the order which is made is an order in favour of the wife; it is her order; and in these cases concerning wilful neglect to provide reasonable maintenance, the wife must establish wilful neglect in order to support the findings of the justices, in the first respect, to provide reasonable maintenance for her, and, in the second respect, to provide reasonable maintenance for the child, who must be her child, must be an infant child, and a child whom the husband is legally liable to maintain. But in respect of the child as in respect of the wife, it must be possible for her to establish that the husband has been guilty of wilful neglect to provide reasonable maintenance.

In my opinion it is still the law, although the contrary has been argued in this case, that in either case wilful neglect imports an element of misconduct. *Tulip* v. *Tulip*,[2] a decision of the Court of Appeal, was cited in support of the contrary view, but that case strongly affirmed a number of decisions of this court, and particularly the decision in *Morton* v. *Morton*,[3] in which the element of misconduct in the phrase "wilful neglect to provide reasonable maintenance" was emphasized.

Starting with the proposition that the wife is the complainant in respect of wilful neglect to provide maintenance, not only for herself but for her infant child, it is, I think, important to bear in mind that by section 6 of the Summary Jurisdiction (Married Women) Act, 1895, however badly the husband has behaved in respect of the infant child, there may be a complete and absolute bar to the wife obtaining an order if she has committed adultery which has not been connived at nor condoned by the husband, nor conduced to by his misconduct or wilful neglect. As it is not suggested in this case that the wife has disentitled

[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.

[3] (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273.

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herself by any other matrimonial misconduct, such as desertion, it would be academic to discuss the question whether a wife who had put herself completely out of court for any maintenance for herself because she had deserted her husband might also, in certain circumstances, have disentitled herself from complaining of wilful neglect to provide reasonable maintenance for the infant child whom she had carried away with her in the process of deserting her husband. That matter can be discussed when it arises. Any failure on this wife's part to prove her own claim for maintenance does not depend upon any misconduct upon her part, whether adultery or otherwise. For the same reason I do not think it necessary to pursue the interesting topic which has been debated, whether by any contractual act on her part she can not only make it difficult to assert that the husband has been guilty of neglect to maintain her but also to assert the same about the child. I can imagine circumstances in which the self-same contract might conceivably be available as evidence in favour of the husband (not conclusive evidence: *Tulip* v. *Tulip*[4] makes that clear), that he had no more been guilty of wilful neglect to maintain the child than he had of wilful neglect to maintain the wife. But, again, I do not think it necessary to pursue that topic.

The wife's difficulty in this case—to take it once more by stages—is that as regards her own maintenance she has been held, on evidence which I think abundantly justifies the finding, to have consented to this particular separation, and has been found to have agreed to that separation without any stipulation, expressed or implied, that the husband should maintain her while they are thus living separate and apart. As at present established, the law in such circumstances is conveniently contained in a short passage from a judgment of this court in *Baker* v. *Baker*.[5] The passage was quoted in the Court of Appeal in *Chapman* v. *Chapman*,[6] which was followed in *Stringer* v. *Stringer*,[7] another decision of this court. I will quote the passage[8] which was approved in *Chapman* v. *Chapman*[9] in the Court of Appeal: "There is no law involved in this case; it is merely an "application of the principle that, if a wife is living separate and "apart from her husband, it is not enough for her to give "evidence that her husband had money and that she needed "maintenance. The question is: What was the nature of the "parting? If the wife can prove desertion, she is, of course, "entitled to a maintenance order on that ground. If the "separation was consensual, then, if she can prove—and Mr. "Crispin accepted that the onus was on the wife—that this was "on the basis, expressed or implied, that the husband undertook "to be responsible for her maintenance, she is entitled either to

[4] [1951] P. 378.

[5] [1950] W.N. 29; 66 T.L.R. (Pt. 1) 81.

[6] Unreported, April 4, 1951.

[7] [1952] P. 171, 179; [1952] 1 T.L.R. 415; [1952] 1 All E.R. 373.

[8] 66 T.L.R. (Pt. 1) 82, 83.

[9] Unreported, April 4, 1951.

"the agreed amount (if there was an agreed amount), or to a "reasonable amount under the section, although she is living "apart from her husband. But unless she can show, where the "separation was consensual, that the husband had accepted "liability, expressed or implied, to maintain her, she has no case "at all."

That is precisely what has been found in this case. The separation was consensual, and there was no agreement, expressed or implied, to maintain her. In my opinion, therefore, the finding of wilful neglect to provide reasonable maintenance for the wife cannot stand. But that is not the end of the case. We pointed out recently in *Kinnane* v. *Kinnane* [10] that the wife would be entitled, if she established a complaint of wilful neglect to provide reasonable maintenance for her infant child whom the husband was legally liable to maintain, to any of the orders permissible under the Act, and included, of course, in such orders, would be one giving her the custody of the child. We also pointed out that the establishment of that complaint might entitle her to an order for maintenance, and maintenance not limited only to any sum which was awarded in respect of the child of whom she was given the custody; but at the same time we pointed out that if she failed to establish wilful neglect to maintain herself, the discretion of the justices as to the amount to be awarded must be exercised in recognition of the fact that she had failed to establish that complaint.

This case falls to be decided on this simple question, remembering that we are not talking about a wife being barred by some statutory disability but merely by her own consensual act in agreeing to a separation without an obligation on the part of the husband to maintain her: Does the failure of her complaint necessarily carry with it, in those circumstances, exoneration of the husband from responsibility in respect of the child? Having regard to some of the arguments which were addressed to us, I think that it is important to distinguish, with reference to the husband's responsibility, two things: (1) the condition precedent that he is legally liable to maintain the child, and (2) the offence that he has wilfully neglected to provide reasonable maintenance for the child. The two things are not the same. Maybe, speaking generally, there is very little practical difference, but they are not the same thing. In this case there is no doubt about the husband's legal liability to maintain the child. I know that there has been a dispute about the paternity, but that, to put it at its lowest, certainly has not been resolved in the husband's favour, and there is nothing whatever to show that his legal liability to maintain his infant child does not subsist. I point out, however, that if his legal liability to maintain the child necessarily imports wilful neglect if he does not do so, all that it would have been necessary for the section to state, as contrasted with wilful neglect to provide maintenance for the wife,

[10] [1953] 3 W.L.R. 782; [1953] 2 All E.R. 1144.

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is that the husband has not maintained any given child, and leave out all reference to wilful neglect.

In this case the justices have found that from the moment of this parting the husband never paid a penny in respect of this child. I cannot see that he has ever given any sort of excuse or explanation for that, except the suggestion that the child was not his, which has not been determined in his favour. In my opinion, therefore, the fact that the wife cannot make out a case of wilful neglect to provide reasonable maintenance for herself does not bar her from proving that there has been wilful neglect to provide reasonable maintenance for the child, and I think that the justices were quite entitled to find that complaint proved; and I think that is the right conclusion in this case in spite of the very unsatisfactory way in which the matter was originally presented to us by the justices.

There remains the question whether the whole order can stand. That is to say, on the basis that the wife has proved one out of her three complaints, can she have an order of 20s. for herself as well as the 30s. in respect of the child of whom she is given custody? The order for 20s. was challenged, but although, as we said in *Kinnane* v. *Kinnane*,[10] it is possible for the justices to make an order for the maintenance of the wife on the basis that she has proved the complaint of wilful neglect to maintain the child, I do not think that, on the question of quantum, this order can stand, because the justices have awarded the maximum sum which is now possible under the amended statute in respect of the maintenance for the child. I think that it is wrong, therefore, that in addition to that sum, £1 should be ordered in favour of the wife, who has failed in the two complaints in which she is principally concerned. In my opinion the proper way to resolve the situation is to allow the order for the wife's maintenance to stand for the nominal sum of, say, 1s. a week, which will recognize the fact that she is the complainant, that she is entitled to an order, and that if at any time variation is necessary she will not be barred by the fact that no foundation for variation is laid.

COLLINGWOOD J. I agree. The justices have found that on and after July 20, 1953, the husband was guilty of wilful neglect to provide reasonable maintenance for his wife and infant child, the child being some eighteen months old at the time of the hearing. Upon that they have made an order in the wife's favour for £2 10s. a week, being £1 in respect of the wife's maintenance and £1 10s. in respect of the child, and have given the custody of the child to the wife.

In answer to question (d) of the questions which were submitted to the justices by this court in view of the form which their reasons took, the justices say "The justices considered "that there was no evidence from either side that after the

[10] [1953] 3 W.L.R. 782.

"parting on July 20, 1953, the husband paid the wife any main-"tenance either in respect of herself or of the child." I agree with my Lord that it is impossible to go behind this finding at this stage. We were invited to do so upon the strength of an answer given by the wife, according to the note, but in view of the way in which these answers have been elicited, and not overlooking the fact that in his evidence in the court below the husband gave no evidence on the matter at all, it is impossible, in my view, to go behind that finding.

By their answer to question (c) the justices say: "The "justices considered that the wife left home rather on a con-"sensual basis than because of the words and conduct of her "husband, and that there was for that reason no constructive "desertion," and they amplify that in sub-paragraph (i) of their answer by saying: "The justices considered that the wife's "evidence showed that the parting was on a friendly basis. The "husband also stated they agreed to separate. The justices "accepted this evidence, and therefore found that the husband "had not constructively deserted the wife." That being so, and there being evidence to support that finding, clearly the wife was not entitled to maintenance from her husband save in the event of there being an agreement, expressed or implied, that the husband would maintain her. That is clear from *Baker* v. *Baker*.[11]

By their answer to question (c) (2), the justices found that there was no agreement, expressed or implied, that the husband should pay maintenance for the support of the wife or the child. They considered that there was no evidence before them which could support the finding that there was such an agreement. Again there was evidence to support that finding, and, in my opinion, that would have been the end of the wife's case of wilful neglect to provide reasonable maintenance for her had there been no question of the maintenance of a child involved at all. I put it in that form because it is important to remember what was pointed out by Lord Merriman P. in *Kinnane* v. *Kinnane*[12]: "I reject the argument that an order cannot be made in favour "of the wife for maintenance of the wife unless it is founded "on wilful refusal to provide reasonable maintenance for her, or, "put the other way, that if the only legitimate finding is that "there has been wilful neglect to provide reasonable maintenance "for the infant children whom the husband is legally liable to "maintain, no order for maintenance of the wife can be made. I "do not think that that is the law. It may be that the amount "which justices of this court, for that matter, may think reason-"able in favour of a wife may depend upon whether the neglect "has been of the wife or of the children or both, but, in my "opinion, the right to make an order is established when once "the justices are satisfied that any one of the complaints set "out in section 4 of the Act of 1895 is proved."

[11] 66 T.L.R. (Pt. 1) 81.

[12] [1953] 3 W.L.R. 782, 785.

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STARKIE v. STARKIE (No. 2).

Collingwood J.

In this case, there is an infant child some eighteen months old, whom there is no question the husband is legally liable to maintain. Furthermore, no payments have been made by the husband in respect of that child. I agree that in order to prove wilful neglect to maintain it is not sufficient merely to show that the liability to maintain has not actually been carried out. It is clear from the decisions of *Jones* (*B.*) v. *Jones* (*M. E.*)[13] and a number of cases up to *Morton* v. *Morton*[14] that wilful neglect imports some element of matrimonial misconduct. Here, the justices have found that he has wilfully neglected to maintain the child, and, indeed, the wife. No payment has been made by the husband, and no sort of attempt has been made by him to justify that. It is true that there was some reference to a doubt as to paternity, but that was raised, according to him, by the wife herself, whether as a taunt to him or not is not quite clear; but he never put that allegation forward, as I read the evidence, as in any way exonerating him from liability to maintain the child. In my opinion, therefore, there was material upon which the justices could find that he had been guilty of wilful neglect in that regard.

The only question that remains is that of quantum. The order was made for £2 10s. The statutory maximum for the order in respect of the child's maintenance is now 30s., and, therefore, I agree that this order should be reduced in the way in which my Lord has suggested.

LORD MERRIMAN P. (upon argument as to costs): We pointed out on the previous occasion[15] that we would give the justices an opportunity to be heard about costs in view of the waste of public money, owing to their default, both parties being legally aided. They have, however, written to say that they did not intend to defy the court; and that they did not realize, owing to a misconception of the rules, that they had to give detailed reasons for their decision. I merely point out that although, perhaps, justices and their clerks are not to be expected to read month by month the Law Reports, a very pointed reference to *Sullivan* v. *Sullivan*[16] about the duty of justices and their clerks is contained in the last two editions of Stone's Justices Manual. However, we do not think it necessary to say any more on the topic, although it is really owing to the difficulties created by the default that recourse to a second hearing before us has been occasioned. We do not think it necessary to make any other order as to costs than that both sides shall tax under their certificates.

Appeal allowed.

Solicitors: *Beachcroft & Co. for Curwen & Co., Workington; Speechly, Mumford & Craig for Paisley, Falcon & Highet, Workington.*

J. B. G.

[13] (1929) 46 T.L.R. 33.
[14] 58 T.L.R. 158.
[15] [1953] 1 W.L.R. 1396.
[16] [1947] P. 50.

* EASTBOURNE CORPORATION *v.* COMMISSIONERS OF CUSTOMS AND EXCISE.

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Dec. 8, 9, 10, 11.

Danckwerts J.

[1952 E. 1439.]

Revenue—Entertainments duty—Corporation concerts—Concerts including variety performers—Whether exempt from duty—Finance Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 64), *s.* 8 (1)—*Finance Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 33), *s.* 3.
"*Recitation.*" "*Music hall or other variety entertainment.*"

A corporation, under its statutory powers, produced five performances, of which one consisted of violin, piano and other instrumental solos and songs, and the other four contained, in addition, comic items and songs by well-known variety entertainers:—

Held that, having regard to the appearance of well-known variety entertainers and to the nature of their "turns," the latter four performances contained elements which could not be brought within the statutory exemptions from duty of the Finance Act, 1946, s. 8 (1) and the Finance Act, 1952, s. 3, and became variety entertainments; and that the remaining concert was exempt from duty, as it contained no variety turn and was entirely a musical entertainment.

WITNESS ACTION.

On June 26, 1952, the Eastbourne Corporation, in pursuance of their statutory powers as the local education authority, entered into a written agreement with a producer for the production of a series of concerts at the Winter Garden Floral Hall, Eastbourne.

During the summer of 1952 five concerts were produced on the following dates, respectively—July 20, July 21, July 28, August 28 and October 30. Among the items performed at those entertainments were the following:—

July 20: violin and piano solos; also comic dialogues, songs and instrumental numbers by Richard Murdoch and Kenneth Horne:

July 21: organ solos, and songs by various performers, including comic items by Tommy Fields:

July 28: organ solos, xylophone solos, violin solos and songs, including a comic monologue by Robb Wilton:

August 28: piano solos, songs, violin solos and piano-accordion solos:

October 30: organ solos, harmonica solos, violin solos; and songs, which included songs by Gracie Fields.

The corporation applied to the Commissioners of Customs and Excise for exemption from entertainments duty in respect of these entertainments, but the Commissioners took the view that they were variety entertainments and liable to entertainments duty. They, however, deferred consideration of the application pending the hearing of these proceedings, which were commenced as a test case and in which the corporation claimed declarations that

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each of the entertainments consisted of one or more of the items referred to in section 8 (1) of the Finance Act, 1946,[1] and was provided by a society, institution or committee not conducted or established for profit; that the aims, objects and activities of the society, institution or committee were partly educational and that the said entertainments were not music hall or other variety entertainments within the meaning of section 3 of the Finance Act, 1952.[1]

J. Millard Tucker Q.C. and *John Clements* for the corporation.

Sir Reginald Manningham-Buller Q.C., S.-G., Viscount Hailsham Q.C. and *J. P. Ashworth* for the Crown.

Case referred to in argument: *Barnes* v. *Jarvis.*[2]

DANCKWERTS J. This is an action brought by the corporation of Eastbourne against the Commissioners of Customs and Excise. At the opening of the hearing, I was told that it was in the nature of a friendly action, and that it was a test case. So far as it is in the nature of a friendly action, the course of the case is somewhat disturbed by a slight dispute as to the character of the relief claimed and the substance of the case which has been agreed between the parties. However, the atmosphere may perhaps be said to have improved. So far as it is a test case, that fact usually makes very little difference in this court, which is accustomed to decide the issues on the facts arising in a particular case, and does not apply its decision to other facts and cases which are not before it for determination.

The subject of the action, so far as the plaintiffs are concerned, relates to five concerts which were put on by the Eastbourne corporation in a place called the Winter Garden, which is the property of the corporation. The concerts were put on without

[1] Finance Act, 1946, s. 8 (1): "Entertainments duty within the "meaning of section 1 of the Finance "(New Duties) Act, 1916, shall not "be charged on payments for admis-"sion to any entertainment which "consists of one or more of the fol-"lowing items, that is to say—(*a*) a "stage play; (*b*) a ballet (whether "a stage play or not); (*c*) a perform-"ance of music (whether vocal or "instrumental); (*d*) the exhibition of "a cinematograph film; (*e*) a lecture; "(*f*) a recitation; (*g*) an exhibition "of artistic work; (*h*) an industrial "exhibition; (*i*) an Eisteddfod, "where the commissioners are satis-"fied that the entertainment is pro-"vided by a society, institution or "committee which is not conducted "or established for profit and that "the aims, objects and activities of "the society, institution or committee "are partly educational."

Finance Act, 1952, s. 3 (1): "An "entertainment consisting of one or "more of the items specified in "section 8 (1) of the Finance Act, "1946 (which subsection exempts an "entertainment consisting of one or "more of certain specified items which "is provided by a body not conducted "or established for profit whose aims, "objects and activities are partly "educational), shall be treated as not "falling within the said subsection "(1) if it is a music-hall or other "variety entertainment."

"(2) This section shall apply, and "be deemed to have applied, as "respects payments for admission to "entertainments held on or after "March 12, 1952, other than pay-"ments made before that day."

[2] [1953] 1 W.L.R. 649; [1953] 1 All E.R. 1061.

any stage scenery on an open stage, without any drop curtain, I think it is called, but merely with side curtains which were drawn across the stage at the beginning and at the end, and in the course of the first part of the entertainment; and the point of the case is that a claim for entertainments duty has been made by the Commissioners of Customs and Excise, the corporation seeking to establish that they are entitled to exemption from that duty under the appropriate provisions of the Act.

I will first refer to the relevant statutes. The duty in question was imposed by the Finance (New Duties) Act, 1916, which provides by section 1: "There shall be charged, levied and paid "on all payments for admission to any entertainment as defined "by this Act an Excise duty (in this Act referred to as 'enter-"'tainments duty')" at certain rates. "Entertainment" is defined in subsection (6) of that section in these words: "The "expression 'entertainment' includes any exhibition, perform-"ance, amusement, game or sport to which persons are "admitted for payment; and the expression 'admission to an "'entertainment' includes admission to any place in which the "entertainment is held." It is perhaps worth while also to refer to a subsection which has since been repealed but which is not without interest. That is subsection (5) of the same section: "Entertainments duty shall not be charged on payments for "admission to any entertainment where the commissioners are "satisfied . . . (*b*) that the entertainment is of a wholly educa-"tional character (any question on that point to be determined "in case of difference by the Board of Education); . . . (*d*) that "the entertainment is provided for . . . partly scientific purposes "by a society, institution or committee not conducted or estab-"lished for profit, or is provided by any such society or institu-"tion, which has been founded with the object of reviving "national pastimes, in furtherance of that object."

The next statute in time to which I should refer is the Finance Act of 1935, s. 1 (3) (as amended by the Finance Act, 1946) which provides for duty at reduced rates in certain cases. "The said "duty shall be charged at the reduced rates set out in the First "Schedule to this Act in a case where all the performers whose "words or actions constitute the entertainment are actually "present and performing, and the entertainment consists solely "of one or more of the following items, namely, a stage play, a "ballet (whether a stage play or not), a performance of music "(whether vocal or instrumental), an Eisteddfod, a lecture, a "recitation, a music hall or other variety entertainment, a circus, "a travelling show, a menagerie or any game or sport other than "the racing or trial of speed of animals, vehicles, motor vessels "or aircraft"; then "stage play" is defined in a manner with which I need not trouble.

The Finance Act, 1946, introduced a provision which is of immediate concern in this action, section 8: "Entertainments "duty on certain entertainments provided by bodies which are

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"not profit making." [His Lordship read section 8 (1) and continued:] There are two comments to be made in regard to that Act before I pass on. First of all, from the nature of the performances with which I am concerned, it is plain that there are only two provisions in subsection (1) which are capable of applying to the performances in question: "(c) a performance "of music (whether vocal or instrumental)" and "(f) a recita- "tion." Secondly, one has to observe that the test of the nature of the society, institution or committee which is essential for the purposes of exemption from duty is left to the decision of the commissioners; and the objection has been taken (and in the circumstances it seems to be a sound objection) that it is not open to me to decide whether or not the Eastbourne Corporation is a society, institution or committee of the kind which is there mentioned. There may be other proceedings in which that point may be brought to the decision of the court, and the decision arrived at by the commissioners may possibly be questioned in that way. But so far as relief in this action is concerned, it is clear to me that I am severely handicapped by these provisions which fetter my jurisdiction, at any rate for present purposes.

The present form of action, therefore, is not particularly convenient for dealing with the questions which the parties wish to have decided; and for that reason I was not much attracted by a suggestion which arises out of the defence, that the number of cases which I shall have to consider in the ambit of the questions to be decided should be enlarged by reference to a number of other entertainments.

Another thing to observe in regard to this section is this. Apparently the legislature has changed its mind as to the way in which the claim for exemption shall be dealt with, because, whereas under the Act of 1916 the exemption depended on the educational nature, to some extent, at any rate, of the entertainment which was presented, under the provisions of this Act of 1946 the educational character is removed from the entertainment itself and is transferred to the character of the body which is putting on the entertainment. In other words, it is not for me to consider (and, indeed, it is immaterial) how great or how little is the educational value of the entertainment which is provided.

The remaining Act to which I have to refer is the Finance Act, 1952. Section 2 is material for consideration, though not for the purpose of the point which I have to decide directly, in that it provides for three scales of entertainments duty, the lowest of which is obviously intended to apply to performances which are performed by living and acting performers in view of the audience. The next higher scale is one which applies to games and sports and such matters, and the highest scale, the third, applies to cinematograph and reproduced musical performances.

Section 2 (2) provides that the first scale—that is the lowest—". . . shall be applicable in the case of any entertainment where

"all the performers whose words or actions constitute the enter-"tainment are actually present and performing and the entertain-"ment consists solely of one or more of the following items, "namely—(*a*) a stage play, (*b*) a ballet (whether a stage play or "not), (*c*) a performance of music, (*d*) an eisteddfod, (*e*) a lecture, "(*f*) a recitation, (*g*) a music-hall or other variety entertainment, "(*h*) a puppet or marionette show, (*i*) a circus, a travelling show "or a menagerie." So it is to be observed there that a music hall or other variety entertainment which may not qualify as including solo items which fall within (*c*) and (*f*)—that is to say, "a perform-"ance of music" or "a recitation"—may qualify for duty at the lowest rate.

With those observations, let me turn to the important section, which is section 3. [His Lordship read section 3 and continued:] That completes the statutory provisions with which I am concerned, and therefore it is plain that, in order to come within the provisions relating to exemption in these statutes, first of all the individual items contained in the programme of the entertainment must fall within one or other of the items specified in section 8 (1) of the Act of 1946 and further, taken together, must not amount to either "a music hall or other variety entertainment," whatever that may mean.

This case, so far as the statement of claim is concerned, relates to five concerts—to give them the term used by the plaintiffs—taking place on five different days in 1952; that is to say, July 20, July 21, July 28, August 28 and October 30. The common feature of all those entertainments was that they consisted of a number of items, the greater part of which, at any rate, were of a musical nature, either vocal or otherwise; but in a certain number of cases an item was included which was not of a musical character. In those cases (and also in the case of one concert which was entirely, it would seem, of a musical character) one or more items consisting of a performance by a greater or less well-known variety performer was included.

The concert of July 20, 1952, which was a Sunday, contained a number of musical items, and an item or two items which were only at least partly musical given by well-known variety stars principally known, I should say, in respect of broadcasting, Mr. Richard Murdoch and Mr. Kenneth Horne; whose performance, it appears, consisted at least in part of what is called patter, and no doubt was of an extremely amusing character.

In the second concert of July 21, 1952, which was a Monday, there were again turns or performances of a musical character, but a compère known as "Flotsam," who is very well known in the broadcasting world, introduced the various items; and there was a very amusing performer included, one Tommy Fields, who was described in the programme as "The world famous light enter-"tainer," and he is very well known, it would appear, in the variety world.

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On July 28, in addition to the musical items, there came a very well known variety entertainer who has been described as "The "spirit of the old music hall," Mr. Robb Wilton ("Mr. Muddle-"combe, J.P."), who gave a monologue and told stories of an amusing character.

I will deal first with those three concerts because, as it seems to me, they have similar elements contained in them. Putting on one side the musical items in each of those entertainments one finds that there is a turn in each case given by one or more performers, whose turn includes, in addition in two cases to a certain amount of singing, a considerable amount of either monologue or dialogue, which is not of a musical nature; and it appears, therefore, that if those items are to qualify for the purpose of section 8 (1) of the Act of 1946, it is necessary to find that they, to that extent at any rate, amounted to a "recitation." The word "recitation," according to the dictionary, it would appear, has a meaning of this kind: "The act of reciting; that which is recited," and then under "recite," "To repeat, deliver or rehearse, as "something prepared, written down, committed to memory, or "the like." Those definitions I have taken from Webster's Collegiate Dictionary, but I think they are very similar to those which are to be found in other dictionaries.

It is contended that the performances in question which I have just mentioned, fall within the terms of those definitions, because the performers concerned carefully prepared their various apparently impromptu observations, and learned them by heart before they gave the performance; and therefore it is said that they were reciting something which they had already learned. That would be, no doubt, from the point of view of the plaintiffs, of course, a convenient and easy way of reaching the result. Unfortunately, dictionary definitions do not always present the living picture of the act or matter which they are describing; and it is therefore, I think, necessary to use what Lord Goddard C.J. has called "common sense" in regard to these matters: *Barnes* v. *Jarvis*.[1] It was not a case on the same statute, and the words used were on a somewhat different occasion; but the observations of the court give some assistance to me at any rate in the present case.

In my view, if one applies common sense to the word "recitation" in the context in these particular Acts, one cannot come to the conclusion that the statute and the legislature had in mind something of the nature of the monologue given by that very excellent comedian Mr. Robb Wilton, or, indeed, the sparkling entertainment given by Messrs. Richard Murdoch and Kenneth Horne, or, indeed, the bright entertainment provided by Mr. Tommy Fields. It is not necessary for me to consider whether "Flotsam" was guilty of a recitation or not, because I do not think that is really material for the purpose of this case. I have,

[1] [1953] 1 W.L.R. 649.

therefore come to the conclusion that in each of the three concerts of July 20, July 21 and July 28, 1952, there was an element which cannot be brought within any of the heads contained in section 8 (1) of the Finance Act, 1946. That, of course, is enough to dispose of those three concerts; but for reasons which I will discuss in a few minutes, I think that they also fail to qualify for exemption from duty on another ground.

The fourth concert or the fourth entertainment was that of August 28, 1952; and that appears to have been wholly musical in its composition. There was no variety turn that really matters of any sort introduced, and the witnesses for the commissioners did indeed say that, in their opinion, it was a light musical concert, and was not a variety entertainment. It seems to me that that was clearly the case, and indeed that case was not pressed against the plaintiffs by the commissioners. Accordingly, in my view, it is plain that that entertainment consisted entirely of performances of music, either vocal or instrumental, and was not a "music hall "or other variety entertainment."

I now come to the entertainment which to me is the most difficult of all to decide on, and that is the entertainment of October 30, 1952, which appears to have been one of a series of entertainments included in what Mr. Harold Fielding, the producer, called "Gracie Fields' Concert Tour." It consisted of an overture and incidental music played by Ron Millington at the grand organ, "Singing Songs from the Shows," by a singer called John McHugh, "Canada's Harmonica Virtuoso, Tommy Reilly"; another performer called Stephane Grappelly from "The Hot Club "of France"; and finally, in two parts, a performance by Miss Gracie Fields, who, I was told, sang as many as 26 songs; she did interpose, I think, a short speech describing her pleasure at having returned to Eastbourne, and made some jokes or other observations in between her songs. But it was clear that the songs which she sang, although they were not all of a humorous nature, were very much the same as those which she had sung on other occasions upon the variety stage. Now I do not think that the interposition of a speech by the performer to her audience, or some incidental jokes, prevent the performance being a performance of music; but it is plain that the presence of Miss Gracie Fields dominated the whole of this entertainment.

I was provided with a great deal of evidence. A number of experts (or persons who were termed experts) gave evidence on each side as to what was the nature of a variety entertainment, and the question is one of considerable difficulty in some circumstances. But in my view, the evidence of Mr. Macqueen-Pope came closest to a picture of the true situation, when he said that an entertainment given in conditions such as those which prevailed in the case of these five entertainments became a variety entertainment, if it was dominated by a well-known variety performer doing the act which he or she did in the variety theatre, or in a recognised variety performance. It seems to me that in the case

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of the first three concerts on July 20, 21 and 28, 1952, those concerts or entertainments were dominated and coloured by the presence of variety entertainers, and they plainly became variety entertainments.

Though I think the matter is perhaps somewhat more difficult in the case of the concert of October 30, 1952, because it is conceivable that a variety star might so alter his or her style that he or she might appear in another variety entertainment in perhaps quite a different character, it cannot be said that the performance by Miss Gracie Fields on October 30, 1952, was of such a different nature as that from the normal performance which she would give in an ordinary variety entertainment. Therefore, the conclusion which I reach is that in the case of this entertainment also, it was dominated by a variety performer, and became a variety entertainment.

I have not troubled to consider very carefully the meaning of the term "music hall" in the context of the Act because the term "music hall" seems to have become rather obsolete—for the purposes with which I am concerned at any rate; I was told indeed that "music hall" has been superseded by "variety "entertainment." It is sufficient, therefore, I think if I consider the matter from the point of view of "variety entertainment," and on that issue the conclusion which I reach is that the plaintiffs are entitled to a declaration of some sort in regard to the entertainment of August 28, 1952, but fail in their claim in respect of the other four entertainments mentioned in the writ.

In the case of the entertainment of August 28, 1952, I am prepared to make a declaration that the entertainment at the Winter Garden, Eastbourne, Sussex, on August 28, 1952, consisted of one or more of the items referred to in section 8 (1) of the Finance Act, 1946, and that the said entertainment was not "a "music hall or other variety entertainment" within the meaning of section 3 of the Finance Act, 1952. Otherwise, in my judgment, the action fails.

Judgment accordingly.

Solicitors: *Sharpe, Pritchard & Co. for F. H. Busby, Town Clerk, Eastbourne; Solicitor, Customs and Excise.*

J. L. D.

[CHANCERY DIVISION.]

1953 *Nov.* 24, 25, 26; *Dec.* 16.

Lloyd-Jacob J.

** *In re* WHEATCROFT BROS. LD.'S TRADE MARKS.

Trade Mark—Registration—Name of plant—Roses—Trade marks the "variety" names—Variety names sole designation of a rose—Not distinctive — Confusion — Wrongly registered — Rectification of register—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *ss.* 9, 11 (1), 15, 32 (1).

"*Distinctive mark.*"

The variety name of a rose being the sole designation of a particular type of rose to both the trade and public, it cannot be validly registered as a trade mark under the Trade Marks Act, 1938, to denote the rose of a particular proprietor.

A firm of rose growers had registered 11 variety names as trade marks in respect of roses. They failed to disclose in the application for registration that they were the variety names. Application was made by another firm of rose growers under section 32 of the Act, for the rectification of the register of trade marks by removal of the marks, on the ground, (1) that the variety names could not be distinctive within the meaning of section 9 and were therefore wrongly registered; (2) that their continuance on the register would cause confusion and was contrary to section 11. The evidence was that variety names were registered with the National Rose Society, and were alone used by the trade and public as the designations of particular roses.

The respondents contended, inter alia, that the objection that a trade mark was invalid because it was the descriptive name of an article should be determined by section 15, and not by sections 9 and 11:—

Held, (1) that variety names could not be distinctive of the roses of the respondents as required by section 9, and had it been disclosed on registration that they were the variety names they would not have been registered; they were therefore wrongly registered;

(2) that the continuance on the register of these marks would in the circumstances inevitably cause confusion, and constitute an impediment and embarrassment to traders, and they must be expunged from the register;

(3) that section 15 was concerned only with what occurred after registration, and could not restrict investigation into distinctiveness under section 9, or into the question of confusion under section 11, so that the contention under that section failed; that section moreover contained a positive direction to deem as wrongly registered any mark which by reason of concurrent user in a descriptive sense would occasion deception or confusion.

MOTION.

Wheatcroft Bros. Ld., a firm of rose growers, were the registered proprietors of eleven trade marks, registered in respect of roses; the marks being "Coppelia," "Cocorico," "Pigalle," "Confidence," "Mahina," "Mascotte," "Moulin Rouge," "Tzigane," "Festival" and "Magali." Wisbech Plant Co. Ld., who were also rose growers, applied under section 32 [1] of

[1] Trade Marks Act, 1938, s. 9: "(1) In order for a trade mark . . . "to be registrable in Part A of the "register, it must contain or consist "of at least one of the following "essential particulars . . . (*d*) a word "or words having no direct reference "to the character or quality of the "goods . . . (*e*) any other distinctive "mark. . . .

"(2) For the purposes of this "section 'distinctive' means adapted, "in relation to the goods in respect "of which a trade mark is registered, "to distinguish goods with which "the proprietor of the trade mark is "or may be connected in the course "of trade from goods in the case of "which no such connexion subsists. ". . ."

S. 11: "It shall not be lawful "to register as a trade mark or part "of a trade mark any matter the use "of which would, by reason of its "being likely to deceive or cause con-"fusion or otherwise, be disentitled "to protection in a court of justice. ". . ."

S. 15: "(1) The registration of a "trade mark shall not be deemed to "have become invalid by reason only "of any use, after the date of the

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the Trade Marks Act, 1938, for the removal of the marks on the ground that the registrations were made without sufficient cause, and that the marks were wrongly registered, and wrongly remained on the register in contravention of sections 9 and 11 of the Act.

Basil Drewe Q.C. and *T. A. Blanco White* for the applicants, Wisbech Plant Co. Ld.

Geoffrey Tookey Q.C. and *P. S. Bevan* for the respondents, Wheatcroft Bros. Ld.

Cases referred to in argument: *In re Leonard & Ellis' Trade Mark* [2]; *In re H. N. Brock & Co. Ld.* [3]; *Philippart* v. *Wm. Whiteley Ld.* [4]; *In re Spillers' Ld.'s Application* [5]; *In re Williams & Co. Ld.'s Application.* [6]

Cur. adv. vult.

Dec. 16. LLOYD-JACOB J., reading his judgment. By this motion, the applicants, Wisbech Plant Co. Ld. seek the rectification of the trade mark register by the removal therefrom of eleven trade marks standing in the name of the respondents, Wheatcroft Bros. Ld., all of which were registered without proof of distinctiveness, five of which are entered upon the register in respect of "Roses, Rose Cuttings and Rose Trees" and the remaining six in respect of "Rose Plants." As the evidence disclosed, this variation in the classification of goods has no genuine significance in relation to the points for consideration, and it calls for no further mention. The locus standi of the applicants was admitted, and evidence and argument were directed to the issues of the propriety of the original admission of these marks to the register and of the continuance of the marks thereon since registration.

The applicants' statement of case, by para. 6, asserted a ground of objection under section 15 (1) (*a*) of the Trade Marks Act, 1938, but this objection, although retained by the applicants

"registration, of a word or words "which the trade mark contains, or of "which it consists, as the name or "description of an article or substance: Provided that, if it is proved "... (*a*) that there is a well-known "and established use of the word ... "as the name or description of the "article ... by ... persons carrying "on a trade therein, not being use in "relation to goods connected in the "course of trade with the proprietor "... (2) Where the facts mentioned "in paragraph (*a*) ... the proviso to "the foregoing subsection are proved "with respect to any word ... then "(*a*) if the trade mark consists solely "of that word ... the registration of "the trade mark, so far as regards "registration in respect of the article "... in question ... shall be deemed "for the purposes of section thirty-two "of this Act to be an entry wrongly "remaining on the register. ..."

S. 32: "(1) Any person aggrieved "by ... any entry made in the register without sufficient cause, or by "any entry wrongly remaining on the "register, ... may apply ... to the "court. ..."

[2] (1884) 26 Ch.D. 288.

[3] [1910] 1 Ch. 130, 137; 26 T.L.R. 100; 26 R.P.C. 850.

[4] [1903] 2 Ch. 274; 24 T.L.R. 707; 25 R.P.C. 565.

[5] (1953) 70 R.P.C. 51.

[6] (1917) 34 R.P.C. 197.

for future consideration should an opportunity arise on appeal, was not developed in argument, nor was I invited to deal with it. One other preliminary matter requires to be stated. The respondents did not attempt to support by evidence the contention particularized in their statement of defence that certain combinations of letters and figures as therein set out had come to be identified in the public mind with certain varieties of roses. This contention will not therefore qualify for further notice.

By section 49 of the Trade Marks Act, 1938, the tribunal in a proceeding relating to a trade mark is required to admit evidence of the usages of the trade concerned. It will be convenient to summarize this evidence by way of introduction. There has existed, since the year 1876, an organization called the National Rose Society, with a present membership exceeding 25,000, one purpose of whose existence is to encourage and develop the cultivation of roses in this country. Certain of the members of this society, being professional rose growers, are also members of the Association of British Rose Producers, and for convenience of reference these two organizations can be respectively termed the "society" and the "association."

A new rose variety is developed as a consequence of experimentation by a "rose raiser" in the cross-fertilization of existing varieties, and it would appear that only a very small percentage of the seedlings so produced are found to be sufficiently outstanding to justify introduction to the market. When one such is developed and a sufficient stock of rose trees created therefrom by budding, the raiser or an associate to whom he has entrusted the task of introducing the variety to the market, and called the "introducer," will seek to procure publicity for the variety, in order that the purchasing public may be encouraged to buy and plant examples of it. For this purpose an acceptable designation of the variety is essential. The raiser or introducer may himself offer for sale, and sell the new variety in the form of trees or bushes ready for planting, or he may dispose of buds of the new variety to professional rose growers for them to use in the development of trees and bushes. The designation chosen is referred to as the name of the rose, and it is the usual practice for rose growers to publish catalogues wherein the roses they offer for sale are identified by name, and to guarantee that goods supplied in response to orders will be found to be true to name. They can secure supplies of a variety introduced by some other grower by direct purchase from him of trees and bushes or of buds for implantation into stock of their own choosing, or indirectly by acquisition of trees or bushes of the required variety from persons in possession of the same, which trees and bushes may provide a quantity of buds or grafts with which to propagate further supplies. This propagation may be effected so rapidly that by the time the merits of a new introduction and the publicity efforts of its introducer have operated to create a substantial public demand, rose growers other than the introducer

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will be possessed of supplies with which to satisfy the requirements of the public, and this even though the introducer, by refraining from supplying his competitors directly with either trees or bushes or buds, had sought to maintain his exclusive dealing.

The evidence established that the identification of a variety of rose was in practice secured by examination of the blooms, and as these are produced from the budded or grafted portion of the tree or bush, the nature and origin of the root stock are of no particular significance for such identification, although they may vitally affect—as will the skill and effectiveness of the budding—the habit and strength of the tree or bush.

Difficulty in a number of instances appears to have been experienced before 1948 due to the use of a plurality of designations in respect of examples of a single variety of rose, and in that year the society introduced what was termed the Rose Registration Scheme, whereby a list was compiled containing one identifying name in respect of each known variety, and the society accepted the responsibility of registering for the benefit of all concerned with roses the identification name attached by the introducer to any new variety of rose submitted for the purpose.

The registration scheme secured the approbation of the association, which recommended its members not to use in their trade catalogues any identification name not recognized by the society. Amongst their other activities, the society maintains a trial ground, wherein rose trees submitted by members are planted and tended, and their habit and quality tested and noted. Upon the results of these trials certificates are granted for meritorious introductions, but only when an identifying name for the variety has been entered upon the society's register. The Rose Registration Regulations and the application form, the completion of which is an essential preliminary to the registration, were exhibited in evidence.

In completing the application form, the introducer asserts the variety to be new and in this country previously unnamed, and must propose for registration the name that he suggests for its future designation. The regulations include a provision that exhibition of a variety under a name other than the name registered shall render the exhibit liable to disqualification in any competition to which the powers of the society extend. Speaking generally, it is by exhibition at flower shows sponsored by the society and by the receipt of certificates, medals and the like awards given by the society, that an introducer may expect to bring his variety to the notice of the interested public. It is, I think, a fair conclusion on the evidence that at the present time an introducer could not expect to popularize a new variety without meeting the requirements of the society in respect of registration, and if a member also of the association it would be possible for him to commence to market supplies of it in the

ordinary way of business under a name not registered with the society only by disregarding the association's specific recommendation. Indeed, as the respondents fairly acknowledged in evidence, it would be wholly impracticable to designate a rose in the course of trade by a name other than that under which the variety was registered with the society, and they further acknowledged that should this be attempted, chaotic conditions would result.

It is against this background of trade usage that the particulars of the registrations in suit fall to be considered. The respondents, having accepted the task of introducing new varieties raised abroad into the market in this country, sought to carry out that task in such a way as to ensure, first, the availability only of satisfactory examples, and second, a reasonable financial return to the raiser and his associates. In pursuance of these purposes, the respondents agreed with their principals abroad to follow a particular course of action, whereby the designation selected for a new variety was to be registered with the society, and as soon as reasonably possible thereafter registered as a trade mark. With two exceptions (registered trade marks No. 701,611 "Concerto" and No. 709,608 "Festival") this procedure was followed in respect of the trade marks in suit, and the exceptions in no way indicate any desire to modify the procedure in principle.

In this way it was hoped that the designation would, by reason of its registration with the society, become the means whereby the variety could alone be identified, and further, by reason of its registration as a trade mark, be available to indicate a connexion in the course of trade between articles so designated and the proprietors and registered users of the registered trade mark, so as to preclude unauthorized growers from offering supplies.

The present proceedings are based upon the provisions of section 32 of the Act, which, shortly stated, permit the removal from the trade marks register of entries therein made without sufficient cause, or which wrongly remain therein. So far as concerns each original entry, the applicants seek to establish that the statutory requirements contained in section 9 of the Act were not complied with, and so far as concerns each original registration and its continuing presence upon the register they contend that the provisions of section 11 render both unlawful.

The prerequisite for registration in Part A of the register as set out in section 9 is distinctiveness, "distinctive" being defined in subsection (2) as meaning "adapted to distinguish "goods with which the proprietor of the trade mark is or may be "connected in the course of trade from goods in the case of "which no such connexion subsists." Such distinctiveness may be established in the case of certain categories specified in the section merely by inference, and in other cases by affirmative

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evidence. All the registrations in suit were accepted as inferentially distinctive, on the ground that each consisted of a word having no direct reference to the character or quality of the goods.

Seeing that the classification of goods in respect of which registration was sought was expressed broadly to cover all varieties of rose, there was of course no reason for the registrar to suspect that the averment that the mark was proposed to be used, as contained in the application form, was true only in relation to one particular variety of rose, and still less reason for him to be put upon inquiry as to the characteristics or qualities possessed by such variety, so as to permit him to determine the absence of any direct reference in the mark propounded for registration.

In the light of the evidence before me, it is clear that at the respective dates of application for each of these marks, the respondents intended only to use each mark in relation to one variety of rose, which variety as they well knew and intended either was or would be characterized by the same name recorded in the register of the society. Had the application form accurately reflected these intentions the registrar could not have regarded the mark proposed as inferentially distinctive. An intention to use the mark as the name of a variety appears to be wholly inconsistent with a bona fide intention to use it as signifying a connexion in the course of trade with the supplier, for which purpose it must necessarily be capable of differentiating between examples of the same variety coming from differing trade sources.

If the question be posed:—Was the name intended for use to distinguish rose trees of the respondents' growing from rose trees of the same variety grown by others, or was it intended for use to distinguish one variety introduced by the respondents from the generality of roses, there can be only one answer, for the inevitable consequence of registration with the society was to give the name a variety status. The evidence which establishes this is not questioned, and the desire of the respondents to prevent other rose growers from offering supplies of any of these new varieties save under specific authorization, even if successful, would not affect the intention to use as such, but would merely condition the circumstances in which roses so named were dealt with in commerce.

Once the respondents decided to invite the society to accept any particular name as an identification of the variety to which it was applied, they put it out of their power to intend the name only to identify such instances of the variety as they themselves had raised. If they can contrive some manner of monopolizing the production of a particular variety, it is true that the variety name will not fall to be used save upon their products. This possibility, although it might conceivably permit the respondents to create and acquire a secondary meaning for the original variety

name, would certainly not justify a registration granted without evidence of distinctiveness.

The propriety of these registrations being called in question, I am satisfied that the court is entitled, and indeed bound, to examine the objection under section 9, in the light of all the evidence adduced. So examined, registrations Nos. 700,985 "Cocorico," 701,614 "Pigalle," 709,607 "Coppelia," 709,605 "Magali," 709,609 "Moulin Rouge," 701,613 "Mascotte," 700,984 "Tzigane" and 709,606 "Mahina" do not qualify under section 9 (1) (*d*), and were therefore entered upon the register without sufficient cause.

Similar reasoning as to lack of distinctiveness likewise condemns registration No. B 701,612 "Confidence." With regard to Nos. 701,611 "Concerto" and 709,608 "Festival," these marks were registered before any application had been made to the society for their entry as variety names. The precise reason for this inversion of the designed procedure was not specified in respect of No. 701,611 "Concerto," and was due so far as concerned "Festival" to the circumstance that the originally designed name for the variety, "Cannes Festival," was in fact registered with the society as a preliminary to registration as a trade mark, but the requirements of the trade mark registry caused the geographical reference in the name to be dropped at the application stage. As I am satisfied that in neither instance was any departure from the intended use proposed, these registrations are equally vulnerable with the others for the same reasons.

Turning now to the objection under section 11, the evidence satisfies me that to the thousands of persons acquainted with the rose registration scheme of the society, the use of any name entered upon that register as importing a reference to trade origin would inevitably cause confusion. Moreover, save upon the footing that sellers other than the respondents will have no opportunity of meeting demands for these varieties when expressed in the only manner open to the buyer for the identification of his requirements, the inevitable result of leaving these marks on the Register of Trade Marks would be to impede the efforts of such other traders and to embarrass both them and their customers.

The evidence affords no grounds for assuming either a future inability on the part of growers to produce any of the varieties to which the marks in suit are assigned or the absence of any public demand for their products under their variety names. It is, of course, true that production of such varieties will require for its inception the receipt of some supply of stock from the respondents' growing, but neither procurement of supplies nor production of stock therefrom need involve any unlawful act as the law now stands. If, therefore, it be right to postulate a state of affairs wherein willing sellers and willing buyers are minded to deal in these commodities, the imposition of a clog upon their

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means of identifying the subject-matter of their dealing must operate in restraint of trade.

In my judgment, section 11 of the Act requires this court to safeguard the free operation of normal trade channels from such interference so far as it proceeds under the protection of trade mark registration. For this reason the entries in respect of all the marks the subject of this motion wrongly remain upon the register and must be expunged therefrom.

It was strongly urged upon me by counsel for the respondents that having regard to the provisions of section 15 of the Act, the objection that a trade mark is invalid because it is the descriptive name of an article falls to be determined according to the terms of that section and not under sections 9 and 11. This submission must be rejected. With the exception of subsection (3) of section 15 (which relates to chemical substances and is therefore not in point) this section is concerned with what has developed after the date of registration. It cannot therefore operate to restrict or avoid the investigation into distinctiveness which by section 9 is imposed upon the registrar at the application stage, and the use of the expression " by reason only " in subsection (1) shows that no substitute for the investigation under section 11 was intended. If the legislature had intended to permit the continued registration of marks which in use were causing deception and confusion, much plainer direction would have been found in the statute.

If the argument with regard to section 15 be put somewhat differently and it be submitted that the section should be taken as a guide to the proper decision in cases where concurrent use as a trade mark and as a description was to be anticipated, the respondents would fare no better.

If the whole of section 15 be closely examined, it will be found that it contains a positive direction to deem as wrongly registered any mark which by reason of concurrent use in a descriptive sense could occasion deception or confusion, and this irrespective of the intentions of the registered proprietor as to its use.

Where, as here, the respondents themselves promote and adopt the descriptive use, they cannot complain of the consequential effect upon the validity of the trade mark.

Having had the advantage of seeing and hearing Mr. Harry Wheatcroft in the witness box, it is only right to add that the respondents appear to have intended no impropriety. Being convinced, as he was, that the welfare and prestige of British rose growers required the establishment of some control over the marketing of new varieties, this gentleman appears to have been assured that the registration of variety names as trade marks would create an opportunity, and the introduction into trade mark law of the registered user provisions would enable the respondents to authorize, under properly controlled conditions, the supply of their new varieties to the public by suitably

qualified growers. I accept from him that the respondents desired to protect the public from obtaining poor examples of new varieties, and were wishful only to secure fair and equitable terms upon which the industry could collaborate with them.

Although the respondents must bear the consequences of having failed to disclose to the registrar the correspondence they intended between variety name and trade mark (but for which failure the marks would never have been registered nor these proceedings have been possible), I have no ground for attributing to them any personal knowledge of this default. What they were really seeking was a means or method of preventing the use of stock of their growing for the propagation of rose trees and bushes by unauthorized professional rose growers, such as is provided by the domestic patent law in some other countries. In so doing, they adhered to an earlier understanding in relation to the tenth commandment, and overlooked the modern gloss which A. H. Clough felicitously expressed in "The Latest Decalogue" as

"Thou shalt not covet, but tradition
"Approves all forms of competition."

For the purpose the respondents had in mind I am satisfied that the registration of the trade marks in suit was of no avail, for they were not validly registered, nor can they properly remain on the register. Accordingly, I must direct the rectification of the register as prayed.

Application granted.

Solicitors: *Metcalfe, Copeman & Pettefar; Smith & Hudson for Day, Johnson & Boot, Nottingham.*

I. G. R. M.

[LEEDS ASSIZES.]

* REGINA *v.* COOK.

1953
Nov. 16, 17.
Stable J.

Criminal Law—Mental deficiency—Procuration of mental defective girl—Carnal knowledge with girl under statutory supervision—Mental Deficiency Act, 1913 (3 *&* 4 *Geo.* 5, *c.* 28), *s.* 56 (1) (*a*) (*b*).
Mental deficiency.

By section 56 (1) of the Mental Deficiency Act, 1913: "Any "person (*a*) who unlawfully and carnally knows . . . any woman "or girl under care or treatment in an institution or certified "house or approved home, or whilst placed out on licence therefrom "or under guardianship under this Act; or (*b*) procures . . . "any woman or girl who is a defective to have unlawful carnal "connection . . . with any person or persons . . . shall be guilty "of a misdemeanour. . . ."

P., a certified mental defective, was under the statutory supervision of a mental health social worker who boarded her out with the defendant's wife at the defendant's house. It was alleged that

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[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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while P. was at the house the defendant had carnal connection with her. On a charge against the defendant under section 51 (1) (*b*):—

Held, that (1) the facts alleged did not show that the defendant had procured P. to have the carnal connection with him; (2) the defendant had not committed an offence under section 56 (1) (*a*) because P. did not come within the categories therein mentioned and therefore if, sed quaere, "unlawful" in section 56 (1) (*b*) meant contrary to section 56 (1) (*a*), the defendant could not be guilty of the offence charged.

TRIAL before Stable J. and a jury.

The defendant was charged with procuration of a mental defective girl contrary to section 56 (1) (*b*) of the Mental Deficiency Act, 1913, the particulars being that between April 12 and May 21, 1953, he procured Jean Pearson, a girl aged 17 years, who was then a defective, to have unlawful carnal connection with himself.

The facts proved by witnesses for the prosecution were that the girl Pearson was on January 15, 1951, certified as, and had ever since that date been, a feeble-minded person under the Mental Deficiency Acts. She had not been placed in any institution or certified house or approved home or placed out on licence therefrom or under guardianship, but had been placed under the supervision of a Miss Appleyard, a mental health social worker, under the Mental Deficiency Acts. In April, 1953, Miss Appleyard boarded Pearson out with Mrs. Cook, the wife of the defendant, at the defendant's house. While Pearson was so boarded at the house the defendant one morning asked her to go back to bed. She went and the defendant there had carnal connection with her. The defendant had carnal connection with her under similar circumstances on two subsequent occasions.

[STABLE J. Section 56 (1) (*b*) says: "Who procures, or "attempts to procure, any woman or girl who is a defective "to have unlawful carnal connection," so that the act of intercourse has to be an unlawful act of intercourse and then you are thrown back on section 56 (1) (*a*). What is meant by the word "unlawful"? Does it mean outside the bonds of matrimony?]

A. M. Hurwitz for the prosecution.

J. M. Dodson for the defendant submitted that there was no case to answer.

The following cases were cited in the arguments: *Rex* v. *Mackenzie & Higginson*[1]; *Rex* v. *Christian*.[2]

STABLE J. Members of the jury, this case arises under an Act of Parliament which is intended to protect women who are mentally defective from the lusts of the opposite sex. Parliament

[1] (1910) 27 T.L.R. 152. [2] (1913) 23 Cox C.C. 541.

has created categories of mental defectives covering a fairly wide field, and when a person has been certified by a medical officer as being a mental defective, the patient can be put into some sort of an institution. If she benefits from treatment, she may be let out on licence. Alternatively, the patient may be put under guardianship. Short of that she can be put under what is called "statutory supervision" which means that she is not put into a home, or under guardianship, but a person like Miss Appleyard keeps a watchful eye on her. That was the situation of the girl in the present case and the defendant is charged with the offence of having procured this girl to have intercourse with him.

On examination of the Act of Parliament that creates this offence (Mental Deficiency Act, 1913, s. 56 (1) (*a*)) one finds that it provides that it is an offence to have intercourse with a mental defective who is in an institution, or who has been placed out on licence, or who has been placed under a guardianship order. It does not say that it is a criminal offence to have sexual intercourse with a girl who is merely under statutory supervision, as this girl was. Therefore, the act of intercourse with this girl was not a criminal offence. If she had been under guardianship or if she had been an inmate of one of these homes it would have been unless the man could have satisfied you that he did not know and had no reasonable grounds to suspect it; but Parliament has definitely refrained from making it a criminal offence to have intercourse with a girl in this girl's situation. Therefore, these acts of intercourse, however morally reprehensible, were not criminal offences.

To get over that difficulty the defendant is charged under another paragraph of the same section of the Act which makes it an offence to procure a defective girl to have sexual intercourse with a man. It is not easy to define what procuration amounts to but there is not a shred of evidence that this man procured anybody. He did not get the girl to come into his house. He did not get her away from her mother. Nobody suggests that Mrs. Cook was a procuress, getting hold of this girl for immoral purposes. Inasmuch as the Act has most specifically refrained from making the act of intercourse itself a criminal offence, there is no evidence before you on which you can convict this man of an offence under the Act of Parliament. Although you may think there is a defect in the law, you have no alternative but to return a verdict of Not Guilty against this man.

Verdict: "Not Guilty."

Solicitors: *R. C. Linney, County Hall, Wakefield; Carter, Bentley & Gundill, Pontefract.*

[QUEEN'S BENCH DIVISION.]

1953
Oct. 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31; *Nov.* 2, 3, 4, 12.

McNair J.

** ROE *v.* MINISTER OF HEALTH AND OTHERS. WOOLLEY *v.* SAME.

[1949 R. No. 3784.]

[1948 W. No. 3792.]

Negligence—Onus of proof—Res ipsa loquitur—Operation under control of two persons—Hospital—Anaesthetist—Operations—Injection of spinal anaesthetic—Contamination by phenol—Plaintiffs permanently paralysed—Liability of hospital for acts of specialist anaesthetist—Liability of anaesthetist.
Hospital—Negligence.

Two patients in hospital were operated on on the same day. Both operations were of a minor character and in each case a spinal anaesthetic, namely, nupercaine, was injected by means of a lumbar puncture by a specialist anaesthetist assisted by the theatre staff of the hospital. The nupercaine had been contained in sealed glass ampoules which had been stored in a solution of phenol. After the operations both patients developed severe symptoms of spastic paraplegia resulting in permanent paralysis from the waist down. In actions for damages for personal injuries against the Minister of Health as successor in title to the trustees of the hospital, and against the anaesthetist, the plaintiffs relied on the doctrine res ipsa loquitur inasmuch as the injuries which they had sustained did not normally follow upon a spinal anaesthetic properly administered:—

Held, (1) that where an object or operation is under the control of two persons not in law responsible for the acts of each other, the doctrine of res ipsa loquitur cannot apply to either person since the res, if it speaks of negligence, does not speak of negligence against either person individually.

Held, (2) that the hospital, although responsible in law to the plaintiffs for the acts of their servants, the theatre staff, was not so responsible for the acts of the anaesthetist who, as a specialist, was in a position comparable with that of a visiting surgeon or physician for whose acts a hospital does not assume responsibility in law.

Gold v. *Essex County Council* [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237, and *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574 applied.

Held, (3) that the plaintiffs' claims failed against both defendants, since (a) the hospital had discharged its duty by supplying a competent anaesthetist and a trained theatre staff; and (b) it had been established by the evidence that the plaintiffs' injuries were in fact caused by the injection of nupercaine contaminated by phenol which could have occurred by percolation through "invisible cracks" or molecular flaws in the glass ampoules containing the nupercaine, since there were no positive proved facts from which a legitimate inference could be drawn as to the amount of phenol which had in fact percolated into the ampoules. In those circumstances neither the anaesthetist nor a fortiori the theatre staff could be guilty of negligence in failing to appreciate the risk of such percolation on

[Reported by MRS. E. M. WELLWOOD, Barrister-at-Law.]

the basis of medical knowledge in 1947. Neither could the anaesthetist be held to be guilty of negligence in law in failing to apply a differential colour test which might have disclosed a risk which, in common with many other anaesthetists, he did not appreciate as a possibility.

ACTION.

The following statement of facts is taken from the judgment. In these two consolidated actions the plaintiffs, Cecil Henry Roe, a farm labourer, aged 46, and Albert Woolley, a labourer, aged 51, sought to recover damages for personal injuries which they suffered as the result of the administration to them of a spinal anaesthetic on October 13, 1947, at the Chesterfield and North Derbyshire Royal Hospital. In each case the surgical operation for which they were anaesthetized was of a comparatively minor character—in Roe's case an operation upon a damaged cartilage in the knee and in Woolley's case an operation for a hydrocele. But in each case the end-result was disastrous as both men developed in the course of time a condition of spastic paraplegia—more severe in the case of Roe—which resulted in both becoming permanently paralysed from the waist downwards. In these circumstances they brought actions for damages for personal injuries against (1) the Minister of Health as successor in title under the National Health Service Act, 1946, and the National Health Service (Appointed Day) Order, 1948, to the trustees of the hospital; and (2) against Dr. J. Malcolm Graham, who was responsible for the administration of the anaesthetic in each case.

Detailed charges of negligence against each defendant were set out in the pleadings; but in substance the plaintiffs' cases proceeded on the following lines: (a) As against both defendants it was urged that the doctrine of res ipsa loquitur applied inasmuch as the disastrous result in fact experienced did not ordinarily follow upon a spinal anaesthetic properly administered. Alternatively (b) as against the hospital it was urged (1) that (on the basis that the defendant Graham was in law the servant or agent of the hospital) the injuries were caused by the negligent injection of the contents of a glass ampoule of nupercaine contaminated by phenol or carbolic acid; and (2) that (on the basis that the defendant Graham was not in law the servant or agent of the hospital) the contamination occurred through the negligent mishandling of the ampoules by the theatre staff, and, further, that the failure to detect the contamination was due to the failure to employ an effective system of differential colouring in the phenol or carbolic solution in which the ampoules were stored. Further (c) as against the defendant Graham it was urged that he negligently injected the contents of an ampoule of nupercaine contaminated by phenol or carbolic, that he failed to make any proper examination for cracks in the ampoules, and failed to adopt and maintain an effective system of differential colouring in the phenol or carbolic solution in which the ampoules were stored.

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The defendants, while denying the several allegations of negligence, raised an affirmative case that the injuries were in fact caused by the nupercaine itself administered without negligence, the nupercaine being supplied in sealed glass ampoules by the manufacturers, Ciba Laboratories Ld. The manufacturers were accordingly joined as third defendants and took part in the trial for some days, but were finally dismissed upon the admission by counsel for the plaintiffs and the first two defendants that no legal liability was in the result then alleged against them.

Richard Elwes Q.C., *John Hobson* and *R. F. Hannay* for the plaintiffs.

Montague Berryman Q.C., *R. Marven Everett Q.C.* and *J. S. Macaskie* for the first defendant.

H. B. H. Hylton-Foster Q.C. and *J. R. Cumming-Bruce* for the second defendants.

Gilbert Paull Q.C., *Neville Faulks* and *Philip Syrett* for the third defendants.

The following cases were among those cited in argument: *Lindsey County Council* v. *Marshall* [1]; *Cassidy* v. *Minister of Health* [2]; *Gold* v. *Essex County Council* [3]; *Ballard* v. *North British Railway* [4]; *The Kite* [5]; *Caswell* v. *Powell Duffryn Associated Collieries Ld.* [6]

Cur. adv. vult.

November 12. McNAIR J., having stated the facts set out above, continued: The method of anaesthesis employed was the well-known method of injecting nupercaine into the patient's theca by means of a lumbar puncture between the lumbar vertebrae. This method, at any rate in 1947 before the general development of the use of other relaxant drugs, was widely used and had the advantage of securing by a simple technique normally involving little distress to the patient a complete relaxation in the field of the intended operation.

I desire to emphasize at the outset that no charge of negligence was made based upon the adoption of this method of anaesthesis for the two operations in question. At the hearing before me, which lasted for eleven days, I had the advantage of hearing the evidence given by a number of surgeons, neurologists, anaesthetists and pathologists of the highest professional standing, who, while each desiring to assist the court without any reservation, differed widely in many respects in their views of the cause of the condition which developed in both plaintiffs following upon the

[1] [1937] A.C. 97; [1936] 2 All E.R. 1076; 52 T.L.R. 661.

[2] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[3] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 357.

[4] 1923 S.C. 43.

[5] [1933] P. 154; 49 T.L.R. 525.

[6] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

administration of the anaesthetic. I have had accordingly a more than usually anxious task in attempting to reach a solution.

[His lordship described the anatomy of the spinal column, stated the facts as to the development of the disease in each case, reviewed the evidence and continued:] In these circumstances Mr Elwes as counsel for the plaintiffs, emphasizing the close parallelism between the two medical histories and the fact that injuries of this nature do not normally follow from spinal anaesthetics properly administered, submits that the doctrine of res ipsa loquitur applies (a) as against the hospital on the basis that in law the hospital is responsible for the actions of Dr. Graham as well as for the actions of the theatre staff; (b) as against Dr. Graham on the ground that he administered the anaesthetic and had control of the theatre staff in all revelant respects.

The validity of this submission in my judgment depends on determining (1) the extent of the obligation assumed by the hospital towards patients received by the hospital; (2) the position of Dr. Graham in relation to the hospital; and (3) the extent, if any, of the application of the doctrine of res ipsa loquitur where the offending object or operation is under the control of two persons not in law responsible for the acts of each other.

Before examining these points, certain further facts should be stated. (i) Both Roe and Woolley were contributors for hospital and surgical treatment under a contributory scheme run by the hospital, so that they made some contribution for their treatment which was received by the hospital. This, however, appears to be in law irrelevant since the same standard of care applies whether the treatment is gratuitous or on payment. (ii) Dr. Graham, who had been in practice as a general medical practitioner since he qualified in 1939, was appointed in October, 1941, as a temporary anaesthetist at the hospital to help out wartime shortages. In that capacity he attended for anaesthetic purposes for one afternoon a week until May, 1946. During this time he became deeply interested in the science of anaesthesia, and after a course of reading and after attending a course on anaesthesia at the Radcliffe Infirmary he took his Diploma of Anaesthesia granted by the Joint Board of the Royal Colleges of Surgeons and Physicians, this being at that time the only specialist qualification in anaesthesia. By the autumn of 1946 he had decided to give up his general practice and devote his whole time to anaesthetics. In October, 1946, he was, with Dr. Pooler, who had taken his Diploma of Anaesthesia some years earlier, appointed as a visiting anaesthetist to the hospital. He and Dr. Pooler between them were under an obligation to provide a regular anaesthetic service for the hospital, it being left to them to decide how to divide up the work. In fact, apart from emergencies, they worked at the hospital on alternative days. The hospital set aside a sum of money out of their funds derived from investments, contributions and donations for division among the whole of the medical and

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surgical staff including visiting and consulting surgeons as the participants might decide. Dr. Graham participated in this fund but otherwise received no remuneration from the hospital. He was at all times allowed to continue his private anaesthetic practice.

I now turn to (1), the problem of the obligation assumed by the hospital towards patients received for treatment. The two most relevant authorities, both of which are binding upon me, are the decisions of the Court of Appeal in *Gold* v. *Essex County Council*[1] and *Cassidy* v. *Ministry of Health*.[2] I take as my guide the passage in the judgment of Lord Greene M.R. in *Gold's* case[3]: "The question which presents itself in the present case "may, therefore, be formulated as follows: When a patient "seeking free advice and treatment such as that given to the "infant plaintiff knocks at the door of the defendant's hospital, "what is he entitled to expect? He will find an organization "which comprises consulting physicians and surgeons, presum-"ably also house physicians and surgeons, a staff of nurses, "equipment for administering Grenz ray treatment and a radio-"grapher, Mead, employed to give that treatment. So far as "consulting physicians and surgeons are concerned, clearly the "nature of their work and the relationship in which they stand "to the defendants precludes the drawing of an inference that "the defendants undertake responsibility for their negligent "acts."

I also think it is clear that the judgments of Somervell and Singleton L.JJ., who formed the majority on this point in *Cassidy's* case,[4] proceed on the same basis. No useful purpose would be served by my expressing my own views upon the judgment of Denning L.J. in the latter case, which states the hospital's obligation in much wider terms, except to say that there is in my judgment much force in the criticism directed by Mr. Berryman against Denning L.J.'s reading of the decision in *Mersey Docks and Harbour Board* v. *Coggins and Griffiths*,[5] which apparently forms the basis of this judgment.

I accordingly conclude (1) that so far as Dr. Graham was concerned, the hospital's obligation towards their patient was limited to providing a competent anaesthetist, which obligation the hospital undoubtedly fulfilled, and that the hospital was not liable in law for his acts of negligence, if any; and that so far as the theatre staff were concerned, the hospital assumed towards their patients the vicarious responsibility of a master for his servants. (2) It follows from what I have said above that in my judgment the position of Dr. Graham as a specialist anaesthetist was comparable to that of a visiting surgeon or

[1] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.

[2] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[3] [1942] 2 K.B. 293, 302.

[4] [1951] 2 K.B. 343.

[5] [1947] A.C. 1; 62 T.L.R. 533; [1946] 2 All E.R. 345.

physician for whose acts the hospital does not assume responsibility in law. As to (3) the extent of the application of the doctrine of res ipsa loquitur where the thing or operation is under the control of two persons not in law responsible for each other—I am unable to understand how it can be said that the maxim can apply to either of such persons, since the res, if it speaks of negligence, does not speak of negligence against either individually: see the passage in Lord Murray's speech in *Carruthers* v. *MacGregor*.[6] In this connection reference should also be made to the words of Farwell L.J. in *Hillyer* v. *St. Bartholomew's Hospital*,[7] quoted by Somervell L.J. in *Cassidy's* case.[8]

Furthermore, it was established on the evidence that, though the anaesthetist is responsible for the choice of the anaesthetic, for the giving of directions as to its preparation and for general supervision of the activities of the theatre staff, he cannot properly be regarded as responsible for their casual acts of negligence.

Accordingly, in my judgment the ordinary onus rests upon the plaintiff of proving negligence against the hospital or Dr. Graham. It being conceded that the injection of nupercaine per se was on the facts of this case not negligent, and it being clearly established on the medical evidence that the injuries were not caused (1) by an infective organism, as in *Voller's* case,[9] or (2) by traumatic injury to the spinal column by the needle itself, and no other contaminant than phenol being suggested, the first step in this proof of negligence must be to satisfy the court that the injuries were in fact caused by the injection of phenol.

None of the medical witnesses had consciously ever seen the results of injecting phenol into the human theca. Accordingly, the arguments for and against this view had necessarily to be based largely on deductive reasoning from the observed effects of phenol in other circumstances and the known effects of other toxic substances on the contents of the theca itself. After the most anxious consideration I have come to the conclusion that the phenol theory is sufficiently established for it to form the basis of a finding by the court that the injuries were in fact caused by the injection of phenol with the nupercaine, and I so find. [His Lordship stated the reasons for his finding, examined the medical evidence, and continued:]

I now come to what I regard as the most difficult part of this case, namely, the inquiry whether it is proved either by presumption, inference or direct evidence, that the phenol which I find was introduced was so introduced by reason of the negligence of Dr. Graham or the hospital staff.

It is now clear that phenol can find its way into an ampoule of nupercaine stored in a solution of phenol through cracks which are not detectable by the ordinary visual or tactile examination

[6] 1927 S.C. 816, 823.
[7] [1909] 2 K.B. 820, 827; 25 T.L.R. 762.
[8] [1951] 2 K.B. 343, 354.
[9] (1947) 203 L.T.J. 264.

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which takes place in an operating theatre—these cracks were referred to in the evidence as "invisible cracks"—or through molecular flaws in the glass. The attention of the profession was first drawn to this risk in this country by the publication of Professor Macintosh's book on Lumbar Puncture and Spinal Anaesthesia in 1951. In 1947 the general run of competent anaesthetists would not appreciate this risk. Dr. Graham certainly did not appreciate this as a risk. I accordingly find that by the standard of knowledge to be imputed to competent anaesthetists in 1947, Dr. Graham was not negligent in failing to appreciate this risk and a fortiori the theatre staff were not negligent. Accordingly (subject to one further point, namely, the absence of an effective colouring of the phenol), it seems to me that the plaintiffs' case must fail unless I am satisfied that the amount of phenol which percolated into the ampoules in fact used in the two cases of Roe and Woolley could not have percolated in through "invisible cracks."

In this connexion I have to bear in mind the classical passage in Lord Wright's speech in *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[10] as to the distinction between inference and conjecture and ask myself whether there are in this case "any "positive proved facts from which an inference" as to the amount of phenol which percolated can be drawn. If there are not, any finding as to the amount would be conjecture. [His Lordship reviewed the medical evidence and continued:] In my judgment, in the absence of any clear proof as to the minimum concentration necessary, the results of these calculations were so speculative and founded upon such uncertain data that no legitimate inference can be drawn from them as to the quantity of percolation. Such concrete evidence as there was seems to suggest that the degree of substitution of nupercaine by phenol cannot have been great since the nupercaine administered, and administered in the minimum dose, apparently produced its normal and anticipated degree of anaesthesia, and there was no evidence that phenol had any anaesthetic effect.

Again, even if it had been possible to establish with any certainty the minimum percolation which must have taken place to produce the results, it would on the evidence be quite impossible to infer even as a matter of reasonable possibility that that percolation must have percolated into the ampoules through visible cracks. It is clear that under the system adopted (which cannot be criticized on the basis of 1947 knowledge) some of the ampoules may have been in the solution for many days or even weeks; for I am unable to accept as accurate Sister Fletcher's recollection that all the ampoules were renewed on October 11, having regard to the contemporary documentary material which was put to her in cross-examination by Mr. Paull.

[10] [1940] A.C. 152, 169; 55 T.L.R. 1004.

Furthermore, having seen Dr. Graham, who gave his evidence in a very careful and forthright manner, and having heard him describe and seen him demonstrate the method of examination to which he subjected the ampoules before aspiration, I find it extremely difficult to believe that he could in the case of two successive patients have missed a visibly cracked ampoule. Accordingly, even if it be true that on proof of damage by phenol, the burden shifted to Dr. Graham to displace the implication of negligence, this burden in my judgment he has successfully discharged by showing that phenol in a significant quantity could percolate into an ampoule otherwise than by visible cracks and remain undetected without negligence on his part.

There remains for me to consider the question of the inadequacy of the colouring agent used in the phenol solution. It was admitted, or, if not admitted, established, that the colouring agent used, namely, 9 mins. of Bordeaux B. red to ½ gallon of solution, was inadequate to detect percolation under theatre conditions; but it was not proved to my satisfaction that a prudent anaestheist in 1947 who did not realize the risk of percolation through invisible cracks should have used a deeper colour tint than that in fact used. Indeed, the contrary seems to be the case.

The only references in medical literature to which I have been referred about the importance of using a colouring agent when sterilizing ampoules by immersion in disinfectant are in two American publications (neither of which would be within the range of the ordinary anaesthetist in this country), namely, (1) Pitkin's Conductive Anaesthesia (1946 ed.), and (2) an article by Drs. Nicholson and Eversole in the Journal of the American Medical Association dated November, 1946.

Nor was it proved that the quantity of phenol which did in these cases percolate into the ampoule (that quantity being unknown) would have been detected by the use of the colouring concentration commonly used in 1947, if there was any such standard. The truth is that Dr. Graham, believing, in common with other competent anaesthetists in 1947, that there was no danger of percolation except through cracks which would be visible under a proper theatre examination, was not relying upon colour except as an additional precaution in the case of ampoules visibly cracked.

In my judgment, on the standard of a reasonably competent anaesthetist in 1947, he cannot be blamed for so acting. It would, in my judgment, be quite wrong to find Dr. Graham guilty of negligence in law for not adopting a technique which might have disclosed the presence of a risk which he, in common with many other competent anaesthetists, did not appreciate as a possibility.

Furthermore, as regards the hospital, as I have reached the conclusion that it is not possible for me by legitimate inference from proved facts to say that the quantity of phenol in fact

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introduced can only have come in by visible cracks, it would be wrong I think for me to find that the cracks, if any, through which the phenol percolated were caused by negligence on the part of the theatre staff. None of the experiments as to formation of cracks in ampoules—whether visible or invisible—lead me to the conclusion that invisible cracks must be caused by, or can only reasonably be attributed to, rough handling by the theatre staff. The experiments, except those spoken to by Mr. Johnson, were all carried out on ampoules of a different texture to the glass used in 1947. Sister Drever and Sister Fletcher were both called before me and demonstrated their method of handling the ampoules. They gave me the impression that they were well trained and deft in the handling of ampoules and were not persons who were likely to handle the ampoules carelessly.

In the result, therefore, the plaintiffs' claims fail both against the hospital and Dr. Graham.

Judgment for defendants.

Solicitors: *Gibson & Weldon, for John Whittle, Robinson & Bailey, Manchester; Berrymans; Hempsons; Swepstones.*

[QUEEN'S BENCH DIVISION.]

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Oct. 15.

Lord Goddard C.J., Sellers and Havers JJ.

* REGINA *v.* JUDGE WILLES.
Ex parte ABBEY NATIONAL BUILDING SOCIETY.

County Court—Jurisdiction—Action for recovery of land—House—Legal charge—Mortgagee's action for possession against surety—Consent to judgment by defendant—County court judge's refusal to hear case—County Courts Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 53), *ss.* 43, 53; *County Court Rules,* 1936, *Ord.* 24, *r.* 4 (2).

By a legal charge made between the owner of a house as mortgagor, a building society as mortgagee and the defendant as surety, the owner attorned tenant of the house to the building society. The legal charge exceeded £500 and contained a power of sale in the event of subscriptions falling into arrears. The owner died and after her death the defendant was in possession of the house. The subscriptions under the charge having fallen into arrears, the building society brought an action for possession in the county court against the defendant. Before the case was called the defendant orally agreed to consent to judgment. The judge refused to hear the case, holding that he had no jurisdiction since it was an action to enforce a charge. The building society moved for an order of mandamus directing the county court judge to hear and determine the action:—

Held that, (1) no question of jurisdiction arose since by virtue of sections 43 and 53 of the County Courts Act, 1934, any common law action or proceeding in equity could be tried in a county court provided that the parties consented in writing; and that (2) apart

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

from consent, the judge had jurisdiction to hear the case since it was an action for the possession of property forming the security for payment to the plaintiff of principal money or interest as specifically provided for in Ord. 24, r. 4 (2), of the County Court Rules, 1936, and Form 385 thereunder.

MOTION for order of mandamus.

The applicants, the Abbey National Building Society, were the plaintiffs in an action in the Ilkeston County Court in which they claimed possession of a house at Hands Road, Langley Heanor, Derby, which was occupied by the defendant in the action, Alexander Richardson. The plaintiffs alleged that under a legal charge dated May 1, 1950, made between them, one Olive Richardson, the owner of the house, now deceased, and the defendant, Olive Richardson attorned tenant of the house in question to the plaintiffs, and that the plaintiffs were at liberty at any time after the power of sale under the legal charge had arisen to enter on all or any part of the mortgaged property and to determine the tenancy without previous notice. The power of sale arose as the subscriptions covenanted to be paid under the legal charge had fallen three months or more in arrears. The defendant was in possession of the house. He was not the mortgagor or a person who had attorned tenant for the plaintiffs.

On the day of the hearing in the county court the defendant, after taking independent advice at the suggestion of the plaintiffs' solicitor, signified his willingness to consent to judgment, but when the case was called the judge held that he had no jurisdiction to hear the case as it was an action to enforce a charge which exceeded £500, and he subsequently delivered a reserved judgment setting out his reasons. The plaintiffs in the action thereupon moved for an order of mandamus directing the judge to hear and determine the case.

W. W. Stabb for the applicants.

The respondents did not appear and were not represented.

LORD GODDARD C.J., having stated the facts, continued: The court regrets very much that the judge took the action he did because it has put the parties to a great deal of extra expense for no reason whatever. Before the case was called on, the solicitor representing the building society had seen the defendant, who was apparently willing to consent to judgment. The solicitor for the society very properly told the defendant to obtain independent advice from another solicitor. The solicitor whom the defendant consulted advised him to consent to judgment, whereupon the defendant indicated his willingness to do so. As soon as the case was called on, the judge took the point that he had no jurisdiction to hear the case, and he delivered a written judgment setting out certain reasons in which he referred to his judicial experience. It is odd, however, that in the course of his judicial experience he had overlooked the fact that where parties consent to have

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a case decided in the county court no question of jurisdiction arises.

The present case is nothing but a common law action and section 43 of the County Courts Act, 1934, provides: "If, "with respect to any action assigned for the time being to the "King's Bench Division of the High Court, the parties to the "action agree, by a memorandum signed by them or by their "respective solicitors, that a county court specified in the memo-"randum shall have jurisdiction in the action, that court shall "have jurisdiction to hear and determine the action accordingly." That section deals with common law matters, and section 53 also gives jurisdiction by agreement in equity proceedings; so that the parties, being quite willing for the judge to proceed with the case and give judgment, had only to put their agreement into writing to confer ample jurisdiction on the judge. But the judge did not give the parties a chance of putting their agreement into writing but proceeded to give a judgment saying that he had no jurisdiction to hear the case.

With respect to the judge, we cannot understand why he said he had no jurisdiction. This was an action by a mortgagee. The judge seems to have taken the point that the plaintiffs were seeking to enforce a charge, and although the land was worth less than £100 a year, and he had jurisdiction to entertain an ordinary action for recovery of land, he would not have jurisdiction to enforce a charge. He seems to have entirely overlooked the fact that the matter is expressly provided for by Ord. 24, r. 4, of the County Court Rules, 1936, in much the same way as it is provided for in the High Court Rules. Subrule (2) provides: "In an "action (other than a foreclosure action) in which there is a "claim for possession of any property forming a security for "payment to the plaintiff of any principal money or interest, "with or without a claim for the whole or part of such money or "interest, a judgment for the plaintiff shall include an order to "the plaintiff as set out in Form 385, or if such money or interest "also is ordered, in Form 386, and a copy of the judgment shall "be served on the plaintiff."

When one looks at Form 385 in the County Court Forms, one finds the form of judgment as follows: "It is adjudged that the "Plaintiff do recover from the Defendant possession of the land. ". . . And it is ordered that the Defendant do give the Plaintiff "possession of the said land. . . . And it is ordered that upon the "Defendant paying to the Plaintiff the moneys remaining due to "the Plaintiff upon the security of a mortgage (or charge) . . . "the Plaintiff (subject and without prejudice to the due exercise "of any power of sale for the time being vested in him) do re-"deliver to the Defendant possession of the property subject to "the said mortgage (or charge) and release to the Defendant the "security constituted by the said mortgage (or charge)." That is because the mortgagee has the power of entering into possession of the property, but the mortgagor still has a right to redeem the

property by tendering the money to the mortgagee and paying the costs.

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In the present case one is not concerned with the question of the mortgagor and mortgagee. It is perfectly true that the mortgagee was saying that he was entitled to possession, but the person in possession was a person not a party to the mortgage except as a surety, and he had no right to be in possession. None of the considerations which the judge set out in his judgment has any relevance to this case. It is simply the case of a man who is in possession of property to which the plaintiffs could show a better title. It was most unfortunate that when both parties were before him—and when he was dealing with a defendant in a humble way of business and a small property—that the judge should say, in effect, that the representatives of the building society ought to have brought the case in the High Court. They ought not; they quite properly brought the case in the county court. Quite apart from any consent, the judge had ample jurisdiction to try the case by virtue of the provisions in the County Court Rules. In any case, if the judge had any doubt, all that he had to do was to tell the parties to put their consent in writing. As it is, the costs and expenses of that day have been thrown away, the plaintiffs have been put to the expense of coming to this court to obtain an order of mandamus, and the case must go back to the county court to be re-heard, the position presumably being that when the defendant found that the judge refused to try the case he took the gifts the gods were offering and remained in possession. It is an unfortunate state of affairs, and this order must go.

SELLERS J. I agree.

HAVERS J. I agree.

Application granted.

Solicitors: *Butt & Bowyer for A. J. Cash & Sons, Derby.*

[QUEEN'S BENCH DIVISION.]

**F. & K. JABBOUR *v.* CUSTODIAN OF ISRAELI ABSENTEE PROPERTY.

1953 *Oct.* 19, 20, 21, 22, 23; *Nov.* 27.

Pearson J.

Conflict of Laws — Chose in action or debt — Transfer or discharge — Applicability of proper law or lex situs—Situs of chose in action—Insurance—English company—Policy effected in Haifa—Claim—End of Palestine mandate — Claim transferred to custodian by Israeli legislation—Whether assured or custodian entitled—Whether legislation operated extraterritorially—Whether confiscatory.

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F. & K. JABBOUR v. CUSTODIAN OF ISRAELI ABSENTEE PROPERTY.

Conflict of Laws—Contract—Proper law—New State—Whether change of proper law effected. Conflict of laws — Foreign legislation. Insurance — Claim — Unliquidated damages — Chose in Action. Company — Residence — Agency abroad. Residence. Evidence — Foreign law—Proof—No witnesses—Decision by judge on foreign enactments. Statute—Extraterritorial effect. "Is"—"Any person "who is . . ."—Effect of regulations. "Moveables"—Chose in action. "Damages"—Insurance claim.

By a policy of insurance dated November 21, 1947, issued by an English insurance company through their agents in Haifa, the company agreed to cover the plaintiffs against loss in respect of a garage owned by them at Haifa. In January, 1948, the garage was blown up during riots, the loss being covered by the policy. Shortly afterwards the plaintiffs left Haifa and went to reside in Egypt where they have remained ever since. In May, 1948, the British mandate in Palestine was terminated and the State of Israel was proclaimed.

By emergency regulations passed in December, 1948, a custodian of absentee properties was appointed and it was the duty of every person to deliver up to the custodian any property of an absentee which was under his control and if such property was a liability towards the absentee, such person was to discharge the liability to the custodian. "Absentee" was defined as any person who was the lawful owner of any property in the area of the regulations and who on and after November 29, 1947, was in, inter alia, Egypt. "Pro-"perty" was stated to include movables, moneys and a right to property.

From December 31, 1949, the insurance company ceased to accept new business in Israel and there was no evidence that the company's agents there had authority to conclude settlements without referring to the company. In 1950 the Absentee Property Law came into force and was in substantially the same terms as the regulations, and provided that the Law should be read as one with the regulations.

In an interpleader action between the plaintiffs and the custodian in which each party claimed to be entitled to the sum admittedly payable under the policy:—

Held, (1) that such an insurance claim was a claim for unliquidated damages; that, as a chose in action, it was situated where it was properly recoverable—where the debtor resided; that where a corporation resided in two or more countries a chose in action was properly recoverable from the corporation in the country where it was primarily payable; that, on the facts, the company, through its agents, resided in Haifa up to December 31, 1949, and that that was the primary place of payment according to the ordinary course of business; and that, accordingly, the chose in action was there situate.

(2) That the proper law of the contract was that of Palestine until the termination of the mandate and thereafter that of Israel, and not, as the plaintiffs contended, thereafter that of Palestine as at the termination of the mandate.

(3) That it was the lex situs, not the proper law, which could alter the title to debts and choses in action.

(4) That the chose in action was a "movable" within the meaning of the regulations, the Law of 1950, and as generally understood, and was therefore "property" within the meaning of the Law and the regulations.

(5) That the Law was confined to property situated in Israel, and if the custodian had to show that the chose in action was caught de novo by the Law, which, on a proper construction of the Law, he did

not, he would fail because it was not proved that the chose in action was situated in Israel at any time after the Law came into force; but that the Law, on its true construction, only continued the existing régime under the regulations with alterations.

(6) That accordingly the claim against the company had properly become vested in the custodian, and the plaintiffs failed.

The regulations and Law were measures of economic warfare analogous to the English legislation relating to the custodian of enemy property; neither the regulations nor the Law were confiscatory.

In re Munster [1920] 1 Ch. 268; 36 T.L.R. 173 applied.

INTERPLEADER ACTION.

The Yorkshire Insurance Co. Ld. eventually admitted liability under a policy of insurance, which was issued on November 21, 1947, at the insurance company's Haifa agency in favour of F. & K. Jabbour Brothers, to pay the sum of £5,039 4s. in respect of a loss which had occurred on January 18, 1948. There were rival claims to that sum, first, from F. & K. Jabbour Brothers, as the persons who were insured under the policy; secondly, from the Custodian of Absentee Property of the State of Israel, claiming to be entitled to receive that sum by virtue of Israeli Regulations of December, 1948, and an Israeli Law of March, 1950.

On January 11, 1952, an interpleader order was made, directing that the insurance company should pay into court the amount in dispute after deduction of its costs, and that an issue should be tried between F. & K. Jabbour as plaintiffs and the custodian as defendant. The net sum paid into court, after deduction of the insurance company's costs, was £4,962 19s. 9d.

At an early stage of the hearing it was decided that, on the admitted facts, the plaintiffs in the issue had a prima facie right to receive the amount in dispute and the burden of proof was on the defendant to establish his claim under the Israeli regulations and the Israeli Law.

It was admitted by the plaintiffs that at the time when the policy was effected the plaintiffs were in a part of Palestine which is now in the State of Israel, and that the application for the policy was made by or on behalf of the plaintiffs through the insurance company's agents and the grant of the policy was made by the company through their agents who were at the time in a part of Palestine which is now in the State of Israel.

On January 18, 1948, the plaintiffs' garage and workshop at Haifa were mined and blown up, and the contents to which the policy related were destroyed, the destruction being a loss covered by the policy.

On March 26, 1948, the plaintiffs left Haifa and went to Egypt, where they have resided ever since.

At midnight of May 14/15, 1948, the British Mandate in Palestine was terminated and the State of Israel was proclaimed. On December 2, 1948, the Israeli Minister of Finance made

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Emergency Regulations concerning Properties of Absentees, and on March 31, 1950, the Absentee Property Law came into force. By both the regulations and the Law, property of an absentee, as defined, became vested in the custodian.

The plaintiffs claimed a declaration that the sum in question was due from the insurance company to the plaintiffs under the policy. By his points of defence the custodian alleged that the policy was effected in the following circumstances: (*a*) the property in respect of which it was granted; (*b*) the plaintiffs; (*c*) the making of the application for the policy; (*d*) the agents of the insurers to which the application was made, and (*e*) the making of the agreement for and the granting of the policy by the insurers through their agents, was or were in a part of what was Palestine which is now in the territory of the State of Israel. It was claimed, therefore, that the policy was to be governed by the law of Palestine up to May 15, 1948, and subsequently by the law of Israel. Alternatively it was claimed that the local situation of any debt payable by the insurers under the policy was the part of Palestine which was now Israel. It was pleaded that the plaintiffs were at all material times "absentees" within the meaning of the regulations and the Law and that the sum due under the policy and the rights against the insurance company were vested in the defendant by virtue of those regulations and the Law.

John Megaw Q.C. and *I. C. Baillieu* for the plaintiffs.
Leonard Caplan for the custodian.

The cases referred to in argument appear in the judgment.

Cur. adv. vult.

Nov. 27. PEARSON J. read a judgment in which he stated the facts and continued: The plaintiffs' counsel, for the purpose of one aspect of the many-sided argument in this case, desired to contend that the regulations and the Law were confiscatory. The defendant's counsel objected that this point was not open to the plaintiffs because it had not been pleaded, but he also said that he would not object to an amendment of the points of reply to cover this point, if he were then allowed to plead and prove, for the purpose of showing that the Israeli legislation was analogous to trading-with-the-enemy legislation, that there had been a period of armed fighting followed by a period of uneasy relations between Israel and the Arab states.

The plaintiffs' counsel contended that no amendment of the points of reply was required, because it was for the defendant to prove that the regulations and Law were of such character as to be recognizable and enforceable by the courts of this country.

It appeared to me, and in effect I gave a ruling, that, in view of the attitude of the defendant's counsel, it was not necessary to have the question of pleading, and the burden of

proof argued and decided or for evidence to be called, because the broad facts of the relations between Israel and the Arab states were well known to everybody and could be judicially noticed, although evidence would be required if it were necessary to establish the dates of commencement and cessation of hostilities of the proper legal or diplomatic description of the relations at any time between Israel and the Arab states. At a later stage the defendant's counsel referred to *McQuaker* v. *Goddard*,[1] and for the purpose of clarifying and amplifying the judicial knowledge produced for inspection certain United Nations documents which supplied the dates and confirmed the facts which had been previously mentioned.

As questions will arise under the regulations and the Law as to whether the plaintiffs' claim against the insurance company, which according to the defendant's contention became vested in him, was "property" within the meaning of the relevant provisions, and whether it was a "mere right to claim "damages," it is necessary to consider the legal nature of the claim and what, if any, situation it had at the material times.

It is established by many decided cases that such a claim is a claim for unliquidated damages: *Grant* v. *Royal Exchange Assurance Co.*[2]; *Hardcastle* v. *Netherwood*[3]; *Castelli* v. *Boddington.*[4] (Assumption on a valued policy of marine insurance. Averment of partial loss by perils of the sea; breach; non-payment thereof.) *Luckie* v. *Bushby*[5]; *Lloyd* v. *Fleming*[6]; *Pellas* v. *Neptune Marine Insurance Co.*[7]; *Swan & Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co. and Croshaw*[8]; *Baker* v. *Adam*[9]; *William Pickersgill & Sons Ld.* v. *London and Provincial Marine and General Insurance Co. Ld.*[10]

Such a claim is unliquidated because the plaintiff has to prove the amount, and even after an adjustment of the amount the plaintiff (unless he chooses to sue on an account stated) must still prove the amount, using the adjustment as evidence because it involves an admission by the insurer, but such evidence might be rebutted, for instance, by proof of a mistake—*Luckie* v. *Bushby.*[11] But the word "damages" is puzzling and seems to be used in a rather unusual sense, because the right to indemnity arises, not by reason of any wrongful act or omission on the part of the insurer (who did not promise that the loss would not happen or that he would prevent it) but only under his promise to indemnify the insured in the event of a loss. The usual meaning of the word "damages" is as stated in Halsbury's Laws of England, 2nd ed., vol. 10, p. 82, where it is said: "Damages may be defined as the pecuniary compensation which

[1] [1940] 1 K.B. 687, 700; 56 T.L.R. 409; [1940] 1 All E.R. 471.
[2] (1816) 5 M. & S. 439.
[3] (1821) 5 B. & A. 93.
[4] (1852) 1 E. & B. 66.
[5] (1853) 13 C.B. 864.
[6] (1872) L.R. 7 Q.B. 299.
[7] (1879) 5 C.P.D. 34.
[8] [1907] 1 K.B. 116, 123; 23 T.L.R. 101.
[9] (1910) 15 Com.Cas. 227.
[10] [1912] 3 K.B. 614, 622; 28 T.L.R. 591.
[11] 13 C.B. 864.

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"the law awards to a person for the injury he has sustained by "reason of the act or default of another, whether such act or "default is a breach of contract or a tort; or, put more shortly, "damages are the recompense given by process of law to a "person for the wrong that another has done him."

On the other hand there is an interesting footnote in Mayne on Damages, 11th ed., p. 1. The first sentence of the text is: "Damages are the pecuniary satisfaction obtainable by success "in an action." The footnote states: "Mayne's definition was "intentionally wide to bring within the scope of his work actions "for the price of goods, amounts payable under policies of "insurance, dividends in bankruptcy and other cases where "money is recovered otherwise than as compensation for a "wrong. Lawyers generally distinguish, however, between debt "and damages. Where under a contract, instrument or statute "a person is entitled to a sum certain, either ascertained or "capable of being ascertained, the sum constitutes a debt and "can be recovered as such: but failure to pay a debt when "due is a wrong and an action may be framed either for the "debt or for damages."

The explanation of the use of the expression "unliquidated "damages" to describe a claim for an indemnity under an insurance policy may be wholly or partly afforded by the old form of pleading in assumpsit, alleging a breach by non-payment, as in *Castelli* v. *Boddington*.[12] But as the only wrong admitted by the insurer is his failure to pay a sum due under a contract, the amount of which has to be ascertained, he seems to be in much the same position as the person who owes and has failed to pay a reasonable price for goods sold and delivered or a reasonable remuneration for work done or services rendered. The claim is for unliquidated damages, but the word "damages" is used in a somewhat unusual sense.

The claim for indemnity under an insurance policy after a loss has occurred is not a proper subject for a garnishee order: *Randall* v. *Lithgow*[13]; *Israelson* v. *Dawson* (*Port of Manchester Insurance Co. Ld. Garnishees*),[14] where Scrutton L.J. said[15]: "I "have come to the conclusion that as between assured and "underwriter there is no debt. There may be a breach of "contract or an obligation to indemnify, but there is nothing "which can be called a debt or an indebtedness within the "meaning of Ord. 45, r. 1." But such a claim for indemnity is a chose in action which can be assigned. *Lloyd* v. *Fleming*[16] and *Swan's* case[17]; *Green* v. *Brand*[18]; *English and Scottish Mercantile Investment Co.* v. *Brunton*[19]; *Bank of Toronto* v. *St. Lawrence Fire Insurance Co.*[20]; *A. S. Tallina* v. *Estonian*

[12] 1 E. & B. 66.
[13] (1884) 12 Q.B.D. 525.
[14] [1933] 1 K.B. 301.
[15] Ibid. 304.
[16] L.R. 7 Q.B. 299.
[17] [1907] 1 K.B. 116.
[18] (1884) Cab. & El. 410; 1 T.L.R. 79.
[19] [1892] 2 Q.B. 700; 8 T.L.R. 772.
[20] [1903] A.C. 59.

State Steamship Line[21]; Halsbury's Laws of England, 2nd ed., vol. 18, p. 495, note (*g*).

Reference was made to condition No. 14 of the policy, giving the insurance company an option to reinstate, and to condition No. 11, requiring the insured to give due notice of his claim with proper particulars, and afterwards to give all such further particulars and documents and information as might be reasonably required by or on behalf of the insurance company, and, providing that "no claim under this policy shall be possible "unless the terms of this condition have been complied with." But the correspondence in this case from July 7, 1948, to December 22, 1949, shows (1) that the insurance company never suggested that they wished to exercise their option to reinstate the property, and they impliedly elected not to do so; (2) that the plaintiffs reported the loss to the insurance company's Haifa agent on the day of the loss, and a survey report was prepared after their expert had visited the site and was forwarded to head office in England, and the insurance company never asked for any further particulars or documents or information, and the amount of the indemnity was agreed between the plaintiffs and the insurance company by letters of March 29, October 18 and November 11, 1949. Under condition 11 the right to be indemnified by a payment of money must accrue at some time and, in my judgment, it had accrued at any rate by November 11, 1949, if not by some earlier date.

Next to be considered is the situation of the chose in action. It is established by the decided cases that not only debts, but also other choses in action, are for legal purposes localized and are situated where they are properly recoverable and are properly recoverable where the debtor resides: *Commissioner of Stamps* v. *Hope*[22]; *In re Maudslay, Sons & Field*[23]; *Rex* v. *Lovitt*[24]; *Favorke* v. *Steinkopff*[25]; *Swiss Bank Corporation* v. *Boehmische Industrial Bank*[26]; *New York Life Assurance Co.* v. *Public Trustee*[27]; *Sedgwick Collins & Co.* v. *Rossia Insurance Co. of Petrograd*[28]; *England, Scottish and Australian Bank Ld.* v. *Inland Revenue Commissioners*[29]; *Sutherland* v. *Administrator of German Property*,[30] where the claim was against English shipowners for damages for breach of contract or in tort, and it was held to be a chose in action situated in England. The *Tallina* case,[31] where the claim was for payment under an English policy of marine insurance and was considered to be a chose in

[21] (1947) 80 Ll.L.Rep. 99, 111, 113, 114.
[22] [1891] A.C. 476, 481.
[23] [1900] Ch. 602, 609; 16 T.L.R. 228.
[24] [1912] A.C. 212, 218; 28 T.L.R. 41.
[25] [1922] 1 Ch. 174, 178.
[26] [1923] 1 K.B. 673, 678, 681, 682, 684; 39 T.L.R. 179.
[27] [1924] 2 Ch. 101; 40 T.L.R. 430.
[28] [1926] 1 K.B. 1, 15; 41 T.L.R. 663.
[29] [1932] A.C. 238, 243, 246, 248, 252, 256, 258; 48 T.L.R. 170.
[30] [1934] 1 K.B. 423; 50 T.L.R. 107.
[31] 80 Ll.L.Rep. 99.

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action situated in England: *In re Banque des Marchands de Moscou.*[32]

A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval: *Saccharin Corporation Ld.* v. *Chemische Fabrik Von Heyden Aktiengesellschaft*[33]; *Okura & Co. Ld.* v. *Forsbacka Jernverks Aktiebolag*[34]; *Thames and Mersey Marine Insurance Co.* v. *Societa di Navigazione A Vapore Del Lloyd Austriaco.*[35]

On the facts I hold that the insurance company is proved to have had a residence in Haifa up to December 31, 1949, but is not proved either to have had or not to have had a residence there after that date.

Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and therefore situated, in that one of those countries where the sum payable is primarily payable, and that is where it is required to be paid by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of business; *Rex* v. *Lovitt*[36]; *New York Life Insurance Company* v. *Public Trustee.*[37]

On the evidence in this case the insurance policy was issued in Palestine at the Haifa agency and was in respect of property situated in Haifa, and there was an option for the insurance company to reinstate the property and the sum to be paid was not to exceed a sum stated in Palestine currency, and any claim under such a policy would, according to the insurance company's ordinary course of business, have been settled by a payment at the Haifa agency. When all these facts are taken into account it may be that there should be read into the policy an implied term that payment should be made in Palestine currency as currency and, therefore, in Palestine, being the only country in which that currency is legal tender.

If there is no such term of the policy, still the natural and primary place of payment according to the ordinary course of business and the inferred expectations of the parties when the policy was issued is Haifa. I hold that the chose in action was properly recoverable, and therefore, situated in Haifa up to December 31, 1949, but its situation after that date is uncertain.

The defendant relies upon the regulations of December, 1948, and the Law of March, 1950. The defendant's notice to admit facts, dated October 3, 1952, set out, inter alia, the following facts: "(1) That the document entitled the Law and Administration

[32] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[33] [1911] 2 K.B. 516, 522, 524, 526.

[34] [1914] 1 K.B. 715, 724; 30 T.L.R. 242.

[35] (1914) 30 T.L.R. 475.

[36] [1912] A.C. 212; 28 T.L.R. 41.

[37] [1924] 2 Ch. 101; 40 T.L.R. 430.

"Ordinance 5708–1948 Emergency Regulations Concerning Pro-"perties of Absentees, attached to this notice with annexed "copy certificate by Haim Herman Cohn, then Attorney-"General of Israel, and dated October 18, 1950, is a true and "accurate translation from the Hebrew language of a law passed "by the competent legislative authority of Israel. (2) That the "said law was a valid and effectual part of the law of Israel "from December 2, 1948, until March 31, 1950. (3) That the "document entitled the Absentees' Property Law 5710–1950, "attached to this notice with annexed copy certificate by Haim "Herman Cohn, then Attorney-General of Israel, and dated "December 13, 1950, is a true and accurate translation from the "Hebrew language of a law passed by the competent legislative "authority of Israel. (4) That the said law is and has been a "valid effectual part of the law of Israel since March 31, 1950."

It was assumed and expressly or impliedly agreed by counsel for both parties at the hearing and should be taken as established, that all the facts Nos. 1 to 4 are admitted, and, therefore, that the regulations were a valid and effectual part of the law of Israel from December 2, 1948, to March 31, 1950, and that the law has been a valid and effectual part of the law of Israel since March 31, 1950, and that the translations supplied are true and accurate.

No witness was called to give expert evidence of Israeli law. The plaintiffs' counsel did not raise any objection on that ground, or contend that the defendant necessarily failed to prove his case by reason only of no such witness having been called. When I asked what the position was in that respect, I understood that both counsel on behalf of the parties desired that the regulations and the law should be construed and applied without expert assistance, and it was their view or submission that that course could properly be taken. I have thought it right to verify that by reference to the authorities, and for that purpose have considered the following: *Concha* v. *Murrieta* [38]; *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* [39]; *Princess Paly Olga* v. *Weisz* [40]; *Lazard Brothers & Co.* v. *Midland Bank Ld.*[41]; *De Beeche* v. *South American Stores Ld.*[42]; *In re Cohn* [43]; *The Tallina* case,[44] at pp. 107, 113 and 116, and Dicey on Conflict of Laws, 6th ed., at pp. 73 and 868.

I think it does appear from the reports of *In re Cohn* [45] that in that case Uthwatt J. construed and applied a provision of the German Code without having had any oral evidence of German law, and if that is so it affords a precedent for this case. Also there is a passage in Dicey on Conflict of Laws, p. 868,

[38] (1889) 40 Ch.D. 543, 550, 554.

[39] [1923] 2 K.B. 630, 643; reversed on appeal [1925] A.C. 112; 40 T.L.R. 837.

[40] [1929] 1 K.B. 718.

[41] [1933] A.C. 289, 298; 49 T.L.R. 94.

[42] [1935] A.C. 148, 158; 51 T.L.R. 189.

[43] [1945] 1 Ch. 5.

[44] 80 Ll.L.Rep. 99, 107, 113, 116.

[45] [1945] 1 Ch. 5.

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where it is said: "How far can judges examine foreign laws "for themselves? On this point it is impossible to lay down any "absolute rule, the courts wisely having avoided any pronounce-"ment which might unduly fetter their discretion. They "recognize as obvious the impossibility in normal cases of judges "forming any useful opinion on foreign law except on the basis "of expert evidence, but by a prudent exercise of common-"sense they have shown themselves willing to waive proof by "experts where such is manifestly unnecessary, as, for instance, "on points which must be formally proved, but need really no "expert testimony, which may be costly or difficult to procure."

In the circumstances I think it right in accordance with the wishes of the parties to face the task of construing and applying the regulations and the Law without the assistance of an expert in Israeli law and subject also to the disadvantage that the documents which I have to construe and apply are translations from the original Hebrew text.

I did not feel entitled or qualified to look through volumes of Palestine or Israeli ordinances or statutes or law reports as they were not in evidence and I would not know which of the ordinances or statutes were still in force or which of the reported decisions were still good law at any material time. It must be assumed that the Israeli rules of construction are the same as the English rules of construction.

On December 2, 1948, the Israeli Minister of Finance, by virtue of his powers conferred on him by section 9 (*a*) of the Law and Administration Ordinance 5708—1948, made the Emergency Regulations and these regulations remained in force until March, 1950. I must first refer to the word "absentee," which is defined in regulation 1. "In these Regulations (*a*) 'absentee' "means—(1) any person who is a lawful owner of any property "which is in the area of these regulations or enjoys or holds it, "whether by himself or through some other person, and who, "on the 16th Kislev, 5708 (November 29, 1947) or thereafter—"(*a*) was a citizen or subject of the Lebanon, Egypt, Syria, "Saudia, Trans-Jordan, Iraq or the Yemen, or (*b*) was in any "one of the above-mentioned countries or in any part of Palestine "outside the area of these regulations."

In my opinion the word "is" at the beginning of that definition in the words "any person who is a lawful owner of "any property which is in the area of these regulations" means at any time when the regulations are in force. At some time in or before November, 1949, as I have already held, the plaintiffs' claim became a chose in action and it was situate within the area of the regulations as defined in paragraph (1) of regulation 1, that is to say, the area within which the law of the State of Israel applies. It is not proved that the plaintiffs had any other property in the area of the regulations at any time in the period, beginning, presumably, on December 2, 1948, when the regulations were in force. The plaintiffs were in Egypt from about

March, 1948, onwards. Therefore, they fall within the definition of "absentee" if, and only if, the chose in action was "property" within the meaning of these regulations.

Paragraph (*c*) of regulation 1 provides that "property" includes immovables and movables, moneys, a right in property, whether immediate or contingent, and goodwill. Although in each of the other paragraphs of this regulation the word "means" is used, so that there is a definition, in paragraph (*c*) the word used is "includes," and it seems to follow that the provision in paragraph (*c*) is not intended to be a definition, or at any rate not a complete definition.

I should have thought "moneys" would be "movables," and yet they are both mentioned. It looks as if the draftsman was trying to make sure of covering particular types of property, as to which there might be a doubt, rather than to give an exact and comprehensive definition. Mr. Megaw for the plaintiffs argued that, because "moneys" and "a right in property" (whatever that may be) and "goodwill" are specifically mentioned, the word "movables" should be given a restricted meaning, confined to physical movables or chattels. The word "movables" is not, so to speak, indigenous to English law, which has its own native distinction between real property and personal property, but the word "movables" has become known in English law through private international law, and normally is used to include both "tangible movables," such as chattels, and "intangible movables," such as choses in action: *In re Maudslay, Sons* v. *Field*[46]; *In re Hoyles*[47]; Dicey's Conflict of Laws, 6th ed., pp. 557–8; Cheshire on Private International Law, pp. 426–7; Martin Wolff on Private International Law, 2nd ed., p. 502.

It is inherently improbable that regulations of this character would intend to leave unaffected a class of property so obvious and so important as debts and choses in action, but there are two other regulations which seem decisive on this question. Regulation 7 provides that: "It shall be the duty of every person "to deliver up to the custodian any property of an absentee "which is under his control; and if such property is a liability "or undertaking towards the absentee, such person shall dis-"charge such liability to the custodian or carry out such "undertaking towards him."

There is also regulation 22 (*a*) (2), which provides: "No "person shall pay to any person other than the custodian a debt "or fulfil an obligation which are vested property, without the "consent in writing of the custodian whether before or after the "act; if the Minister of Finance published an order in the "Official Gazette requiring such consent before the act, thence-"forth any consent of the custodian after the act shall be "invalid."

[46] [1900] 1 Ch. 602, 609, 610; 16 T.L.R. 228.

[47] [1911] 1 Ch. 179, 183; 27 T.L.R. 131.

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Having regard to the ordinary scope of the word "movables" and to the inherent improbability that debts and choses in action would be left unaffected by such regulations, and to the language of regulation 7 and regulation 22 (*a*) (2), I hold, after taking into account Mr. Megaw's argument, that the chose in action—the claim against the insurance company—was a "movable" and therefore "property" for the purposes of the regulations. [His Lordship referred to further provisions in the regulations and continued:] I hold that under these regulations the chose in action—the claim against the insurance company—became vested in the custodian. But it now remains to consider, inter alia, whether there is any alteration of that position by virtue of the Law of 1950. The Law of 1950 provides, by section 37: "The provisions of the Law shall replace the provisions of the "Emergency Regulations concerning Properties of Absentees, "5709–1948, as from the 13th day of Nisan 5710 (March 31, "1950); but this Law shall be read as one with those regulations, "and for this purpose, those regulations shall be deemed to be a "law which has been amended by this Law." Then section 38 provides: "Any act done before the 13th day of Nisan 5710 "(March 31, 1950), which would have been validly done if, at "the time it was done, this Law as it stands on the 13th day "of Nisan, 5710 (March 31, 1950), had been in force, shall be "deemed to have been validly done."

Comparison of the Law with the regulations shows that the general effect is substantially the same, the same matters being dealt with and on similar grounds, though there are many changes of wording and details. [His Lordship referred to various sections of the Law, held that the chose in action was "property" within the meaning of the Law and continued:]

The next question is whether the Law in general applies to property situated anywhere in the world, or only to property situated in Israel. First, there is a rule that legislation should be construed as applying only within its proper territorial limits, unless the contrary intention appears. Maxwell on Statutes, 10th ed., p. 144; *Bank Voor Handel En Scheepvaart N.V.* v. *Slatford*[48]; *Attorney-General* v. *Campbell*[49]; *Colquhoun* v. *Brooks*[50]; *Regina* v. *Jameson*[51]; *Tomalin* v. *Pearson.*[52]

Secondly, in view of the definition of "absentee," absurd results would follow if the vesting was in general applied to property outside Israel. Suppose that a person living in Egypt has £10,000 worth of property in Egypt, £10,000 worth of property in America and £10,000 worth of property in Australia, and suppose that he paid a short visit to Palestine or Israel at any time after November 29, 1947, taking (as he must) some personal property with him. Then all the property held by him

[48] [1953] 1 Q.B. 248, 258.
[49] (1872) L.R. 5 H.L. 524, 531.
[50] (1889) 14 App.Cas. 493, 503, 511.
[51] [1896] 2 Q.B. 425; 12 T.L.R. 551.
[52] [1909] 2 K.B. 61, 64; 25 T.L.R. 477.

in Egypt, America and Australia would vest in the custodian and became subject to all the provisions of the Law. That unreasonable result is, of course, not conclusive, because excessive width of legislation can be rectified by administrative action in this case by the custodian releasing the property. But that example is only an illustration of the many difficulties that would arise.

Thirdly, the provisions of a number of the sections indicate an intention to deal only with property situated in Palestine, at any rate so far as immovable property is concerned.

Fourthly, the evident scope of the Law considered as a whole is to regulate ownership of and dealings with property in Israel of persons who are absentees as defined. I hold that in general, subject to some possible exceptions, the Law does not apply to property situated outside Israel.

A further point is that, even if the Law upon its true construction purported to apply to property situated anywhere in the world, the courts of this country would refuse to recognize it as having such a wide operation or, in general, as applying to property situated outside Israel: *The Tallina* case.[53]

Accordingly, if the defendant had to show that the chose in action was, so to speak, caught de novo by the Law of 1950, he would fail to do so, because it is not proved that the chose in action was situated in Israel at any time after the Law came into force. But the next question is whether the defendant does have to show that the chose in action was caught de novo by the Law of 1950. Section 37 of the Law is important and needs careful consideration: "The provisions of the Law shall replace "the provisions of the Emergency Regulations concerning "Properties of Absentees, 5709–1948, as from the 13th day of "Nisan 5710 (March 31, 1950); but this Law shall be read as "one with those regulations, and for this purpose, those regula-"tions shall be deemed to be a law which has been amended "by this Law."

This section is entirely dealing with and is the only provision dealing with the matter of transition from the regulations to the Law. In my opinion the words "this Law shall be read as one "with those regulations," taken in their context, do not merely provide a canon of construction, but also provide a continuity of the régime. The next words are: "and for this purpose these "regulations shall be deemed to be a law which has been "amended by this Law." Therefore, the régime under the regulations does not perish but continues subject to the amendments introduced by the Law. The Law does not create a new régime starting again from the beginning; it continues with alterations on an existing régime. That interpretation of section 37 is supported by a comparison of the provisions of the regulations with the provisions of the Law, showing that in substance the Law does not abolish or radically alter the system set up by the regulations but only makes minor alterations in it.

[53] 80 Ll.L.Rep. 99.

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It follows, in my opinion, that the provision for continued vesting, contained in regulation 5 (d)* of the regulations and carried on with only minor alterations by section 4 (c) of the Law,† has the effect of keeping the chose in action continuously vested in the custodian notwithstanding the replacement of the regulations by the Law. That is a proper extra-territorial operation of the Law. Personal property, which has become vested in a State department, or official of some country by legislation of that country, while the property was situated in that country, does not cease to be so vested by reason of its subsequent removal to another country. *Princess Paley Olga* v. *Weisz*.[54] I should add that in the present case it is not proved that the chose in action had ceased to be situated in Israel by March 31, 1950, or at any time.

I therefore hold that the defendant succeeds in this issue, because the chose in action became vested in the defendant under the Regulations of 1948 and remained vested in the defendant under the Law of 1950.

It is right, however, to say something about a contention of Mr. Caplan, to which much argument was directed on both sides, because if Mr. Caplan's contention is correct the case should be decided in his favour on a different ground. He contended that the law by which a debt or chose in action can properly be affected (whether by discharge or modification or transfer of the right) is the proper law of the contract, rather than the lex situs. Mr. Megaw contended, inter alia, that the only law by which a debt or chose in action can properly be so affected is the lex situs.

The problem arises because a debt or chose in action can be regarded in two ways: (1) it can be regarded as properly movable property, and when so regarded it naturally falls under the lex situs; (2) it can be regarded as a still unperformed obligation under a contract, and therefore it might be still subject to the proper law of the contract and liable to be discharged or altered by that law. A legislative provision that a debt or a chose in action owing to A shall be discharged by payment to B could be regarded either as involving a transfer of the ownership of the property from A to B, or as an alteration of the contractual obligation by substituting B for A and as the obligee.

I am inclined to think that there is a short answer to Mr. Caplan's contention in this case. The Israeli Law of 1950 is, on the face of it, a law dealing with property and not with contract, and therefore it should be construed as applying only

* Regulation 5 (*d*): "Vested property—(1) shall remain vested property so long as it has not become relinquished property under Regulation 30 or released property under Regulation 29; (2) the Custodian shall be entitled to receive it wherever he may find it."

† S. 4 (*c*): "Vested property—(1) shall remain vested property so long as it has not become released property under section 28 or ceased to be the property of an absentee under section 27; (2) may be taken over by the Custodian wherever he may find it."

[54] [1929] 1 K.B. 718.

within those territorial limits which are appropriate to property legislation. Accordingly, an initial vesting under that law could only be of a property situated in Israel, and if Mr. Caplan had to show that this chose in action was caught de novo by the Law of 1950, he would fail to do so for want of proof that the chose in action was situated in Israel at or after the time when the Law came into force.

I have, however, considered more generally the authorities relied on by Mr. Caplan and Mr. Megaw in support of their respective contentions. I will take first the principal authorities on Mr. Caplan's side. In the early cases to which he referred either no distinction or no clear distinction was drawn between the proper law and the lex situs, the distinction being avoided by the use of such phrases as "a debt or liability arising in any country." On this point, the beginning of Lord Ellenborough's judgment in *Potter* v. *Brown* [55] should be compared with the latter part of his judgment, and with the judgment of Lawrence J. in the same case. In *Ellis* v. *M'Henry* [56] the judgment of the court, which comprised Bovill C.J., Willes, Keating and Brett JJ., was delivered by Bovill C.J. Referring to certain previous authorities he said [57]: "In the first place there is no "doubt that a debt or liability arising in any country may be "discharged by the laws of that country, and that such a dis-"charge, if it extinguishes the debt or liability, and does not "merely interfere with the remedies or course of procedure to "enforce it, will be an effectual answer to the claim, not only in "the courts of that country, but in every other country. This "is the law of England, and is a principle of private international "law adopted in other countries. It was laid down by Lord "King, in *Burrows* v. *Jemino*"[58]; by Lord Mansfield in *Ballan-"tine* v. *Golding* [59]; by Lord Ellenborough in *Potter* v. *Brown* [60]; "by the Privy Council, in *Odwin* v. *Forbes*,[61] and in *Quelin* v. "*Moisson* [62]; and by the Court of Queen's Bench in the case of "*Gardiner* v. *Houghton* [63] and by the Court of Exchequer "Chamber, in the elaborate judgment delivered by my brother "Willes, in *Phillips* v. *Eyre*." [64]

But there is also a passage where he said [65]: "There are nice "distinctions which may sometimes arise where, though a con-"tract is made in one country, it is to be performed or to take "effect in another; or is made under circumstances which show "that it is intended to be subject to some law other than that "of the place in which it was made; *Lloyd* v. *Guibert*.[66] But "no such point arises in these cases, as the contracts out of

[55] (1804) 5 East 124.
[56] (1871) L.R. 6 C.P. 228.
[57] Ibid. 234.
[58] (1726) 2 Str. 733.
[59] (1784) 1 Cooke's Bankruptcy Laws, 8th ed., p. 487.
[60] 5 East 124.
[61] Buck 57.
[62] (1828) 1 Knapp 265.
[63] (1862) 2 B. & S. 743.
[64] (1869) L.R. 4 Q.B. 225.
[65] L.R. 6 C.P. 237.
[66] 6 B. & S. 100.

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"which these debts arose were both made and to be performed "in Upper Canada."

In *Perry* v. *Equitable Life Assurance Society of the United States of America*[67] the plaintiff had, in May, 1903, taken out a 20-year endowment life assurance policy for 10,000 roubles, which were payable at the defendants' office in St. Petersburg, and the terms of an imperial decree provided that all disputes which might arise in connection with the assurance operations carried on by the defendants in Russia should be settled according to the Russian laws and in the Russian courts of justice. On November 18, 1919, the Soviet Government issued a Decree of Cancellation of which the material provisions were: "(1) Life assurance "in all its forms in the R.S.F.S.R. shall be abolished; (2) all "contracts entered into with insurance companies and savings "banks for the purpose of life insurance are annulled; (3) all "insurance premiums shall be transferred to the revenue of the "Treasury." Branson J. said[68]: "The first question is what is "the proper law of the contract. In my opinion there is no "doubt about the answer. The proper law of the contract is the "law of Russia. This appears plainly from condition 7." Later he said[69]: "The proper law of the contract being Russian, the "next question, which is one of fact, to be decided upon the "evidence, is what has been the effect of the Soviet legislation "upon the contract." After considering the evidence as to Russian law, he said[70]: "Upon these grounds I accept the "evidence as to Russian law of Professor Sack and Mr. Konkie-"vitch, and find, in accordance with it, that the contract "between the plaintiff and the defendants was annulled "by the Cancellation Decree, if, indeed, there was any con-"tractual nexus left in existence between them after the "Monopolisation Decree came into force in December, 1918, "and the plaintiff cannot recover upon it."

That is a clear decision that a contract can be annulled, the contractual nexus between the parties can be dissolved, by legislation of the country whose law is the proper law of the contract. It is to be observed, however, that as no payment would have become due under the policy before the year 1923, and the contract was annulled in 1919, if not earlier, no chose in action had arisen, so there was nothing to which any lex situs could apply.

In *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft*[71] the headnote reads: "In 1917 the "British Government made an offer in New York of 5½ per cent. "secured loan convertible gold notes, the principal and interest "of which and of the bonds into which they might be converted "were to be payable, without deduction for British taxes, in "New York in United States gold coin, or, at the option of

[67] (1929) 45 T.L.R. 468.
[68] Ibid. 470.
[69] Ibid.
[70] Ibid. 473.
[71] [1937] A.C. 500; [1937] 2 All E.R. 164.

"the holder, in London, in sterling at the fixed rate of 4·86½ "dollars to the pound. The offer was made 'subject to the "'approval by our counsel of necessary formalities.' The "respondents were the holders of a bond, in exchange for a Note, "by which the British Government promised to pay one "thousand dollars on February 1, 1937, either in New York, "at the office or agency to be maintained there by them, in gold "coin of the United States of the standard of weight and fineness "existing in February, 1917, or in London in sterling money at "the fixed rate of 4·86½ dollars to the pound. The payment "was to be made without deduction for any British taxes. In "1933 by a joint resolution of the Congress of the United States, "which it was admitted had the force of law, it was provided "that every provision contained in any obligation which pur-"ported to give the obligee a right to require payment in gold "or a particular kind of coin or currency, or in an amount in "money of the United States measured thereby, was against "public policy, and that any such obligation should be discharged "upon payment, dollar for dollar, in any coin or currency which "at the time of payment was legal tender for public or private "debts. On a petition of right by the respondents claiming "that they were entitled to be paid such a sum in dollars as "would equal in value the number of dollars of the standard "specified in the bond—namely, of the weight and fineness "which was prescribed by the law of the United States existing "in February, 1917:—*Held*, (1) that a consideration of all the "circumstances relating to the offer of the loan—the fact that "the notes were issued in the first instance in the United States, "were expressed to be in terms of United States currency, and "were to be paid on one option in New York on a value estimated "by reference to United States coins—pointed to the law of the "United States being the proper law of the contract; and (2) "that the joint resolution of Congress had the statutory effect "of requiring the bond to be discharged upon payment of dollar "for dollar of the nominal amount."

That shows that the obligation under a bond could before its maturity be converted by legislation of the country of the proper law from what may be called a "piece of gold" obligation into what may be called a "simple currency" obligation. But that case was concerned, solely or at any rate primarily, with debts falling due after the date of the legislation, and does not show what effect, if any, such legislation would be allowed to have on debts already accrued before the coming into force of the legislation.

In *Kahler* v. *Midland Bank Ld.*[72] the assumed facts were that the securities were held by a London bank to the order of a Czechoslovakian bank, and the owner had no contractual relation with the London bank, but had a contract of bailment with the Czechoslovakian bank. The contract of bailment was made in

[72] [1950] A.C. 24; 65 T.L.R. 663; [1949] 2 All E.R. 621.

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Czechoslovakia and its proper law was Czechoslovakian law; at the time of the contract and at all times thereafter a system of exchange control was in force in Czechoslovakia, and the effect of that was that by Czechoslovakian law the owner never became entitled to take possession of the securities, because the consent of the National Bank of Czechoslovakia was required and not obtained; therefore, the owner never had a right to take possession of the securities and his claim in detinue against the London bank failed. That case does not deal with the position which would have arisen if the owner had at one time had under his contract a right to take immediate possession of the securities in England and supervening Czechoslovakian legislation had purported to deprive him of that right.

There is also *Lorentzen* v. *Lydden & Co. Ld.*,[73] but the decision in that case appears to have been based mainly on the consideration of public policy referred to on pp. 215–216 of the report.

On the other side there are a number of authorities which tend to show that only the lex situs can alter the title to debts and choses in action. *In re Maudsley, Sons & Field*[74]; *Lecouturier* v. *Rey*[75]; *Swiss Bank Corporation* v. *Boehmische Industrial Bank*[76]; *New York Life Insurance Co.* v. *Public Trustee*[77]; *Sedgwick Collins & Co. Ld.* v. *Rossia Insurance Co. of Petrograd*,[78] *per* Sargent L.J.; the same case in the House of Lords, reported as *Employers' Liability Assurance Corporation* v. *Sedgwick Collins & Co.*[79]; *In re Russian Bank for Foreign Trade*[80]; *Sutherland* v. *Administration of German Property*[81]; *The El Condado*[82]; *A.G. Der Manufacturen I.A. Woronin Leutschig* v. *Frederick Huth & Co.*[83]; *In re Banque des Marchands de Moscou*[84]; the *Slatford* case,[85] *per* Devlin J., not following *Lorentzen* v. *Lydden & Co. Ld.*[86]

Evidently, there is a considerable weight of authority in favour of the view that only the lex situs can alter the title to debts and choses in action, and the authorities cited to prove the contrary proposition do not seem to have that effect. On principle, there is the consideration that, if the action to recover a debt or chose in action is brought in the country where it is properly recoverable and therefore situated, and if there is a conflict between the lex situs and the proper law (the one having legislation which vests the debt or chose in action in A and the

[73] [1942] 2 K.B. 202; 58 T.L.R. 178.
[74] [1900] 1 Ch. 602; 16 T.L.R. 228.
[75] [1910] A.C. 262; 26 T.L.R. 368.
[76] [1923] 1 K.B. 673; 39 T.L.R. 179.
[77] [1924] 2 Ch. 101.
[78] [1926] 1 K.B. 1, 50; 41 T.L.R. 663.
[79] [1927] A.C. 95, 104, 117, 125; 42 T.L.R. 749.
[80] [1933] Ch. 745, 766; 49 T.L.R. 253.
[81] [1934] 1 K.B. 423, 430, 433; 50 T.L.R. 107.
[82] (1939) 63 Ll.L.Rep. 330, 334, 341.
[83] (1946) 79 Ll.L.Rep. 262, 266.
[84] [1952] 1 T.L.R. 739, 741–744.
[85] [1953] 1 Q.B. 248, 257–261.
[86] [1942] 2 K.B. 202.

other having legislation which vests the debt or chose in action in B), the court trying the action will be bound to apply its own law which is the lex situs. I am unable to accept Mr. Caplan's contention on this part of the argument.

On the question as to what has been and is the proper law of the insurance contract, Mr. Caplan contended that it has been and is the law in force from time to time, that is to say, the law of the mandated territory in Palestine up to the date of termination of the mandate and thereafter the law of Israel. Mr. Megaw contended that the proper law of the insurance contract was from the beginning and still is the law of the mandated territory of Palestine, and since the termination of the mandate it is that law as existing at the date of termination. In support, or partial support, of this contention, Mr. Megaw cited a decision of a German court referred to in Wolff on Private International Law, 2nd ed., p. 425, and *In re Fried Krupp Actien-Gesellschaft.*[87]

On the other side, Mr. Caplan cited: *In re Chesterman's Trusts*,[88] and *Banco de Bilbao* v. *Sancha.*[89] The proper law is normally at any rate considered to be the law of a place, e.g., lex loci contractus or the lex loci solutionis, and I think Mr. Caplan's contention is the orthodox view and should prevail.

Finally, there was some argument on the question whether the regulations and the Law either of them should be considered to be confiscatory. As the regulations and the Law are evidently measures of economic warfare, and analogous to the English legislation and orders relating to the Custodian of Enemy Property, I would say on the authority of *In re Munster*[90] that they are not confiscatory. That is on the assumption that according to their true construction their operation is in general at least confined within proper territorial limits. If they should be construed as applying universally or to a large extent to property in any part of the world, possibly a different view could be taken, but the refusal of recognition of courts in other countries might be based on the supposed extra-territorial operation rather than on any confiscatory character. It is not necessary for the purposes of this case to attempt the not easy task of ascertaining from the decided cases what is the meaning or test of "confiscatory" legislation, or what difference confiscatory character makes to its operation in other countries.

My decision, therefore, is in favour of the custodian on this issue. His claim is for a declaration that the sum of £5,039 4s. due from the insurance company under the said policy is due to the defendant. I think he should have that declaration.

Declaration accordingly with costs.

Solicitors: *Stoneham & Sons; Herbert Oppenheimer, Nathan & Vandyk.*

J. D. P.

[87] [1917] 2 Ch. 188, 193.
[88] [1923] 2 Ch. 466, 478.
[89] [1938] 2 K.B. 176, 195; 54 T.L.R. 603.
[90] [1920] 1 Ch. 268.

[COURT OF APPEAL.]

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Dec. 8, 9, 10, 11.

Singleton, Birkett and Hodson L.JJ.

* PATRICK (INSPECTOR OF TAXES) *v.* BROADSTONE MILLS LD.

Revenue—Income tax—Profits of trade—Stock in hand—Accountancy—Cotton spinners—Base stock system of accounting—Cotton stocks omitted from trading account or included at arbitrary figure—Method not appropriate for income tax purposes—Valuation of stock at cost or market price—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

Revenue—Case stated—Findings of fact—Insufficient to "accept" evidence.

A cotton spinning company had for many years consistently employed for all purposes a system of accounting known as the base stock system. Under it the raw cotton actually on the machines (fixed process stock) appeared in the balance sheet but did not appear in the trading account at all, while an agreed weight of the cotton standing by the machines (spare process stock) was included in the trading account at a fixed or arbitrary figure. At a period when the price of cotton was rising considerably, the company was assessed to income tax for the year 1948–49 on the basis that all the fixed and spare process stock was brought into the trading account at a price representing the cost of the raw cotton plus the cost of processing it.

The company appealed against that assessment to the Special Commissioners, who found that the base stock method was one of the methods recognized in the trade and was, as a method for computing profits, in accordance with sound commercial practice; and they allowed the appeal. On appeal by the Crown by case stated, Vaisey J. held that the method was not appropriate for assessment to income tax, since it did not afford a true picture of the profits in any one year of charge. On appeal by the company:—

Held, on an analysis of the results, that the finding at which the Commissioners must be taken to have arrived, to the effect that the base stock method was appropriate for assessment to income tax, was wrong in law, since under that method the raw cotton was not treated as stock to be valued for income tax purposes at the beginning and end of the relevant accounting year at either cost or market price, whichever was the lower, and the profits from the trade for the year of assessment were thus not correctly shown.

Per Singleton L.J. In the case stated the Special Commissioners said that they "accepted" the evidence of all the expert witnesses, though that evidence was an expression of conflicting views. The Special Commissioners, as the tribunal of fact, should state their findings of fact clearly and not leave it to the court to deduce them from a study of the evidence.

Decision of Vaisey J. affirmed.

APPEAL from Vaisey J.

[The facts, briefly summarized below, are fully set out in the judgment of Singleton L.J.]

The taxpayers were a company of cotton spinners at Stockport, incorporated in 1920, when it took over as a going concern the business carried on since 1904 by Broadstone Spinning Co.

Ld. The company owned two mills in which cotton was processed into yarn, the average time taken for the raw cotton to pass through the mill and emerge as saleable yarn being approximately six to eight weeks.

The company had always adopted a system of accounting, known as the "base stock system" and used for nearly 50 years, by which the cotton on the machines, known as fixed process stock, and an agreed weight of the cotton which at all times stood beside the machines, known as spare process stock, were not shown in the trading account at cost or market value, but were either omitted (in the case of the fixed process stock) or included at a fixed and arbitrary figure, the company contending that the cotton clothing the machines was best treated as part of the machines, without which they could not function.

At a period when the cost of cotton was rising considerably, the company was assessed to income tax for the year 1948–49 under Case I of Sch. D of the Income Tax Act, 1918, in the sum of £27,000, and an additional assessment for the same year in the sum of £19,218 less £11,853 capital allowances, on the basis that all the fixed and spare process stock were brought into the trading account at a price representing the cost of the raw cotton plus the cost of processing.

The company appealed against that assessment to the Commissioners for the Special Purposes of the Income Tax Acts, who found that the method adopted by the company for dealing with its base stock in its accounts was one of the methods recognized in the particular trade of cotton spinning and was in accordance with sound commercial practice. They also found that the method the company had adopted for computing its profits was in accordance with sound commercial practice; and they allowed the appeal. On July 24, 1953, Vaisey J., on appeal by the Crown by case stated, held that although the base stock method of accountancy was unobjectionable for some commercial purposes, it was not appropriate for the purpose of assessments to income tax, because it did not afford a true picture of the profits in any one year of charge, and because for that purpose the process stock of the company at the beginning and end of a year of charge should be valued and brought into account at cost. He expressed the view that in computing the company's profits no part of such stock should be either treated as a fixed asset or brought into account at a mere arbitrary figure. He allowed the Crown's appeal.

The company appealed.

Cyril King Q.C., *S. M. Young* and *H. H. Monroe* for the company.

Sir Andrew Clark Q.C. and *Sir Reginald Hills* for the Crown.

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The following cases were cited in the argument: *Usher's Wiltshire Brewery Co. Ld.* v. *Bruce (Surveyor of Taxes)* [1]; *Sun Insurance Office* v. *Clark (Surveyor of Taxes)* [2]; *Inland Revenue Commissioners* v. *Cock, Russell & Co. Ld.* [3]; *Worthington* v. *Oceana Development Co. Ld.* [4]; *Collins (Inspector of Taxes)* v. *Firth-Brearley Stainless Steel Syndicate Ld.* [5]; *Edward Collins & Sons Ld.* v. *Inland Revenue Commissioners* [6]; *J. P. Hall & Co. Ld.* v. *Inland Revenue Commissioners* [7]; *Whimster & Co.* v. *Inland Revenue Commissioners* [8]; *John Smith & Son* v. *Moore (Inspector of Taxes)* [9]; *Heather (Inspector of Taxes)* v. *A. Redfern & Sons. Ld.* [10]; *Asia Mill Ld.* v. *Ryan (Inspector of Taxes)* [11]; *Golden Horse Shoe (New) Ld.* v. *Thurgood* [12]; *In re Spanish Prospecting Co. Ld.* [13]; *Holden (Isaac) & Sons Ld.* v. *Inland Revenue Commissioners* [14]; *B. G. Utting & Co. Ld.* v. *Hughes (Inspector of Taxes).* [15]

SINGLETON L.J. I will endeavour first to state the question for our consideration as simply as I can. The company has always adopted a system of accounting which is known as the base stock system. Under that system the fixed process stock, i.e., the cotton which is on the machines, does not appear in the trading account at all, and the spare process stock is taken at an arbitrary figure. The contention of the company is that the system is well recognized and is in accordance with the principles of sound commercial accountancy and that it ought to be adopted in order to arrive at the company's liability to tax.

On behalf of the Crown it is said that, even if the system is satisfactory for ordinary commercial requirements over a period of years, it is not a proper way in which to arrive at the company's profits for taxation purposes in any year of assessment, and further that it does not show the full amount of profit for the year in question. Moreover, it is claimed that no system will give the true profits of the year unless there is a valuation of stock made (either on market price or cost price) at the beginning and at the end of the accounting period; in other words, if there is a variation between the beginning and the end of the year in the amount of stock, or in its value, those are matters for consideration which are omitted to an extent if the company's method of valuation is applied.

The Commissioners found (in paragraph 15 of the case) that the method adopted by the company concerning its base stock in

[1] [1915] A.C. 433; 31 T.L.R. 104; 6 T.C. 399.
[2] [1912] A.C. 443; 28 T.L.R. 303; 6 T.C. 59.
[3] (1949) 65 T.L.R. 725; [1949] 2 All E.R. 889; 29 T.C. 387.
[4] (1949) 65 T.L.R. 726; 28 A.T.C. 393.
[5] (1925) 9 T.C. 520.
[6] (1924) 12 T.C. 773.
[7] [1921] 3 K.B. 152; 12 T.C. 382.
[8] (1925) 12 T.C. 813.
[9] [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.
[10] (1944) 26 T.C. 119.
[11] [1951] W.N. 390; 32 T.C. 275.
[12] [1934] 1 K.B. 548; 18 T.C. 280.
[13] [1911] 1 Ch. 92; 27 T.L.R. 76.
[14] (1924) 12 T.C. 768.
[15] [1940] A.C. 463; 56 T.L.R. 495; [1940] 2 All E.R. 76; 23 T.C. 174.

its accounts is one of the methods recognized in this particular trade of cotton spinning and is in accord with sound commercial practice. They also found that the method the company had adopted for computing its profits was in accordance with sound commercial practice; and they allowed the appeal against the assessment.

They did not consider the third contention put forward by the representative of the Crown, that the company's method "did "not show the full amount of the profits of the relevant year, "but showed a distorted view of those profits and understated "them, and the company had been undercharged in the first "assessment made upon it." Their failure to consider this has led to the expenditure of much time in this court. Mr. King, on behalf of the company, submitted that on the findings of the Special Commissioners the company was entitled to succeed. Sir Andrew Clark, on behalf of the Crown, submitted that, notwithstanding the findings, the method adopted could not be a proper way to ascertain the profits of the company in the year of assessment if it did not show the full amount of the profits, or if it showed a distorted view of them, and he set out to show that this was so; to which Mr. King replied that we ought to be guided by the findings of the Commissioners on fact. All this could have been avoided if the Commissioners had made a finding on the third contention. They ought to have done so. For some time I thought that this court ought to remit the case to them for a finding, but it was put to us that there could only be one answer, and that, in such circumstances, there was no point in sending the case back.

There is a further matter to which I direct attention. Four witnesses gave evidence before the Special Commissioners, who set out a summary of their evidence in the case. In each case the Commissioners say of the evidence, "which we accepted." I do not know what that means, particularly in regard to the evidence of the accountants. If it means that they accepted the views given as those of the witnesses who gave them it carries one nowhere. If it means more than that, it does not appear to me that they could accept both of two conflicting views. The essential requirement of a case stated is that it shall contain the findings of fact of the tribunal which states it. This case is lacking in that respect. It is said by Mr. King that we ought to assume that the Commissioners, by reason of their conclusion, accepted the evidence of Mr. Robson in preference to that of Mr. Gower. That may be a fair assumption to make; but the Commissioners have already said that they accept the evidence of both, and nowhere do they say that Mr. Gower is wrong in the view he expressed that the method adopted by the company led to a distorted view of the profits in the relevant year.

I mention these matters with the object of saving time in future cases. It is not that which someone says which is of importance. The court ought to have before it the findings of

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fact of the tribunal; if those are clearly stated there is usually no need to set out the evidence which is given.

It is not easy to state the facts in this case, which involves some technical matters, without reading a considerable part of the case itself. Paragraph 3: "At all stages in the production "of yarn, quantities of cotton in various stages of manufacture "are either on the machines or are waiting by each machine "ready to take the place of the cotton on that machine. The "cotton which is actually on the machines and undergoing pro-"cess is termed fixed process stock and that which is waiting "to replace the cotton on the machines is termed spare process "stock. . . ." Paragraph 4: "We were concerned in the appeal "with the method of dealing, in computing the company's profit "for income tax purposes, with the fixed process stock and an "agreed weight (hereinafter called the base weight) of spare "process stock (being the minimum required to ensure continuity "of production); these are together referred to as base stock. "The company in fact held spare process stock in excess of the "base weight of spare process stock but there was no dispute as "to how this should be dealt with. It was agreed that for income "tax purposes the excess should be valued at cost price (being "lower than the market value)." Paragraph 5: "(1) The com-"pany, and its predecessor, Broadstone Spinning Company Ld., "has always adopted a system of accounting known as the base "stock system. In this system the base stock and any further "spare process stock held are not carried in the accounts at cost "or market value, but are carried, either at a fixed price or at "an arbitrary price. (2) There was produced to us, for the "purpose of illustration, a hypothetical account in illustration of "the company's trading account for the accounting period (which "follows closely the actual trading figures for the period) and a "copy of the company's balance sheet as at April 3, 1948. (3) In "the trading account, the base stock assumed to be 123,000 "pounds in weight does not figure at all, either in opening or in "closing stocks, and the further spare process stock in excess of "the base weight is carried at a figure of 28 pence per pound. "This is an arbitrary figure designed to represent the cost of raw "cotton *plus* a weighting for the cost of processing. The figure "was originally 12½ pence, and was increased in 1945 to 17 pence, "then to 28 pence at March 29, 1947, and later to 30 pence at "April 3, 1948. (4) In the balance sheet the fixed process stock "is included in the item 'Land, buildings, boilers . . . and fixed "'stock—£333,236.' It is so included at an unascertained figure "representing the cost of the fixed process stock on the purchase "of the mills by the company in 1920, and has not been changed "since."

That paragraph makes clear two or three matters of great importance in this case. The first is that the fixed process stock, that is, the cotton which is on the machines which has been processed, is not taken into account so far as regards the trading

account. It is omitted entirely, because on the company's system it is not treated as part of the stock in the ordinary sense but is said to be included in the item of "Land, buildings, "boilers and fixed stock" in the balance sheet. It is not in the profit and loss account, or in the trading account. Another matter to notice is that the spare process stock which is included in the trading account is taken, not at its value, but at an arbitrary figure. The third matter of importance is the very large variation in the price of cotton which has taken place over the years. Paragraph 5 (3), which I read, shows values from 12½d. a pound rising to 30d., and I think that I am right in saying that the later figures show that by the end of the accounting year the value had risen to 42d. per pound.

Paragraph 6 states the practice which had been followed by the company: "(1) In all previous years of assessment the "profits of the company and of its predecessor, Broadstone "Spinning Company Ld., were computed for income tax pur-"poses according to the base stock system, i.e., the fixed process "stock did not figure in the account (although, as stated in "paragraph 5 above, a value was in fact attached to it in the "company's balance sheet), the base weight of spare process "stock was valued at the arbitrary figure referred to in para-"graph 5 (3) above, and any further 'spare process stock' in "excess of the base weight was valued at cost. (2) The assess-"ments under appeal were made on the basis of bringing in all "stocks of cotton at cost (which was agreed to be lower than "market value); i.e., the base stock and the whole of the further "spare process stock in excess of the base weight were brought "in at the opening and the close of the account at a price repre-"senting the cost (at such opening or close) of raw cotton plus "the cost of processing. (3) The question for our determination "was whether the company was entitled to have its profits" (for the accounting period) "computed for income tax purposes "according to the base stock system."

Paragraph 7 (*b*) again sets out the variation in prices. Paragraph 8 mentions two documents to which I shall have to refer later, D1 and D2, which become important when the court is asked to consider whether there could be more than one answer to the Crown's third contention: "The weight of fixed "process stock on machines in No. 1 mill rose during the "accounting period from 31,191 pounds to 44,204 pounds (vide "statements D1 and D2). No. 1 mill was put out of production "in 1941 as a result of arrangements for the concentration of "industry, and the cotton on the machines was run off. The "company then created a reserve of £7,132 (which figures in the "balance sheet), to cover the estimated cost, at prices then "current, of re-clothing the mill. No. 1 mill is now gradually "being brought back into production, and the machines are "partially re-clothed; the cost of the fixed process of cotton "on the machines in this mill has not yet been debited to the

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"reserve account, but has temporarily been charged against "revenue, although the company intends to capitalize it. When "fully clothed, the machines in No. 1 mill will carry a weight "of 88,000 pounds of cotton." Let me add that No. 2 mill carries 92,000 pounds of cotton on the machines, so that the two mills together would carry upon the machines 180,000 pounds of cotton. It is not shown in the company's trading account, though it is said that it is in the balance sheet figure of land, buildings, etc.

The next four paragraphs in the case concern the witnesses who appeared before the Special Commissioners and paragraph 9 begins in this way: ". . . the secretary of the company "attended and gave evidence before us (which we accepted) to "the following effect." He said that it was essential for the economical running of a mill that the machines should always remain clothed, and he described the system of buying and selling the cotton. He said that the fixed process stock was taken into the company's balance sheet as a fixed asset and did not figure in the trading account, and that the directors of the company had always taken the view that that was the way they wished the accounts to be presented to the shareholders, it being their view that a true trading result was arrived at in that way. I think it might well be said that if one had every year the same amount of base stock and fixed process stock, and if the value of it was the same, it would not affect the position of the trading account. But if the amount changes and the value changes, the position is not the same.

The secretary is further recorded as saying: ". . . that the "cotton on the machines (i.e. the fixed process stock) is always "changing and is always on the move, and that the cotton on "the machines at the end of the accounting period had in fact "cost the company 42·85 pence per pound as shown in exhibit "D2. The cotton on the machines at the end of the accounting "period must have been bought during the period, and its price "would be included in the purchases charged in the company's "accounts. The price would, however, have been debited to "the particular sale occasioning the purchase of the cotton. "The 136,000 pounds of cotton on the machines at the end of "the accounting period had cost the company 31·88 pence per "pound; that was the bale price, plus the cost of processing "work done on that stock. That cost turned into sterling was "£7,892 plus £16,425. The company had in fact allowed cotton "bought at the advanced price to replace cheaper cotton on the "machines. It had, however, advanced the price of yarn "immediately the raw cotton price increased: the increase in the "price of raw cotton was immediately (and, in his opinion, "rightly) priced on yarn and not left on the base stock on the "machines."

Mr. Robson, a member of a firm of chartered accountants,

gave evidence on behalf of the company, which again the Commissioners say that they "accepted." He said that the company had followed "a recognized commercial accountancy basis. The "base stock method is a good method of accounting, though "some other people might say there is a better method. He "did not agree that it was undoubtedly a better method to "bring in base stock at the beginning and end of the year at "cost or market value; business people who consider the base "stock method suitable in their businesses consider it the best." He added that "an accountant would give an unqualified certifi-"cate to accounts as giving a true and fair view of the profits "of a company whether it employed the one method or the "other so long as the company had adhered to one method "consistently" from year to year. Later, in the record of his evidence: "He agreed that in times of rising prices accounts "prepared on the base stock method would show profits lower "in amount than accounts prepared on the cost or market value "basis; in times of falling prices, the opposite result would be "produced."

As far as I can gather from the figures shown in the case, there have been for some years consistently rising prices for cotton. That means that if the fixed basis is followed year after year their accounts would show profits lower in amount than accounts prepared on the cost or market value basis. The record of the witness's evidence continues: "But, on the basis of the "principles which those people who use the base stock method "hold, there is no distortion of profits in times of rising prices." The meaning of that is that those who use this principle prefer to look on the base stock in precisely the same way as they look on the machines. In other words, they regard the cotton, the raw material, at one stage as part of their fixed capital merely because it is on the machines. It passes through the machine in the course of a few weeks and is treated just as is any other cotton. That is the meaning of Mr. Robson's words, "on the "basis of the principles which those people who use the base "stock method hold." He added: "Business people who use "the base stock method do so because they consider it an "appropriate method for their particular businesses; they regard "the cotton clothing the machines as part of the machines, "without which the machines cannot function, just as a sewing "machine cannot function without a certain minimum weight "of thread upon it. They say, in effect, that the weight of "base stock is just as much a part of the machine as the "lever which engages it." On this view, which the witness considered a tenable view, "the base stock is part of the fixed "assets, and replacements are replacements for maintenance "purposes to be charged against trading as a maintenance cost." It must follow from that principle, if it is adopted, that as prices rise the cotton which is on the machine costs more. It is paid

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for out of revenue, but the cotton which is on the machines is not shown in the revenue account.

The case then deals with the evidence of Mr. Gower, chartered accountant, who is the principal advisory accountant to the Board of Inland Revenue. Some criticism was directed to the evidence of this gentleman. Mr. Gower has for some years been contending for that which he regards as the true principle of real prices and real values, and he has sought to show that the base stock method of accounting is not right, at least for tax purposes. I can well understand that those who follow that system of accounting equally hold the view that they ought to be allowed to have their own method of accounting.

Mr. Gower's evidence begins in this way: "He thought it "was common knowledge that the general basis for the valuation "of stock in trade in all forms, whether raw material, processed "material, or finished goods, was cost price or market value, "whichever was the lower." There is no finding on that. Is it common knowledge that the general basis of the valuation of stock in trade in all forms is cost price or market value? That has been stated in one or two of the cases to which our attention was drawn, but I am concerned here rather with the evidence of the witness. Mr. Gower produced a book to which I do not propose to refer. "He said that the base stock method had "been employed by a limited number of concerns—limited both "as regards the trades in which it was used, and the number "of concerns in any particular trade using it. He considered "that it was unobjectionable and made little difference to results "over a number of years, provided that the quantity of base "stock did not vary, and provided that there were no violent "fluctuations in the cost of the raw material; but in a time of "violent fluctuations, and in particular in a time of constantly "rising prices, in his view, the use of the base stock method "could and did give rise to very misleading results." He said that when prices were rising continually, the accounts did not show a fair view of the position. In the present case he said that the quantity of base stock had risen and that in the period under review "the price of raw cotton had risen seriously. The "cost of the 'fixed process stock' had increased during the year "by something like 10½d. per pound from about 32d. per pound "to about 42d. per pound. Valued in accordance with the "Revenue's contention at cost, the process stock was worth "£22,502 at the beginning of the year and £37,947 at the end—"an increase of £15,445. As shown by the company's books, "the increase during the year in the value of the process stock "was £4,289. There was thus a difference of £11,156 which "had been charged against the profits in this year." He went into further figures, and said that they pointed to the conclusion that the base stock method resulted, in the prevailing circumstances, "in an understatement of profits and the creation of a "hidden reserve. This was due to the fact that the base stock

"method was being used for times for which it could not be "considered at all suitable." The paragraph which summarizes the evidence of Mr. Gower said that the Commissioners "accepted" it. Again, there is no finding of the Commissioners on the last part of that evidence. The statement of Mr. Gower's evidence continues: "He agreed that the base stock method is "a reasonable and recognized method of accounting, and one "which business men could reasonably and properly adopt, and "is good commercial accounting, but he made the qualification "that in times of rising prices it is a conservative method, and "does not produce such correct results as the cost or market "value method. By 'conservative' he meant keeping something "well in hand. No auditor would cavil at conservative accounts; "he rather welcomed them for shareholders' purposes. It was "open to the company to use the base stock method. Asked "whether the company's accounts were erroneous, he expressed "the view that they were conservative and understated the "profits by reason of a hidden reserve of the true cost of cotton. "In his opinion the base stock method did not show the true "quantum of profits earned in the relevant year. In times of "falling prices it worked in the reverse way; where costs were "falling you were losing some of the conservative element and "were absorbing some of the hidden reserve. Once you got "back to a stage where the prevailing cost of cotton was the "same as that adopted for base stock, you were back to zero. "On present day prices he described the base stock method as "distorting the real trend of results. In a stable period, when "prices hardly rose or fell, there was nothing in it."

Mr. Gower emphasized that the Special Commissioners were asked to consider the tax position for one accounting period. The evidence which he gave was to the effect that he did not like the base stock accounting system for tax purposes. It did not matter if one kept the base stock at the same figure and if prices remained the same. If one or other of the elements changed one did not get, by using it, the true profits of the relevant year. He went on to say that the process stock was not a fixed asset. It was just the same as any other cotton bought that passed through the mill and through the machines in the mill, and it ought to be treated as any other cotton was.

Another witness, the principal inspector of taxes, said that efforts had been made to get everyone to adopt the system of cost or market price in regard to stock; he had gone into the position and investigated it and he had found that in the cotton trade 88½ per cent. of the spinners were now valuing process stock at cost in their books, and 11½ per cent. were adopting the base stock method, although, he added, "the latter concurred "in the adjustment to the cost basis for taxation purposes." There is no importance in that from the point of view of the law, but I think that it does show that on the whole it is recognized by accountants who advise trading concerns that when there are

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violently fluctuating prices the cost or the market value of the stock gives the more accurate result in any accounting period.

The first matter for consideration is: what is fixed process stock and what is spare process stock? The answer surely is clear. They are both stock. They are so called. They are bought as stock. All the cotton, the raw material, is bought for the purpose of being turned into yarn by being passed through the mill in the ordinary way. Both the fixed process stock and the spare process stock are paid for out of revenue. The evidence of the company's secretary shows "that the cotton on the "machines at the end of the accounting period" must have been bought during the period and its price would be included in the purchases charged in the company's accounts. The cost of that cotton has passed through the company's accounts.

How can one arrive at the profits of the year without considering what one has on the other side? The position is illustrated by the two documents I mentioned earlier, D1 and D2. D1 shows the company's cotton stock as at the commencement of the accounting period, March 29, 1947. D2 shows the position at the end of the accounting period, April 3, 1948. The first thing which I notice on looking at them is the figure in regard to cotton on the machines, the fixed process stock. In the case of No. 2 mill the amount on the machines remains the same. It is working to capacity, and the amount on the machines was then 92,000 pounds. No. 1 mill had been used for something else during the war and had been stripped of its cotton. During this accounting year it was being gradually brought back to full production. At the beginning of the accounting year the amount of cotton on the machines was 31,191 pounds. At the end of the year it was 44,204 pounds, an increase, as the case shows, of 13,000 pounds in the accounting year, so that there was in No. 1 mill somewhat over £2,000 worth of cotton more in quantity at the end of the accounting period than there was at the beginning of that period; and that cotton had been paid for out of revenue.

The figures in D1 and D2 show also the spare process cotton, and it appears from D1 as though the company had on March 29, 1947, 45,000 odd pounds of spare process cotton, that is, cotton waiting nearby to be used on the machines as occasion arose. That 45,000 pounds odd was taken in the accounts at an arbitrary figure of 28d. a pound. How it is possible to get accuracy in any account by taking an arbitrary figure I do not know. The broad middle column in D1 shows the division up of that 45,000 pounds odd into 23,278 pounds and 21,774 pounds. I take it that that was because it had been pointed out by someone, no doubt on behalf of the Revenue, that the company could not well claim, even on their valuation basis, to have so much spare process cotton as 45,000 pounds at any one time. It was too much; so they reduced that figure to 23,278 pounds, and thereafter in the accounts the figure of 28d. appears against 23,278

pounds, and the balance of 21,774 pounds is taken at what is said to be the cost price of 32·1d. a pound. I find it difficult to see any reason for putting on the spare process cotton a lower figure than cost or market price. Prices were rising all the time. When I look at D2, which shows the figures for the end of the year, I find in the left-hand column the figure of spare process cotton is there put as 76,371 pounds. I do not appreciate the reason for that great increase. True, it is said that the mill was coming into further use, as is shown by the increased cotton on the machines in No. 1 mill, but I should not have thought that there would have been anything like that increase in spare process cotton, and indeed that seems to have been recognized, because in the broad column in the middle, in the same way as in D1, the figures are split up later and the same weight is taken, 23,278 pounds, for the spare process cotton, on which an arbitrary figure of 30d. is put, whereas the balance of 53,093 pounds has against it the value of 42·85d., to which the price had risen. I do not follow the reason for any arbitrary price at all in a matter of this kind, but again it may not matter if conditions do not change through the year. As I have said, the justification for the practice, so far as there is justification, was said by Mr. Robson to be that those who adopted the practice in this trade—and it may be in some other trades—regarded the cotton on their machines as part of the machines.

In arriving at the correct position, those who have to make valuations are guided by section 29 of the Finance Act, 1926: "any income tax in respect of profits or gains or income charge-"able under Case I, Case II, Case IV, or Case V of Schedule D "which would but for the foregoing provisions of this section "have been computed as aforesaid shall be computed, subject "to the provisions of this Part of this Act and subject as herein-"after provided, on the full amount of the profits or gains or "income of the year preceding the year of assessment." The same is shown by section 1 of the Income Tax Act, 1918, and by Schedule D, 1 (*a*) (2). The object is to find the profits or gains from the trade for the year of assessment.

In considering the question of stock, I think that the principle stated by the Lord President, Lord Clyde, in *Whimster & Co.* v. *Inland Revenue Commissioners*,[1] has been accepted generally. The Lord President is reported as saying[2]: "In computing the "balance of profits and gains for the purposes of income tax, "or for the purposes of excess profits duty, two general and "fundamental commonplaces have always to be kept in mind. "In the first place, the profits of any particular year or account-"ing period must be taken to consist of the difference between "the receipts from the trade or business *during such year or* "*accounting period* and the expenditure laid out to earn *those* "*receipts*. In the second place, the account of profit and loss

[1] (1925) 12 T.C. 813.

[2] Ibid. 823.

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"to be made up for the purpose of *ascertaining that difference* "must be framed consistently with the ordinary principles of "commercial accounting, so far as applicable, and in conformity "with the rules of the Income Tax Act, or of that Act as "modified by the provisions and schedules of the Acts regulating "excess profits duty, as the case may be. For example, the "ordinary principles of commercial accounting require that in "the profit and loss account of a merchant's or manufacturer's "business the values of the stock-in-trade at the beginning and "at the end of the period covered by the account should be "entered at cost or market price, whichever is the lower; "although there is nothing about this in the taxing statutes." As I say, that has been adopted in general and it is sound in practice. The Lord President, in saying that "the ordinary "principles of commercial accounting require that in the profit "and loss account of a merchant's or manufacturer's business "the values of the stock-in-trade at the beginning and at the "end of the period covered by the account should be entered "at cost or market price, whichever is the lower," was in one sense going into accountancy matters. But I venture to think that that view of his is based on general experience and common sense—one cannot get at the true position unless one takes actual figures as distinct from arbitrary figures.

In the same case Lord Sands said[3]: "Where a trader sits "down to ascertain from his books his profits or losses for the "year, it is not enough that he should set on one side the money "he has paid out, other than capital outlay, and on the other "the money he has received in respect of the year's business "plus the price he paid for commodities now in his possession. "There are at least three other things that he must take into "account—the present value of these commodities, the debts "he has incurred, and the debts due to him, in respect of the "year's operations." The cotton in this case, whether it be in bale in the mill or ready to be used alongside the machine or in the machine, is a commodity which the trader has bought in order to turn into yarn. Later Lord Sands said[4]: "The con-"sideration of how it would be prudent for a trader to act does "not solve the question here presented to us as one of Revenue "law. Under this law the profits are the profits realized in the "course of the year. What seems an exception is recognized "where a trader purchased and still holds goods or stocks which "have fallen in value. No loss has been realized. Loss may "not occur. Nevertheless, at the close of the year he is "permitted to treat these goods or stocks as of their market "value. This exception to the general rule has never, however, "been extended to the case of probable or indeed apparently "inevitable loss to be incurred in the execution of future

[3] Ibid. 826. [4] Ibid. 827.

"contracts entered into during the year in question, and the "authorities are against it."

Mr. King referred us to *Inland Revenue Commissioners* v. *Cock Russell & Co. Ld.*,[5] in which Croom-Johnson J. cited the words which I have just read from the *Whimster*[6] case, and said himself[7]: "There is nothing in the relevant legislation "which indicates that in computing the profits and gains of a "commercial concern the stock-in-trade at the start of the "accounting period should be taken in and that the amount of "the stock-in-trade at the end of the period should also be taken "in. It would be fantastic not to do it; it would be utterly "impossible accurately to assess profits and gains merely on a "statement of receipts and payments or on the basis of turn-"over. It has long been recognized that the right method of "assessing profits and gains is to take into account the value of "the stock-in-trade at the beginning and the value of the stock-"in-trade at the end as two of the items in the computation."

There is one other authority to which I should like to refer. Mr. King directed our attention to the *Sun Insurance Office* v. *Clark (Surveyor of Taxes)*[8] of which the headnote reads[9]: "A "company carrying on the business of fire insurance, had made "a practice of carrying forward annually, in its published "accounts, as a reserve, 40 per cent. of the yearly premium "receipts representing estimated losses on unexpired risks, and "had claimed to be assessed on this basis. It was found as a "fact by the Commissioners that 40 per cent. was a reasonable "and proper allowance, and the company's claim was admitted. "The Crown contended that the company was not legally "entitled to the allowance. *Held*," (by the House of Lords) "that *The General Accident, Fire, and Life Assurance Corpora-"tion* v. *McGowan*[10] notwithstanding, there is no rule of law "as to the admissibility of an allowance for unexpired risks in "estimating profits, but the question is one to be decided by "reference to the facts in each case; and that on the facts "found in this case the allowance claimed was a proper allow-"ance to be made." The General Commissioners for the City of London in that case had found that the allowance was a proper one to make. There was an appeal to the Revenue Court, and Bray J. dismissed the appeal. The Court of Appeal allowed the appeal from Bray J., and the House of Lords restored the order of Bray J. and of the Commissioners, allowing the appeal from the order of the Court of Appeal.

The difficulty which arose in that case was owing to a misunderstanding which was said to be a failure to appreciate the reasons for the decision of the House of Lords in the *McGowan*[10]

[5] (1949) 65 T.L.R. 725; 29 T.C. 387.
[6] 12 T.C. 813.
[7] 29 T.C. 387, 392.
[8] [1912] A.C. 443; 28 T.L.R. 303; 6 T.C. 59.
[9] 6 T.C. 59.
[10] 5 T.C. 308.

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case. Mr. King relied on this case and on *Inland Revenue Commissioners* v. *Cock Russell & Co. Ld.*[11] in support of his submission that the court ought not to interfere with what he claimed was a finding of fact by the Commissioners. If the report of the case is examined, I think it hardly supports the proposition for which Mr. King contends. Lord Loreburn L.C. said [12]: "An "estimate being necessary and the arriving at it by in some "way using averages being a natural and probably inevitable "expedient, the law, as it seems to me, cannot lay down any "one way of doing this. It is a question of fact and of figures "whether what is proposed in each case is fair both to the Crown "and to the subject." The Lord Chancellor considered the decision in *McGowan's* [13] case: "In *McGowan's* [14] case, to which "reference is made, three methods of estimating these gains or "profits were before the House. I place first, merely for con-"venience sake and not for its importance or value, a faint "suggestion which was made in the case of *McGowan*,[15] which, "as I understand it, was as follows:—It was suggested that "each contract of insurance made during a particular year should "be considered separately. If it had expired then the actual "result should be taken, whether profit or loss. If it had not "expired then an estimate should be made, having regard to "the period unexpired and the degree of risk, which might be "different (in summer and winter for example) during that period. "I do not imagine that either the Crown or the company would "seriously desire such an inquiry. I do not know how many fire "insurances are effected by a great company within a twelve-"month, probably scores of thousands or even hundreds of "thousands. Such a process, as to the unexpired contracts, "would be minute and almost interminable. It was rejected "because there was no evidence that it would be a reasonable "way of ascertaining what was desired.

"The second method suggested in that case was that of "merely taking for each year the sum total of the premiums "received and the sum total of the losses paid and subtracting "the one from the other, without regard to the fact that the "premiums cover risks running on into subsequent years and "the losses include losses arising out of contracts made in "previous years. This method is of course not precise or "scientific. It proceeds upon the view that when this is done "for the three consecutive years indicated by the statute and the "figures thus reached are averaged, a fair and reasonable con-"clusion is attained. This method was adopted long ago and "has more than once been the subject of consideration in courts "of law. I can conceive it being unfair either in the case of a "rapidly increasing or of a rapidly diminishing fire insurance "business. It may prove unfair in both cases. But in

[11] 29 T.C. 387.
[12] 6 T.C. 59, 75.
[13] 5 T.C. 308.
[14] 6 T.C. 59, 75–76.
[15] 5 T.C. 308.

"*McGowan's*[15] case it was not proved to be unfair. On the "contrary it closely corresponded with the dividends actually "distributed and was upon the facts of that case clearly the most "accurate and reasonable of the methods which alone were pro-"pounded for our consideration. Accordingly it was adopted. "I think it is in general a good working rule, but no one in this "House has said that it ought to supersede the truth if the "truth is in conflict with it in any case.

"A third method, similar in principle to that advanced by "the now appellants, was also considered by your Lordships in "the case of *McGowan.*[15] This method is to carry forward "annually at the close of the year a percentage of the premium "income in order to allow for unexpired risks. It has no preten-"tions to being precise. I can easily imagine cases in which "an actuary could show it was misleading. But if it comes "nearer to the truth than any other method in a particular case, "I do not understand why it should not be adopted. This third "method, however, in its application to that case, the "*McGowan*[15] case, would have meant that the insurance com-"pany was to pay income tax upon the footing of about £15,000 "profits and gains in the three statutory years, whereas they "had divided dividends of about £60,000 in those three years. "And there was no evidence and no finding, nor could there "honestly have been, that the third method worked fairly "between the Crown and the subject. In those circumstances "this House rejected the third method. The House adopted the "second, but so far from laying it down as a rule of law, it was "expressly pointed out that the second method was of itself "imperfect and, though a good working rule generally, would "not be applicable if in any case it appeared upon the facts to "involve hardship. The headnote in the Law Reports is quite "wrong and the view of Bray J. of what the House decided in "*McGowan's*[15] case is accurate." Towards the end of his speech the Lord Chancellor added[16]: "I am equally anxious "that your Lordships should not be supposed to have laid down "that the method applied by the Commissioners in the present "case has any universal application. If the Crown wishes in "any future instance to dispute it they can do so by evidence, "and it is not to be presumed that it is either right or wrong. "A rule of thumb may be very desirable, but cannot be sub-"stituted for the only rule of law that I know of, viz.: that "the true gains are to be ascertained as nearly as it can be "done."

Thus I read Lord Loreburn as having said that there may be one or two or three methods of arriving at the profits for the relevant period. The one which shows most accurately the position between the revenue on the one hand and the taxpayer on the other hand is the one which ought to be adopted. In other words, it is not sufficient to say that a particular system of

[15] 5 T.C. 308.

[16] 6 T.C. 59, 77.

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accounting is a well recognized system of accounting and all right during normal times, if the contention on the other side is that the system does not give a true result for the particular year, the accounting year.

That was the case which the Crown put forward before the Special Commissioners. It is shown by their contentions, particularly the one to which I have already referred, but the Special Commissioners, although they had this case before them for quite a long time, failed to consider that contention.

I would state these general propositions: (1) One cannot arrive at the profits of the year without taking into account the value of the stock one has at the beginning of, and at the end of, the accounting year. (2) The figures for stock are just as important as any other figures. Values may have to be estimated when market price is taken, but any departure from accuracy is reflected in the trading account. (3) Stock should be taken either at cost price or at market price, whichever is the lower. The company's method of accounting does not meet these requirements for the relevant year. They have more stock, purchased out of income, than their trading account shows, and other stock is not taken at the right figure. It seems to me that the submission of Sir Andrew Clark that there can be only one answer to the Crown's third contention is established.

Vaisey J. towards the end of his judgment said: "On the "whole, I have come to the conclusion that my decision in this "case must be for the Crown. I am satisfied that the base stock "method of accountancy as adopted by the company is recog-"nized and accepted in the industry and is unobjectionable for "some commercial purposes. But I hold that it is not appro-"priate for the purpose of assessments to income tax, because "it does not afford a true picture of the profits in any one year "of charge, and because for that purpose the process stock of "the company at the beginning and end of a year of charge "should be valued and brought into account at cost (being lower "than market value). It seems to me that in computing the "company's profits no part of such stock should be either treated "as a fixed asset or brought into account as a mere arbitrary "figure."

The Special Commissioners, after making their findings, stated: "We held that the appeal succeeded and we left the "figures to be agreed." I think that it is right to say that they held that the appeal succeeded on their findings already stated in paragraph 15 of the case. It appears to me that on the facts they misdirected themselves in law in so holding. The decision of Vaisey J. was right, and in my view this appeal ought to be dismissed.

BIRKETT L.J. I am of the same opinion. In view of the comprehensive judgment which my Lord has just delivered, I will state quite briefly the reasons why I have come to the

same conclusion, though I should like it to be clearly understood that I accept his reasoning and conclusions on all those detailed matters with which he has dealt so fully.

The case has been one of very great interest, and because of the nature of the figures a case of some complexity, and I should like to acknowledge the help which I have received from the arguments of counsel on both sides.

When the matter came before the Special Commissioners it was by way of an appeal by the company from the assessment made on them by what I may call the Gower method of assessment. The company took the view, and submitted to the Special Commissioners, that they were not bound by that method at all, and were entitled to have the figures for income tax assessed on the system which they and their predecessors in trade had used for almost 50 years. That was the issue before the Special Commissioners.

I was very much impressed, by the argument of Mr. King that the only question before this court was whether there was evidence to support the findings of the Special Commissioners. If the answer to that question was in the affirmative, he submitted, then this court had no course other than to support the decision of the Special Commissioners and reverse the judgment of Vaisey J.

During the argument I was at some pains to try to ascertain the real question which this court had to determine. The question formulated by the Special Commissioners on the face of it seems complete. The question for their determination was "whether the company was entitled to have its profits computed "for income tax purposes according to the base stock system." Mr. King said that the Commissioners had the precise question and the detailed evidence before them. They formulated the questions for this court thus: "The questions of law for the "opinion of the court are:—(1) Whether there was evidence on "which we could arrive at our findings in paragraph 15 of this "case, and (2) whether, in view of such findings, our decision "was erroneous in law."

My Lord has said that the Commissioners had not really made the proper findings, but Mr. King most strenuously argued during the discussion that they had, and that when one looked at the form in which they had stated their question, they must have been taken to know that the point before them was the assessment for the income tax year. It is plainly so stated: "Those are our findings which we set out in paragraph 15," and those findings are two. They are (1): "We, . . . , found "that the method adopted by the company dealing with its base "stock in its accounts is one of the methods recognized in this "particular trade of cotton spinning and is in accordance with "sound commercial practice." I do not think that anybody is ready to dispute that finding, because Mr. Gower in his evidence lent support to it. Mr. Robson certainly said the same thing.

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(2): "We also found that the method the company had adopted "for computing its profits was in accordance with sound com- "mercial practice." So far as the accountants were concerned, that too would seem to follow from their first finding, because both Mr. Gower and Mr. Robson said that there are reputable firms who prefer this method for their companies' accounts. Finally they said: "We held that the appeal succeeded." By that they must have meant, I think, that "because we have "found that this base stock method employed by this company "was in accordance with sound commercial practice, and "because we found that the method of computing the profits "by that system was in accordance with sound commercial "practice, therefore it was suitable for income tax purposes."

I am bound to say that I think that third conclusion was wrong. If that be a proper construction of the findings of the Commissioners, it was erroneous in law, as it is not a pure question of fact so much as a mixed question of fact and law.

My Lord has read the relevant words of section 29 (1) of the Finance Act, 1926 :"subject as hereinafter provided, on the "full amount of the profits or gains or income of the year preced- "ing the year of assessment." The Rules applicable to Cases I and II in the Income Tax Act, 1918, provide: "(1) The tax "shall be charged without any other deduction than is by this "Act allowed." "(3) In computing the amount of the profits or "gains to be charged, no sum shall be deducted in respect of ". . . (*e*) any loss not connected with or arising out of the trade, "profession, employment or vocation"; and "(*f*) any capital "withdrawn from, or any sum employed or intended to be "employed as capital in such trade, profession, employment or "vocation."

I should have thought that the true question properly formulated and properly stated for the Special Commissioners was this: did the base stock method of accountancy, for which this company contends, correctly ascertain the full profits as enjoined by section 29 for income tax purposes for the year of assessment in question? I do not think that they really answered that question. I have looked again at the evidence of Mr. Robson on which Mr. King placed so much reliance, and I had in mind his criticism of Vaisey J., who had said that Mr. Robson did not seem to commend that system. Mr. King said that it was not part of the duty of Mr. Robson to commend any system—he was merely giving evidence about the matter. Mr. King also complained of Vaisey J. arrogating to himself that which was the task of the Special Commissioners, when he said: "but I hold that it is not appropriate for the purpose of assess- "ments to income tax, because it does not afford a true picture "of the profits in any one year of charge." Mr. King said, with great force, that the only reason that was said was because the company did not adopt what is called the Gower system but adopted its own base stock system. If the evidence of

Mr. Robson is analysed carefully, it is a little singular that he seems to skirt this central question in the case: is the base stock method of computing profits the proper method in accordance with the income tax Acts? I will summarize what Mr. Robson was saying in this way: It is quite true that there is no one method that can be said to be the proper method to apply, speaking generally, among cotton spinning concerns: some use the base stock method and others the Gower method of cost or market value. But the company, when they did follow the base stock method, were following commercial practice. It is a good method, though other people may say that there is a better method. Mr. Robson then said that he did not think it was better to adopt the Gower method, and bring in the base stock at the beginning and end of the year at cost or market value. He said that people who use the base stock method do not agree with that; that if it were employed consistently this method gave a true view of the profits of the company. He said that he had given certificates certifying companies' accounts framed on that basis. For example, he said that if there were a question of ascertaining the commission of a manager in a particular company he would adopt the method consistently used by the company and would not institute any other method. But all the way through, while he was discussing the question of rising and falling prices and the base stock system in relation thereto, he nowhere said: "In my view this system produces an accurate "result in that it provides the full profits for the year of assess-"ment." I think that Vaisey J. was to that extent justified in commenting on the evidence of Mr. Robson.

Perhaps I may refer to what Lord Porter said in *Asia Mill Ld.* v. *Ryan (H.M. Inspector of Taxes)* [17]: "Moreover what may "be prudent accountancy for a company is not necessarily the "correct method of ascertaining the proper assessment for "Income Tax."

I am bound to say that the view which I have taken of the findings of the Special Commissioners here is that they were concerned almost wholly with the first part of that sentence of Lord Porter. The base stock system is the appropriate method for this company which it has adopted consistently for its own purposes, for company purposes; but I do not think the Commissioners have really addressed themselves to the true question in this case: did this base stock method of accountancy correctly ascertain the full profits for income tax purposes for the year of assessment?

Quite naturally, all sorts of subsidiary questions thereupon arise, as, for example, did the base stock method have the effect of making deductions from profits which are expressly or by necessary implication forbidden by the Act of 1918 or any other relevant taxing statute? But if we are asked to say: That if

[17] [1951] W.N. 390; 32 T.C. 275, 296.

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there be evidence to support the findings by the Special Commissioners, then the task of this court is ended, because it must support them, I am bound to answer that the findings of fact by the Special Commissioners do not conclude the matter. Even if one were to say that so far as these findings went there is nothing with which one can quarrel, nevertheless the true issue in this case is still left undetermined, and I think that Vaisey J. was right, though his way of expressing it does not perhaps cover quite accurately the real issue in the case. I would prefer to formulate it in this way: the Special Commissioners who considered the facts of this case considered them only up to one particular point and then stopped short. Bearing in mind the essential features of this base stock system which has been most accurately described by my Lord, taking into account that the fixed stock never comes into the trading account or appears in the balance sheet, and bearing in mind that the spare process stock had an arbitrary figure attached to it, the true view is that the Special Commissioners reached that stage and then stopped. They said: "There is no doubt at all that the base stock method "has been the method in vogue among cotton spinners for very "many years—in this particular case for nearly fifty years." For computing profits for the company's purposes there was no fault to be found with it. But as the real question was whether that system was a proper system for ascertaining accurately the full profit in accordance with section 29, I think that the Special Commissioners did not really address their minds to that topic.

For this reason I am of opinion that this appeal ought to be dismissed, and I concur quite fully in the judgment which my Lord has just delivered.

HODSON L.J. I agree.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Peacock & Goddard for Barlow, Parkin & Co., Stockport; Solicitor of Inland Revenue.*

M. M. H.

[CHANCERY DIVISION.]

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Dec. 14, 15.
Wynn-Parry J.

* *In re* TOUT & FINCH LD.

[No. 00432 of 1953.]

Building—Contract—Insolvency of main contractor—Owner's right to pay unpaid sub-contractor—Retention money—Paid to contractor—Interest "fiduciary as trustee for sub-contractor"—Voluntary liquidation of contractor—Effect.
Bankruptcy. Company—Winding up. Assignment—Equitable.

A local authority entered into a contract, in the standard R.I.B.A. form, with a company as main contractors for the erection of 57 flats. The contract provided, inter alia, (a) that the architect should nominate specialist sub-contractors; (b) that on the issue by the architect of certificates in respect of work done, the company should pay to them within 14 days the amount certified less 10 per cent. retention money and a discount; (c) by clause 21 (*c*), that before the issue of a certificate the architect might require proof that the sub-contractors' accounts included in previous certificates had been duly discharged "in default whereof the employer may "pay such accounts . . . and deduct the amount so paid" from any sums otherwise payable to the company, with a proviso that nothing in the contract was to "render the employer . . . liable to pay any "nominated sub-contractor"; (d) that the architect was to issue interim certificates under which the company was to receive payments, less 10 per cent. retention money, which became payable as to one-half on the "practical completion of the work," and as to the other half on a final certificate of the architect at the expiration of the "defects liability period."

The applicants were nominated sub-contractors for the construction of reinforced concrete floorings; their sub-contract with the company was in the standard "F.A.S.S.," form approved by the trade organisations, and provided (a) that within 14 days of the receipt of a certificate the contractor was to pay to the sub-contractor the sum certified less retention money and cash discount, and (b) by clause 11 (*h*), as to retention money, that "the contractor's interest "in such money is fiduciary as trustee for the sub-contractor and if "the contractor . . . purports to . . . charge such interest . . . "(otherwise than by floating charge . . .) the contractor shall there-"upon immediately set aside and become a trustee for the sub-"contractor of a sum equivalent to the retention money and shall "pay the same to the sub-contractor on demand. . . ."

On September 19, 1952, the architect issued an interim certificate which included a sum due to the applicants. On December 19, 1952, the company, which had become insolvent, went into voluntary liquidation. The contract was nevertheless completed, the date of the "practical completion of the works" being October 25, 1952, and that of the end of the "defects liability period" being April 25, 1953. The architect, however, withheld the issue of his final certificate until the decision of the court on the points raised by this summons:—

Held, (1) that the language of clause 21 (*c*) of the main contract was applicable both to interim and to final certificates, so that the local authority were entitled at their discretion to make a direct payment of any unpaid balance to the applicants: *In re Wilkinson, ex parte Fowler* [1905] 2 K.B. 713 applied;

(2) that the company had under the main contract an interest in the retention money which they could make the subject of a valid equitable assignment, and that such an assignment had been effectively made by clause 11 (*h*) of the sub-contract; so that the company were trustees and were bound to pay over to the applicants retention money received in respect of the applicants' work.

Drew & Co. v. *Josolyne* (1887) 18 Q.B.D. 590; 3 T.L.R. 482 followed; *Wilmot* v. *Alton* [1897] 1 Q.B. 17; 13 T.L.R. 58 distinguished.

ADJOURNED SUMMONS.

The facts are set out in the judgment.

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TOUT & FINCH LD., *In re.*

Raymond Jennings Q.C. and *Stuart Daniel* for the applicants.
John Montgomerie for the liquidator.
R. D. Stewart-Brown for the local authority.
Lionel Edwards Q.C. and *Dennis Lloyd* for a representative general creditor.

The following cases, not referred to in the judgment, were cited in argument: *Milestone (J. A.) & Sons Ld.* v. *Yates Castle Brewery Ld.*[1]; *Henry* v. *Hammond*[2]; *In re Lind.*[3]

WYNN-PARRY J. This is a summons taken out in the voluntary liquidation of the company asking for the determination of two matters. The company carried on the business of building contractors, and went into voluntary liquidation on December 19, 1952. The company is insolvent.

On January 15, 1951, the company entered into a building contract expressed to be made between the company, who were called the contractors, of the first part, Union Assurance Society Ld., as sureties, of the second part, and Ilford Corporation, to whom I will refer for convenience as the council, of the third part. The object of the contract was the erection by the company for the council of a number of flats, 57 in all, on a particular site within the borough of Ilford. The contract price was £66,125 9s., and it was provided that the current edition of the Royal Institute of British Architects' form of conditions of contract, applicable where quantities form part of the contract, adapted for the use of the council, should apply. For the purpose of this judgment I only find it necessary to refer to a very few of those conditions. Clause 21 provides: "Where prime "cost or provisional sums are included in the bills of quantities "for persons to be nominated or selected by the architect to "supply and fix materials or to execute work on the site, (a) "such sums shall be deemed to include 2½ per cent. cash dis-"count and shall be expended in favour of such persons as the "architect shall direct, and all specialists or others who have "been nominated or selected by the architect are hereby "declared to be sub-contractors employed by the contractor and "are referred to in these conditions as 'nominated sub-contrac-"'tors.'" Sub-cl. (b) reads: "The sums directed by the "architect to be paid to nominated sub-contractors for work, "materials or goods comprised in the sub-contract shall be paid "by the contractor within 14 days of receiving from the architect "a certificate including the value of such work, materials or "goods less only (i) any retention money which the contractor "may be entitled to deduct, and (ii) a cash discount of 2½ per "cent." Sub-cl. (c) reads: "Before any such certificate is issued "to the contractor he shall, if requested by the architect, furnish "to him reasonable proof that all nominated sub-contractors'

[1] [1938] 2 All E.R. 439.
[2] [1913] 2 K.B. 515; 29 T.L.R. 340.
[3] [1915] 2 Ch. 345.

"accounts included in previous certificates have been duly dis-"charged, in default whereof the employer may pay such "accounts upon a certificate of the architect and deduct the "amount so paid from any sums otherwise payable to the con-"tractor." By sub-cl. (e) it is provided: "Neither the existence "nor the exercise of the foregoing powers nor anything else "contained in these conditions shall render the employer in any "way liable to pay any nominated sub-contractor."

Clause 24 deals with certificates and payments. By sub-cl. (a): "At the period of interim certificates named in the "appendix to these conditions interim valuations shall be made "whenever the architect considers them necessary, and, subject "to cl. 21 of these conditions, the architect shall issue a certi-"ficate stating the amount due to the contractor from the "employer, and the contractor shall be entitled to payment "therefor within the period named in the appendix." Sub-cl. (b) reads: "The amount so due shall, subject to cl. 21 (c) of "these conditions and to any agreement between the parties as "to stage payments, be the total value of the work properly "executed and of the materials and goods delivered upon the "site for use in the works up to and including a date not "more than seven days before the date of the said certificate, "less the amount to be retained by the employer (as hereinafter "provided) and less any instalments previously paid under this "clause." Sub-cl. (c) provides for the amount which may be retained by the employer in virtue of cl. 24, which in the particular case was 10 per cent. Then sub-cl. (d) provides: "The amounts retained in virtue of this clause shall be dealt "with in the following manner: on practical completion of the "works, and subject to cl. 17 of these conditions, the architect "shall issue a certificate for one moiety of the total amounts "so obtained and the other moiety shall be paid to the con-"tractor upon the issue of the architect's final certificate." By sub-cl. (f): "Upon expiration of the defects liability period "stated in the appendix to these conditions or upon completion "of making good defects under cl. 12 of these conditions, which-"ever is the later, the architect shall issue a final certificate of "the value of the works executed by the contractor and such "final certificate, save in cases of fraud, dishonesty or fraudulent "concealment relating to the works or materials or to any matter "dealt with in the certificate and save as regards all defects and "insufficiencies in the works or materials which a reasonable "examination would not have disclosed, shall be conclusive "evidence as to the sufficiency of the said works and materials."

One of the nominated sub-contractors was the applicants, and they were nominated by the architect, so that the company had no choice in their selection; but in accordance with the usual practice there was brought into existence between the company and the applicants a sub-contract dated April 23, 1951, in the

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"F.A.S.S." form approved by the National Federation of Building Trades Employers and the Federation of Associations of Specialists and Sub-Contractors. That sub-contract provides in the usual way for the execution by the sub-contractor of the sub-contract works which are described as "Construction "'Helicon' Hollow Tile and reinforced concrete fire resisting "floors and roofs, reinforced concrete landings and staircases, "etc., for 57 flats."

By cl. 10 of the sub-contract provision is made for the price of the sub-contract works, upon which nothing really relevant turns. By cl. 11: "(a) The contractor shall subject to and in "accordance with the main contract from time to time make "application . . . to the architect for certificates of payment and "for the inclusion therein of the amount which at the date there-"of fairly represents the value of the sub-contract works and of "any variations authorised under this sub-contract then executed "and of the materials and goods delivered upon the site for use "in the sub-contract works." By sub-cl. (b): "Within four-"teen days of the receipt by the contractor of any certificate "from the architect the contractor shall notify and pay to the "sub-contractor the amount certified therein to be due in respect "of the sub-contract works and any authorized variations thereof, "less retention money, that is to say, the proportion attribut-"able to the sub-contract works of the amount retained by the "employer in accordance with the main contract, and less a "cash discount of 2½ per cent., if payment is made within "fourteen days as aforesaid." Sub-cl. (h) reads: "If and to the "extent that the amount retained by the employer in accord-"ance with the main contract includes any retention money "the contractor's interest in such money is fiduciary as trustee "for the sub-contractor and if the contractor attempts or purports "to mortgage or otherwise charge such interest or his interest "in the whole of the amount retained as aforesaid (otherwise "than by floating charge if the contractor is a limited company), "the contractor shall thereupon immediately set aside and "become a trustee for the sub-contractor of a sum equivalent "to the retention money and shall pay the same to the sub-"contractor on demand; provided that upon payment of the "same to the sub-contractor the amount due to the sub-con-"tractor upon final payment under this sub-contract shall be "reduced accordingly by the amount so paid."

On September 19, 1952, the nineteenth certificate was issued. That set out under the heading "Builder's Work," "Estimated "value of builder's work, £45,156," to which was added, "Estimated value of unfixed materials, £25," giving a total, in round figures of £45,181, which shows that the certificate covered the whole of the work up to that date, September 19. Then there was set out a list of the nominated sub-contractors, the second of which was the applicants. Their type of work was described as "Reinforced concrete floors etc." and the

amount against their name was £7,876. A comparison with the previous certificate shows that at the date of the previous certificate the amount in their case was £7,276, so that they had earned another £600 in the interim. Then there followed a list of nominated suppliers, and a total of £67,355, from which was deducted retention money at the rate of 10 per cent., £6,735, leaving £60,620. Then there is the legend: "Add retention "released on completed blocks and increased costs of nominated "suppliers, £2,660." Then followed a note which stated: "Payments on account have not been deducted. A copy of this "report has been forwarded to the contractor. All nominated "sub-contractors and nominated suppliers have been notified of "the amounts due to them in respect of this report."

According to the evidence the date of the "practical com-"pletion of the works" was about October 25, 1952, so that on that basis the end of the "defects liability period," six months after the date of practical completion, would have been April 25, 1953. It is clear from the evidence that the work has been completed, and that notwithstanding the liquidation of the company, the council did not take over the completion of the contract as they would have been entitled to do under the conditions; and the architect is now in a position to issue his final certificate, but has not yet done so because of the present dispute.

The applicants have raised two points. They say first of all that they are entitled to a declaration that, in accordance with cl. 21 (c) of the main contract between the company and the council, the council are entitled to pay to the applicants the balance remaining unpaid of amounts included in previous certificates given in favour of the applicants. They ask secondly for a declaration to the effect that the company are trustees of any retention money, that is as defined in cl. 11 (b) of the sub-contract, where the phrase has a narrower meaning; and that, in effect, either the retention money when it becomes payable should be paid direct to the applicants, or that if it comes into the liquidator's hands he is bound at once to pay it over to the applicants.

Primarily both questions turn on the construction of these two documents. The first question appears to me to turn entirely, so far as construction is concerned, on cl. 21 of the main contract. It appears from what I have read of that clause, that the scheme is that the sums referred to in sub-cl. (a) are to be expended in favour of such persons as the architect shall direct, including nominated sub-contractors. In order to carry that out, there is set up the machinery which starts in sub-cl. (b), where it is provided that the sums directed by the architect to be paid to nominated sub-contractors for work, materials or goods comprised in the sub-contract shall be paid by the contractor within fourteen days. In sub-cl. (c) the reference to "such certificate" is clearly back to the certificate referred to in the latter part of sub-cl. (b), that is, a certificate including the value of such work, materials

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or goods, namely, the work, materials or goods referred to in the earlier part of sub-cl. (b), less only any retention money which the contractor may be entitled to deduct and the cash discount. On that basis, sub-cl. (c) proceeds to provide that the architect has the right, before he issues the certificate, to ascertain from the company whether the company has duly discharged the amounts due to the nominated sub-contractors under previous certificates, with the consequence that if the architect makes the inquiry and finds that the company has not made those payments, then the council has a right—and the matter is entirely one for the council—to pay such accounts upon a certificate being duly given by the architect, and, as mere necessary machinery, to deduct the amount so paid from any sums otherwise payable to the contractors.

The point which has been made by Mr. Edwards on behalf of the general body of creditors is that the certificate there referred to can only refer to an interim certificate, and cannot refer to a final certificate; and he seeks to establish that point by the interpretation which he places on cl. 24. For the purpose of establishing the point he has to satisfy me that each certificate only deals with work done and money earned since the date of the last certificate, but in my judgment there are two points against that. First it appears to me that the language of sub-cl. (b) is directly against that construction, because it says that the amount so due "shall be the total value"—that is, the amount of the certificate shall be the total value—"of the work properly "executed and of the materials and goods delivered upon the site "for use in the works up to and including a date not more than "seven days before the date of the certificate." Secondly, when one considers the form of certificate to which I have already sufficiently fully referred, it appears clear that the certificate does not proceed upon that basis, but on the basis indicated by the language in sub-cl. (b). It therefore seems to me as a matter of construction that sub-cl. (c) of cl. 21 is apt to cover not only interim certificates but a final certificate.

On that basis it appears to me that this case is covered by the decision of Bigham J. in *In re Wilkinson, ex parte Fowler.*[1] In that case, according to the headnote, A signed a contract with a local authority to construct sewage works at a price to be paid to him by monthly instalments, less 10 per cent., on the certificate of the engineer of the local authority; the 10 per cent. to be retained and paid to A six months after completion of the works. The contract also provided that certain machinery for the works was to be supplied to A by specified firms, and that (cl. 54), "If the engineer shall have reasonable cause to believe "that the contractor is unduly delaying proper payment to the "firms supplying the machinery, he shall have power if he thinks "fit to order direct payment to them." Pausing there, it will be seen that for all practical purposes that clause corresponds to

[1] [1905] 2 K.B. 713.

sub-cl. (c) of cl. 21 of the main contract in this case. In October, 1904, A was adjudicated bankrupt on his own petition. At that date the contract was substantially completed, and there was then due under it the sum of £1,574 only, of which £1,349 was retention money and £224 was a sum payable on the engineer's next certificate, and these two sums were claimed by the trustee in bankruptcy. At that date A owed £836 in various amounts to the specified firms for machinery supplied to him for the works; and subsequently the engineer in 1905 made two orders under cl. 54 directing payment of the £836 out of the £1,574 to the firms in settlement of their accounts. It was held (so far as material) that the power conferred by cl. 54 on the engineer was not annulled or revoked by the bankruptcy and that the firms, by virtue of the two orders of the engineer, were entitled to be paid the £836 out of the £1,574 in priority to the claim of the trustee.

It will be seen, from that paraphrase of the headnote in that case, that it would be difficult to imagine a case which could more completely cover this case. In the course of his judgment Bigham J. said [2] this—and I think it is desirable to refer to this passage because of the importance of the policy which underlies such a clause as this—" Now the contract contains a provision " on which, in my judgment, the whole question turns. It is " clause 54. That clause, in my opinion, is inserted in the " contract for the benefit, not only of the people who supply the " machinery, but also of the council itself. It is very much to the " interest of the council to see that contracts of this kind for " public works into which they enter are carried out in a manner " satisfactory to all persons who are concerned in the performance " of them. The council certainly may, and no doubt frequently " do, make contracts of this kind, and they make them much " more advantageously when the people who supply the machinery " or other goods which are to be used by the contractor in the " performance of the contract know that there is a reasonable " probability that they will be paid. The council are enabled, " by inserting a clause of this kind in their contract, to give a " certain amount of confidence to people who supply goods to the " contractor, and in that way they are placed in a better position " when they come to make contracts again than they otherwise " would be; and, therefore, I say that the clause is inserted, not " only in the interests of the persons who supply goods to the " contractor, but also in the interests of the council themselves."

His Lordship then proceeded to construe the clause, and held that, notwithstanding the supervention of the bankruptcy, the clause remained in effect and that the two orders of the engineer were valid and effective orders. That case, as I say, covers this case. The council in this case have taken up what in my view is a very proper attitude, that is, they made it quite plain before the case came into this court that if permitted to do so by the

[2] Ibid. 719.

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form of the judgment of this court, they would desire to exercise this power under sub-cl. (c) in respect of nominated sub-contractors. It so happens in this case that the figures show that there will be sufficient—so far as one can see more than sufficient—to deal with all the claims of the nominated sub-contractors, without there being any necessity for abatement or apportionment.

Therefore, for those reasons, I propose, in answer to this question in the summons, to make the declaration for which the applicants ask in the modified form which I have indicated earlier in this judgment.

I now pass to a consideration of the other question, which turns on the sub-contract. That involves the construction of cl. 11, and particularly sub-cll. (b) and (h). The first thing to do is to construe the clauses so far as is necessary. Sub-cl. (b) defines "retention money" as "the proportion attributable to "the sub-contract works of the amount retained by the employer "in accordance with the main contract, and less a cash discount "of 2½ per cent., if payment is made within fourteen days." Bearing in mind that definition of retention money, I turn to sub-cl. (h). On the face of it there are clear words used which are apt to create a trust which will operate by way of an equitable assignment of assets described as the contractor's interest in the retention money. It is said, first of all, that on a true construction of the document, which, of course, must be read as a whole, there is no trust, and nothing more than a running account. In support of that argument there is prayed in aid, for instance, cl. 13 of the sub-contract which provides that the contractor shall be entitled to make certain deductions or set-offs from any sums, including any retention money, which he may be liable to pay to the sub-contractor. But such a clause as that appears to me not to affect the matter one way or another. It cannot in the least be decisive, because it appears to me to be a perfectly normal and perfectly sensible provision to make, namely, that against what the company may owe to the applicant as trustee, the company may set off moneys which may be owing by the sub-contractor to the company.

Then it is said that what is made the subject of the alleged trust is the contractor's interest in the money, but that he has no such interest in that money as can form the subject of a trust; and for that purpose great reliance was placed by Mr. Edwards on *Wilmot* v. *Alton*.[3] The headnote sufficiently states the facts: "A trader, who carried on the business of a "theatrical costumier, contracted with a company to supply "dresses for a ballet and keep them in repair for the sum of "£40 a week for twelve weeks commencing from a certain date. "She subsequently charged her right and interest under the "contract in favour of the plaintiff as security for an advance "made by him. The dresses were duly supplied to the company "under the contract, but before any moneys became payable

[3] [1897] 1 Q.B. 17.

"under it the trader became bankrupt." It was held by the Court of Appeal, affirming the judgment of the Lord Chief Justice, "that the charge in favour of the plaintiff gave no title "as against the defendants, the trustees in bankruptcy, to moneys "which might become due under the contract after the "bankruptcy."

In the course of his judgment, Lord Esher M.R. said[4]: "During the period contemplated by the contract she"—that is, the trader—"became bankrupt. The effect of that was that "she could no longer fulfil the contract. The trustee in bank-"ruptcy in such a case may, if he thinks it for the benefit of the "estate, carry on the business and the contract; but he is not "obliged to do so. He would have a right to say that he would "not have anything to do with the contract. If the trustee in "this case had done so, no moneys not already accrued due under "the contract could after that become payable to any one under "it. After the bankruptcy therefore no money would have "become payable under the contract, unless the trustee had "elected to go on with it, and to perform the conditions which "by the terms of it were to be performed by the bankrupt. If "he did go on with the contract, then in consideration of his "doing so week by week the sums of money payable under the "contract would become due. Therefore the case stands thus. "At the moment of the bankruptcy, there is, as regards sums to "become payable in futuro under the contract, no debt due. "There are amounts which may or may not become due according "as the conditions of the contract are or are not fulfilled. In "order to earn those amounts, the conditions of the contract "must be fulfilled, and their fulfilment depends upon the question "whether the trustee in bankruptcy will go on with the contract "or not." That appears to me quite clearly to be (as it was put by Mr. Jennings, on behalf of the applicants) a case illustrative of the established principle of bankruptcy law that it is impossible to assign the profits of a business earned after the bankruptcy. The reference in the later part of the judgment of Lord Esher M.R. to *Ex parte Nichols*[5] confirms this. That is not this case, because here I have a contract where there is a provision for the retention of retention moneys. They represent moneys already earned, though not yet payable.

That situation appears to me to be conclusively covered by the decision of the Court of Appeal in *Drew & Co.* v. *Josolyne*.[6] In that case a building contract provided for payments to be made as the work proceeded subject to the retention of 20 per cent. of the value of the work shown in each certificate. The contractors assigned a portion of the retention moneys to secure a debt, and notice of the assignment was given to the building owners. After making the assignment, the contractors

[4] Ibid. 20.
[5] (1883) 22 Ch.D. 782.
[6] (1887) 18 Q.B.D. 590; 3 T.L.R. 482.

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filed a petition for liquidation, the works then remaining incomplete. In the liquidation a trustee and committee of inspection were appointed. The trustee, in pursuance of the resolution of the committee of inspection, completed the work himself, advancing moneys for the purpose of which an amount exceeding that of the retention moneys which had been assigned was still unpaid. There was no other asset from which he could be recouped. The trustee and the mortgagee both claimed the amount of the retention moneys which had been assigned, and on the interpleader issue to try the title to the moneys it was held, so far as is relevant for my purposes, "that the assignment of the retention moneys held good as against the trustee; and that the mortgagees were therefore entitled to succeed." Now it may, I think, properly be said, that that was a very strong case, because, as will be seen from the summary of the facts which I have given, the trustee himself advanced moneys for the purpose of completing the contract; yet he was not allowed in respect of those moneys to compete with the equitable assignee. Lord Esher M.R. (who later gave the leading judgment in *Wilmot* v. *Alton* [7]) said [8]: "This appears to me a very plain case." He then set out the facts quite shortly, and proceeded: "What then was the position of the trustee in liquidation? He was not obliged to carry out the contract. He might have said that he would have nothing to do with it. The trustee, however, had an option to go on with the contract. There could be no new contract without the building owners' consent. It would be a perversion of language to say that the law by giving power to the trustee to carry on the contract means that he may make a new contract. If he elects to go on with the work, he goes on under the old contract as the trustee of the liquidating debtors' estate and will take their rights under the contract subject to any valid assignment which they may have made of such rights. When the building owners refrained from taking the work out of the contractors' hands and the trustee elected to go on with it, the old contract, as it seems to me, continued in effect. The contract work went on and was completed, and the architect certified accordingly, under the old contract, and, thereupon, if there had been no question of any assignment, the building owners would have been bound to pay the retention moneys over to the trustee. But there had been an equitable assignment of a portion of those moneys by the contractors before the liquidation, of which the building owners had notice; and in consequence they are bound to pay such portion of them to the assignees."

In the course of his judgment Bowen L.J. said [9]: "The truth is that the trustee simply carried on the contract of the liquidating debtors. It may be that the trustee or his firm

[7] [1897] 1 Q.B. 17.
[8] 18 Q.B.D. 590, 595.
[9] Ibid. 597.

"found the money which enabled the contract to be carried on "and completed, without which the retention moneys would "not have become payable, but that was his own affair, and "could not give him any priority over the equitable assignees "of the retention moneys; nor do I see that anything else took "place to give him such priority. The old contract continued "to subsist and the assignment by the contractors of the reten-"tion moneys to become due under it still held good." Finally I refer to the observations of Fry L.J. towards the beginning of his judgment[10]: "Here there was a building contract under "which the contract price was to be paid in the usual way, "namely, by payments on account upon the certificates of an "architect and payment of the balance after completion of the "work. The builders mortgaged a portion of the retention "moneys to become payable to them. These moneys were "the price of work already done, which however would not "become payable till the whole of the work was completed. The "mortgagors of those moneys could not set up a title to be re-"couped the moneys expended in completing the contract in "priority to their own assigns, nor could any person claiming "under them. The trustee comes in under the mortgagors as "trustee of their estate, and the committee of inspection request "him to carry on the contract upon which the liquidating "debtors were engaged at the time of the liquidation. If this "contract was so carried on, then the trustee so carrying it on "claims under the mortgagors and could not claim anything "expended in completing the contract against their mortgagees "of the retention moneys."

Those passages appear to me completely to cover the case before me on this question. They show, to my mind beyond doubt, that the company, under the main contract, had in the retention moneys, an interest which they could make the subject of a valid equitable assignment, and that in my view they have effectively done by the language of sub-cl. (h) of cl. 11 of the sub-contract.

For those reasons, I propose to make declarations in accordance with the effect of this judgment. I think that the first declaration might take the form suggested by Mr. Jennings, namely, a declaration that the interest of the company in the retention money as defined in the sub-contract, being part of the moneys retained by the council in accordance with the main contract, is fiduciary, and that the company are trustees for the applicants in accordance with clause 11 (h) of the sub-contract. Then I will also declare that the company and the liquidator are bound in accordance with the said cl. 11 (h) of the sub-contract to preserve entire the retention money upon receipt thereof by the liquidator from the council, and to pay the same

[10] Ibid. 598.

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to the applicants less only the cash discount of 2½ per cent. provided for by the sub-contract.

Declaration accordingly.

Solicitors: *Braby & Waller; Preston & Naylor; Town Clerk, Ilford.*

F. R. D.

[COURT OF APPEAL.]

C. A.

1953 *Dec.* 15.

Somervell, Denning and Romer L.JJ.

* BIRTWISTLE *v.* TWEEDALE.

PRACTICE NOTE.

Law Reports—Citation—Authenticity—Reports by persons not qualified as barristers—Estates Gazette.

During argument counsel for the appellant asked that their Lordships should refer to a report in the Estates Gazette:—

SOMERVELL L.J. I am unwilling that reports from the Estates Gazette should be cited since those reports are not by a barrister-at-law.

DENNING L.J. I agree. There are quite enough cases that can be cited.

ROMER L.J. I agree.

[Reported by Miss P. STANLEY, Barrister-at-Law.]

[CHANCERY DIVISION.]

1953 *Dec.* 17, 18.

Harman J.

* LOVE *v.* PHARAOH AND ROBERTS.

PRACTICE NOTE.

Practice—Affidavits—Chancery Division—Figures and dates—To be in figures and not in words—Costs of re-swearing and re-filing affidavit not complying with direction payable by solicitor personally.
Solicitor—Costs.

ADJOURNED SUMMONS.

This summons came originally before Wynn-Parry J., who on December 2, 1953, refused to hear it on the ground that figures in the plaintiff's affidavit were set out in words and not in figures, as

required by the direction at p. 683 of the Annual Practice, 1953, see [1923] W.N. 288; [1940] W.N. 51. He adjourned it for the affidavit to be re-sworn and re-filed in proper form. On December 17, the summons came before Harman J. before whom the point as to costs was kept open.

A. J. Balcombe for the plaintiff.
The first defendant did not appear and was not represented.
Ian Edwards-Jones for the second defendant.

HARMAN J. It is best to dispose of this matter straight away. As is well known, there is a direction in the Annual Practice that figures and dates in affidavits should be expressed not in words but in figures. My predecessor P. O. Lawrence J. used to make solicitors pay personally the costs of any affidavits not complying with that direction. My brother Wynn-Parry J., I gather, did not deal with any costs, but I agree with counsel's understanding that the costs of the adjournment should be paid by the plaintiff. That, however, does not preclude me from carrying out what I understand to be Wynn-Parry J.'s intention, namely, that the solicitors personally should pay. I am very glad to hear from counsel for the plaintiff that his professional clients state that they are prepared to pay the costs personally; but be it known that, hereafter, the masters, on the preliminary hearing of adjourned summonses, will have authority to visit any substantial infraction of this direction by ordering that the affidavit be taken off the file and re-sworn at the expense of the solicitor who files it. Those costs will be, in the present case, the costs of and occasioned by the adjournment and of re-filing the affidavit: but I hope that, in future, the masters will deal with the matter at an earlier stage, in which case it will not cause any delay.

Solicitors: *W. G. Mace & Sons, Tenterden; Kingsford, Dorman & Co. for Kingsford, Flower & Pain, Ashford.*

K. R. A. H.

[CHANCERY DIVISION.]

* WARMAN *v.* BARCLAYS BANK LD. AND ANOTHER.

1953
Oct. 30.
Harman J.

[1951 W. No. 4248.]

Legal Aid—Costs—Taxation—Settlement of action—Items disallowed by taxing master — Consultation with leading and junior counsel — Country solicitor's attendance at and travelling expenses to consultation — Conference with junior counsel before accepting offer of settlement—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *Sch. III.*
Solicitor—Costs. Counsel—Costs. Costs—Solicitor and client.

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An action of a complicated and difficult nature was settled before delivery of defence by the plaintiff accepting the offer of a money payment. The plaintiff was a legally-aided person and her costs were under Schedule III to the Legal Aid and Advice Act, 1949, taxed on the ordinary basis of a solicitor and client taxation.

The taxing master disallowed a number of items, including, inter alia, (1) a fee for a consultation with leading and junior counsel in London, and a fee for the country solicitor's attendance and his travelling expenses incurred in connexion with the consultation; (2) a fee for a conference with junior counsel attended by the plaintiff after the offer of settlement was made and before it was accepted:—

Held, that these items were properly incurred, and should therefore be allowed.

SUMMONS.

The plaintiff brought an action against Barclays Bank Ld., as executors of Maud Mary Brown, who died on July 16, 1950, and secondly against the sole beneficiary under her will, in which she claimed specific performance of an agreement made about 1932 between herself and the deceased relating to testamentary dispositions to be made respectively by her and the deceased in respect of a house in Cardiff. Alternatively, she claimed damages for breach of the agreement. She further claimed damages for the breach by the deceased of promises to pay for goods and services supplied by the plaintiff.

The plaintiff's allegations in the statement of claim, so far as here relevant, were: By an oral agreement made in or about 1932 she and the deceased had agreed to purchase this house and to live together in it and to share the costs of the purchase, maintenance and outgoings; they had also agreed that in the event of the death of either, the house was to belong absolutely to the survivor. In pursuance of that agreement they orally agreed to execute, and not to revoke, mutual wills by which each one should give her interest in the house to the other. In August, 1933, the plaintiff and the deceased, in fulfilment of that agreement, each made a will in the other's favour. On June 29, 1950, the deceased, in breach of her agreement, made a new will revoking her earlier will and bequeathing all her property on trust for the second defendant absolutely.

Before delivery of defence the action was settled on terms that the second defendant paid a sum of money to the plaintiff. The plaintiff was a legally-aided person, and an order was made for the taxation of her costs as between solicitor and client in accordance with the Third Schedule to the Legal Aid and Advice Act, 1949.[1]

[1] Legal Aid and Advice Act, 1949, Sch. III, rule 4: "(1) . . . costs shall "be taxed for the purpose of this "Schedule according to the ordinary "rules applicable on a taxation as "between solicitor and client where "the costs are to be paid out of a "common fund in which the client "and others are interested: Provided "that no question shall be raised as "to the propriety of any act for "which prior approval was obtained "as required by regulations."

On taxation the taxing master disallowed a number of items, including, inter alia, (a) a fee for a consultation after delivery of the statement of claim between junior and leading counsel, a fee for the country solicitor's attendance at that consultation which was in London, and his disbursements in travelling from Cardiff to London; (b) a fee for a conference with junior counsel after the offer of a settlement had been made and before it was accepted.

The solicitor stated in regard to (a) that his attendance at the consultation was to give leading counsel the background and history of the case, and to supply any necessary details of the case which were only possessed by him; (b) this conference was held in order that counsel could explain to the plaintiff the desirability of seriously considering the second defendant's offer to settle, as the plaintiff was anxious not to accept an offer if it could be improved on; and she was entitled to hear direct from junior counsel his views of the difficulties which existed in establishing her case; she would, moreover, have been able to correct him if he were under any misapprehension as to facts only known to her. It was only in this way that the plaintiff could make a decision on the offer which she would not regret later.

The taxing master stated that with regard to (a) the matter could have been adequately dealt with by written instruction to counsel to advise, and (b) that these costs were incurred through over-caution, and were neither necessary nor proper.

This summons was taken out to review the taxation of costs.

R. J. S. Harvey for the plaintiff.

HARMAN J. This is a summons to review a taxation under the Legal Aid and Advice Act, 1949; taxation under Schedule III to that Act is, subject to certain matters which do not concern us for this purpose, regulated in these words: "costs shall be "taxed for the purposes of this schedule according to the ordinary "rules applicable on a taxation as between solicitor and client "where the costs are to be paid out of a common fund in which "the client and others are interested: Provided that no question "shall be raised as to the propriety of any act for which prior "approval was obtained as required by regulations." So that for the present purpose it is an ordinary solicitor and client taxation.

A number of objections were carried in, some of which were allowed by the master, and others disallowed, and the legally-aided person has obtained the sanction of the Legal Aid Committee to carry the matter to this court.

[His Lordship, having upheld the master's refusal to allow certain items, which do not call for report, continued:] A group of objections arose in this way: after the statement of claim was drawn and delivered, the country solicitors were minded to take the advice of leading counsel, and they applied for leave from the local Legal Aid Committee. They obtained leave, and having

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regard to the proviso to rule 4 of Schedule III to the Act the master must, at the outset, accept the view that it was a case appropriate for leading counsel, and no question arises as to the propriety of instructing him. The master, looking at the question broadly, decided to allow five guineas for leading counsel's opinion —he was practising in London—and he disallowed all other fees to the leader.

What, however, was charged in the bill was, first of all a fee for a double consultation in London with the leading and the junior counsel; secondly, a fee for the country solicitor's attendance at that consultation; thirdly, as a disbursement, the travelling fees of the country solicitor who came up from Cardiff, and, fourthly, ten guineas for the opinion which leading counsel wrote as a result of the consultation.

Originally, nothing was allowed except that one sum of five guineas, but the taxing master relented to the extent of another five guineas, and allowed ten guineas for leading counsel's opinion; but he would not allow the consultation nor the country solicitor's attendance and travelling expenses. This type of case where the statement of claim depended on a number of small facts, and where there was this sort of client, seems to me to justify the exceptional course of the country solicitor himself coming up to London; and certainly, in my view, it justified the consultation with the leader before the latter wrote his opinion, because he would want, and I think that he would probably insist on it, to see junior counsel who had drawn the statement of claim and who had already advised. As it turned out, leading counsel advised certain amendments to the statement of claim, and no leader would advise those in an action without having his junior there, as a mere matter of ordinary courtesy. I think that it would be right to allow a proper fee for the leader and junior for that consultation, whatever the proper fee is, and to allow a proper fee for the country solicitor's attendance and for his disbursements on travelling. Whether they come to the amount which he has charged, £8 3s. 2d., is for the taxing master to determine and not for me.

I propose to leave the item relating to the leader's opinion as the master has left it; on the whole I do not think that ten guineas was an unjustified fee to charge.

At a later stage in the case the junior counsel left the Bar and another counsel came into the case. An offer was made by the second defendant to settle the case for a money payment, not a very handsome one; now plaintiffs never like it when they are offered a sum which is less than that which they hope to get—but lawyers know the difficulties to be faced when they are put to proof in cases of this kind which involve mutual wills; and it was desirable to satisfy her, if it were possible, that it was in her true interest at that stage to settle the litigation; and that she should see counsel for that purpose is, in my view,

altogether proper. I propose to allow counsel's fee for a conference of £2 7s. 0d. and whatever sum the solicitor may properly charge for attending that conference.

Judgment accordingly.

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Solicitors: *Wrentmore & Son for Morgan, Lloyd & Evans, Cardiff.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

** JOHNSON *v.* CROGGAN & CO. LD. AND ANOTHER.

1953 *Dec.* 3, 4, 14.

Pilcher J.

[1952 J. No. 2643.]

Building — Regulations — Delegation of duties to foreman — Injury to foreman—Negligent selection of unsafe ladder by foreman—Injured by breaking of ladder — Technical breach of statutory duty by employers — Liability — Building (Safety, Health and Welfare) Regulations, 1948 (*S.R. & O.* 1948, *No.* 1145), *regs.* 4, 29 (1) (8)—*Law Reform (Contributory Negligence) Act,* 1945 (8 *&* 9 *Geo.* 5, *c.* 28), *s.* 1.

Joint tortfeasors. Statutory duty — Contributory negligence. Invitor and invitee—Defective ladder selected by invitee. Factory.

Employers, in accordance with the custom of their trade, delegated to the plaintiff, an experienced and competent steel erector who was the foreman in charge of work to which the Building (Safety, Health and Welfare) Regulations, 1948, applied, the task of selecting and approving suitable gear for the work. Although it was, as he knew, within the scope of his authority to ask for suitable ladders—which would have been provided—the plaintiff, without his employers' knowledge, selected and used a lightly constructed fruit-picking ladder which he knew was unsuitable and unsafe for the work in question. Owing to its lightness of construction the ladder broke under the plaintiff's weight and he fell to the ground. In an action for damages for personal injuries sustained in the fall in which the plaintiff alleged breach by his employers of their statutory duty under regulations 4 and 29 (1):—

Held, that in the circumstances, the employers had properly and almost inevitably delegated the task of selecting and approving suitable gear to the plaintiff who knew and recognized that they had done so, and that, even though the employers were technically in breach of regulation 29 (1), the plaintiff, in acting within the scope of his delegated authority, had negligently selected an unsafe ladder and was therefore, the sole author of his own wrong; that from a commonsense point of view the employers were completely blameless and so no question of contribution under the Law Reform (Contributory Negligence) Act, 1945, arose; that the maxim ex turpi causa non oritur actio applied and that, therefore, the plaintiff's claim failed.

Smith v. *Baveystock & Co. Ld.* [1945] 1 All E.R. 530 applied.

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Per Pilcher J. obiter. Were it necessary to apportion the damages recoverable under section 1 of the Act of 1945, the amount recoverable by the plaintiff must be reduced by 99 per cent.

Dictum of Tucker L.J. in *Cakebread* v. *Hopping Brothers (Whetstone) Ld.* [1947] K.B. 641, 653; 63 T.L.R. 277; [1947] 1 All E.R. 389 considered.

ACTION.

The plaintiff, an experienced and competent steel-erector, was employed by the first defendants as foreman in charge of the erection, under subcontract, of a new steel roof on a fruit store on the farm premises of the second defendants. The work on the fruit store, which was situated about 60 or 70 miles from the first defendants' headquarters, was work to which the Building (Safety, Health and Welfare) Regulations, 1948, applied. It was the first defendants' practice, and the custom of the trade, when sending their steel erectors to places at a distance from their headquarters, to delegate to the foreman steel-erector in charge of the work the duty of deciding upon the heavy gear, including ladders, necessary for the particular job, and of selecting and approving it. The plaintiff was well aware of the position and also knew that he had full authority to select and procure what gear he required; and that he could refuse gear if he considered it unsuitable. The plaintiff, on being shown round by one Macey, a director of the second defendants, found that the gear available on the site was not suitable and rang up the first defendants, who told him to telephone to the contractors and ask them to supply whatever gear he required. Whilst walking round the site the plaintiff had seen and roughly tested a fruit-picking ladder and was told by Macey that the second defendants had a number of such ladders which he could make use of if he thought that they would serve his purpose. The plaintiff, although he knew that they were unsuitable for building operations, decided to use the second defendants' ladders, and accordingly did not ask the contractors for any ladders. It was, as he knew, within the scope of his authority to ask the contractors to supply suitable building ladders and, had he asked, such ladders would have been supplied. Macey knew that the plaintiff and his mate were using the fruit picking ladders but the first defendants did not; had the plaintiff told them they would not have agreed to such use.

On November 24, 1950, the plaintiff, in order to descend from the roof of the fruit store, put both feet on one of the fruit picking ladders which was resting against a brick wall about 18 feet high. As the ladder took his whole weight both side runners snapped and it broke into three pieces, plunging him to the ground. The ladder in question was made of wood and was quite unsuitable and unsafe for use in a building operation when it would be supported only at one point near the topmost rung; and it was because of the lightness of its construction that it broke.

The plaintiff claimed damages in respect of the injuries received in his fall, alleging that the accident was caused by the first defendants' breach of their statutory duty under regulations 4 and 29 (1) of the Building (Safety, Health and Welfare) Regulations, 1948,[1] and/or by their negligence at common law. Further and in the alternative the plaintiff claimed damages against the second defendants alleging that they were in breach of the duty owed to him as an invitee upon their ladder.

C. J. T. Pensotti for the plaintiff.
John Russell for the first defendants.
Malcolm Morris for the second defendants.

The following cases were referred to in argument: *Gallagher* v. *Dorman, Long & Co. Ld.*[2]; *Barcock* v. *Brighton Corporation*[3]; *Smith* v. *Baveystock & Co. Ld.*[4]; *Vincent* v. *Southern Railway Co.*[5]; *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[6]; *Woods* v. *Durable Suites*[7]; *Stapley* v. *Gypsum Mines Ld.*,[8] and *Marshall* v. *Cellacite and British Uralite Ld.*[9]

Cur. adv. vult.

December 14. PILCHER J. stated the facts and continued: The first defendants contend that, as was the custom of the trade, they delegated to the plaintiff, their foreman on this particular job and an experienced steel-erector, the duty of selecting the gear required for the particular job. He was a man who had necessarily used ladders for many years, and he was no doubt, having seen the work he had to do, as competent as anyone to decide whether such work could safely be done with a ladder of the fruit-picking type some 20 feet long and supported only at one point near the top. I am satisfied that the first defendants, relying upon the plaintiff's experience, had left—and almost necessarily left—to him the selection of the gear required and that the plaintiff was well aware that that was the position. It seems to me that it is almost inevitable that when steel-erectors

[1] Buildings (Safety, Health and Welfare) Regulations, 1948, reg. 4: "It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply (1) to comply with such of the requirements of regulations 5–30, . . . as affect any workman employed by him. . . . It shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him, and to co-operate in carrying out Parts II to VII of these regulations. . . ."
Reg. 29: "(1) Every ladder and step-ladder shall be of good construction, sound material and adequate strength for the purpose for which it is used. (8) No wooden ladder shall be used unless it is constructed with (a) uprights of adequate strength. . . ."

[2] [1947] 2 All E.R. 38.

[3] [1949] 1 K.B. 339; 65 T.L.R. 90; [1949] 1 All E.R. 251.

[4] [1945] 1 All E.R. 531.

[5] [1927] A.C. 430.

[6] [1947] K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.

[7] [1953] 1 W.L.R. 857; [1953] 2 All E.R. 391.

[8] [1952] 2 Q.B. 575; [1952] 1 All E.R. 1092.

[9] (1947) 63 T.L.R. 456.

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are sent out to distant or remote places to carry out specialized work heavy gear must be obtained locally; and it is in the circumstances only reasonable that the choice of the gear to be used should be left to the foreman of the job.

Smith v. *Baveystock & Co. Ld.*[1] shows quite clearly that in an appropriate case it is competent for an employer to delegate his statutory duty to a competent employee. In that case the employer was held entitled to delegate his duty to fence or adjust the guard on a circular saw under the Woodworking Machinery Regulations. Goddard L.J. said[2]: "It is, of course, "perfectly clear that an employer can delegate the duty of seeing "that machines are properly fenced or adjusted to proper "employees, that is to say, to employees who have the necessary "knowledge and experience for them to see that the machine is "fenced as securely as it is possible to do. If an employer dele-"gates that work to a competent man and the competent man "does not carry it out, it follows from that, of course, that the "employers' duty has not been discharged. In this particular "case impliedly the duty of seeing that the fence is properly "adjusted is delegated to the man who works the machine, who "is an experienced person in relation to that particular job. It "is very difficult indeed to see how it could be otherwise done. "One has to try to interpret these rules and obligations in the "light of a certain degree of common sense and also in such a "way as to enable the machines to be used. Parliament "obviously has approved the use of circular saws and recognizes "that circular saws may be used in industry at the present time. "Then one has to consider how, in the ordinary and normal "working of a factory, this business can go on of adjusting the "guard. It would be quite impracticable, I suppose, for a fore-"man to go round every five minutes to see whether a workman "had got his machine adjusted exactly to the last degree of "safety. It must be left to the experience and common sense "of the man to see that it is adjusted in that way as is most "safe."

Smith v. *Baveystock & Co. Ld.*[3] was a case in which the employee to whom the duty was delegated was himself injured because he failed properly to carry out the duty delegated to him. Lord Goddard found that in the circumstances of that case there had been no negligence or breach of statutory duty by the defendants. du Parcq L.J., after considering the situation which might have obtained if the employers had been prosecuted for a breach of the regulations, said[4]: ". . . when it comes to "proceedings in a civil court for damages, I think they [the "employers] are entitled to say: 'The fault is really yours and "'not ours. We were quite entitled to rely on you. True, if "'somebody else had been injured by any failure on your part "'to fulfil your obligation we should have had to pay the penalty,

[1] [1945] 1 All E.R. 531.
[2] Ibid. 532.
[3] [1945] 1 All E.R. 531.
[4] Ibid. 535.

" ' we should have been responsible to him. We cannot rid " ' ourselves of our obligation. But it is quite absurd to think " ' that if you, who are really the person to blame because you " ' were reasonably and properly entrusted by us with this duty, " ' failed to carry it out, therefore, we have got to pay damages " ' to you.' "

In *Gallagher* v. *Dorman, Long & Co. Ld.*[5] employers failed in their submission that they had delegated to the workman a statutory duty not to overload a crane. Wrottesley L.J., who was delivering the judgment of the court, said[6]: " The word " ' delegation ' when used in connexion with the statutory duty of " the employer does not mean the same thing as ' employment.' " An employer does not, merely by employing his servant to work " a crane, delegate to him the statutory duty of seeing that the " crane is not overloaded. The theory of delegation of a statutory " duty is intelligible where the duty is a positive duty such as " to keep the guard of a power saw in adjustment. In the case " of a negative duty such as not to overload a crane, the " conception of delegation presents considerable difficulty."

I was also referred to *Barcock* v. *Brighton Corporation*,[7] where the question of delegation of his duty by the employer was discussed. In that case the plaintiff, to whom certain duties had been delegated, succeeded on the ground that the defendants had not instituted and maintained a safe system of work. I do not think that the case helps me, and I accordingly say no more about it.

I now come to consider the claim of the plaintiff in so far as it is based upon an alleged breach by the first defendants of their statutory liability. The work upon which the plaintiff was engaged was work to which the Building (Safety, Health and Welfare) Regulations apply. The plaintiff relied on breaches by his employers of regulations 4 and 29 (1). Regulation 4 provides: " It shall be the duty of every contractor and employer of work- " men who is undertaking any of the operations to which these " Regulations apply to comply with " (inter alia) regulations 5 to 30. The regulation also provides that it shall be the duty of every person employed to comply with the requirements of such regulations as relate to the performance of an act by him and to co-operate in carrying out Part II of the regulations. Regulation 29 is in Part II, and is in the following terms: [His Lordship read regulation 29 (1) and (8) and continued:]

On my findings of fact, the ladder which broke was not a ladder of adequate strength for the purpose for which it was used, and in particular its uprights were not of adequate strength. The first defendants were thus, as it seems to me, in technical breach of their absolute obligation to provide a ladder of adequate strength for the purpose for which it was in fact used by the plaintiff. The plaintiff himself who had a duty to co-operate,

[5] [1947] 2 All E.R. 38.
[6] Ibid. 41.
[7] [1949] 1 K.B. 339; [1949] 1 All E.R. 251.

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quite apart from any question of delegation, was in breach of regulation 29 (8) in that he used a wooden ladder with uprights of insufficient strength. It is clear, moreover, from the cases to which I have referred, that an employer is entitled in appropriate circumstances to delegate his statutory duty to an experienced employee. I find that the plaintiff was such an employee, and that the circumstances in which the first defendants carried out their business were such that it was eminently reasonable, if not commercially necessary, that they should delegate to their foreman on the spot the selection and approval of the actual heavy gear, including ladders, required for that particular job. The defendants did so delegate this duty to the plaintiff, and the plaintiff recognized and understood that they had done so. The plaintiff, in my view, should have appreciated that the ladder in question was unsuitable and unsafe. If the plaintiff's mate had been injured by the collapse of the ladder, the first defendants could not, of course, have escaped liability, but the situation is obviously different where it is the person to whom the duty to select and approve the ladder had been properly delegated who is himself injured by reason of the insufficiency of the ladder.

On my findings, the plaintiff's case against the first defendants seems to be covered by the decision of the Court of Appeal in *Smith* v. *Baveystock & Co. Ld.*,[8] subject only to the fact, that that case was decided before the passing of the Law Reform (Contributory Negligence) Act, 1945. But whether the present case is regarded as one in which there has been a technical breach of a statutory duty by the first defendants who had properly delegated the performance of that duty to a foreman, or as a case in which the first defendants have committed no breach of statutory duty, the result in my view is the same. I am inclined to think that it would be difficult to argue in this case that the first defendants were not in at any rate technical breach of their statutory duty, but the common sense of the matter is, that the plaintiff, acting within the scope of his delegated authority and negligently selecting an unsafe ladder, was the author, and the sole author, of his own misfortune. I can see no good reason why the well-known principle ex turpi causa non oritur actio should not apply in this case.

I should like to make brief reference to a passage in *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[9] That was a case in which the plaintiff was injured in the course of working a circular saw. The guard with which the saw was fitted was incapable of proper adjustment and consequently did not comply with the Woodworking Machinery Regulations. The plaintiff himself failed to make the necessary adjustments to the guard which was provided. That case, of course, was decided after the passing of the Law Reform (Contributory Negligence) Act and Hilbery J. decided that the plaintiff failed. His decision was varied by the

[8] [1945] 1 All E.R. 531.

[9] [1947] 1 K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.

Court of Appeal who came to the conclusion that it was a case in which the defendants, having been throughout and continuously in breach of their statutory duty in that they had failed to provide a guard which complied with the regulations, were themselves to blame, but that the plaintiff's negligence had contributed to the extent of 50 per cent. towards the accident and his consequent injuries. Tucker L.J., after reviewing the authorities and pointing out what was the situation which had obtained in the earlier cases such as *Vincent* v. *Southern Railway Co.*,[10] continued[11]: "In that case," [*Vincent* v. *Southern Railway Co.*[12]] "of course, the House of Lords, had not before it, any "more than had Goddard L.J. in *Smith* v. *Baveystock*,[13] the "question what the position would have been under this new Act "of 1945, and I do not read the observations of any of their "Lordships as compelling me to hold that the workman here is "entirely out of court by reason of his negligence. I think that "he was negligent and that his negligence contributed to the "accident, as did the breach of statutory duty and common law "negligence of the employers. I therefore think that this is a "case under the new Act for apportioning the damages. I agree "with the figure proposed by my Lord. I think that the damages "" should be equally apportioned in this particular case on the "ground of the interview between the workman and the foreman. "I can quite conceive that, in a case of the type of *Smith* v. "*Baveystock*[13] where nothing of that kind occurs, a competent "skilled man is left in charge of a properly constructed machine, "there is proper delegation to him under reg. 21 and proper "supervision in the factory—if in those circumstances the workman is injured, and assuming, without deciding, that the "question of contribution would arise in such a case, I can quite "conceive, and I say no more, that a court might take the view "that in those circumstances something like 90 per cent. of the "blame might possibly fall on the plaintiff workman. I think "that this case is on its facts to be distinguished altogether from "a case of that kind."

There is perhaps some ground for saying that this case where there has been, in my view, a technical breach by the employer of his statutory duty to provide a safe and suitable ladder is a case of the kind to which Tucker L.J. was referring. Accordingly, I have had to consider that matter: I have found that the employers were acting in accordance with the usual practice of the trade, and that they were acting reasonably in confiding to their experienced employee the choice of suitable heavy gear; in the popular sense the only fault which can be attributed to anyone is the fault of the plaintiff, in choosing a completely unsuitable ladder.

By section 1 of the Law Reform (Contributory Negligence) Act: "Where any person suffers damage as the result partly of

[10] [1927] A.C. 430.
[11] [1947] 1 K.B. 641, 653.
[12] [1927] A.C. 430.
[13] [1945] 1 All E.R. 430.

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"his own fault and partly of the fault of any other person or per-"sons, a claim in respect of that damage shall not be defeated." Looking at the matter from the commonsense point of view—and I venture to think that that is the proper aspect from which to view this case—there was no fault here in the employers. If they were entitled, and, indeed, as I find, almost bound to delegate to the plaintiff the duty of selecting and approving gear, they could do no more, so I very gravely doubt whether it can properly be said that the defendants here were in fault under the section; that being so, I think it would be driving matters too far to hold that, in a case of this kind where the defendants are, in my view, completely free from blame, I am compelled to find them to blame and then to allocate some very large proportion of the blame—possibly 99 per cent.—to the plaintiff. That would seem to me to be the kind of situation which ought not to arise, and I do not propose to decide the case on that ground.

I propose to look at the matter from what I conceive to be the commonsense point of view. I am satisfied here that the only person who was to blame in this matter was the plaintiff. He was negligent and also in breach of the statutory duty imposed upon him under the Building Regulations, and it was his own negligence and breach of duty which immediately caused the accident and resulting injury. I see no reason why upon the facts of this case the maxim ex turpi causa non oritur actio should not apply, and accordingly I find that the plaintiff's claim fails. If I should be wrong about this, and if it had been necessary for me to decide the case on what I may perhaps call the contributory basis, I should without hesitation find that whilst the defendants were in technical breach of the regulations, the amount recoverable by the plaintiff should be reduced by 99 per cent., the result of which would be that he would recover virtually nothing. I am accordingly of opinion that the plaintiff's claim against the first defendants based upon the alleged breach of their statutory duty fails. The selection and approval of this heavy gear having been left, and properly left under a proper system of work, to the plaintiff, and the plaintiff having made this unfortunate and bad selection, it is quite impossible to say that the defendants were negligent or failed to institute and supervise a proper system of work. For the reasons which I have given, I am quite satisfied that the plaintiff's common law claim against the first defendants must also fail.

The plaintiff's claim against the second defendants can be decided quite shortly. The contention that the plaintiff was in substance an invitee of the second defendants upon the ladder is, in my view, quite ill-founded and if authority is needed to support my opinion I need only refer to *Marshall* v. *Cellactite & British Uralite Ld.*,[14] where factory owners gave permission to contractors working on their premises to borrow plant required for

[14] (1947) 63 T.L.R. 456.

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the work, and one of the contractors' employees was injured by falling from a defective ladder. It was held that the contractors, the second defendants, were alone to blame since they had themselves selected the ladder for this particular work. Lord Greene M.R. said [15]: "Because Cellactite" [the factory owners and the first defendants] "had given Adlon" [the employers of the workman] "a general permission to use any plant it was "said that it was just as if Cellactite had put the ladder in place, "with their own hands. That argument is fallacious, because "the permission was not a permission relative to any particular "piece of plant, but a general permission to use plant, and no "guarantee was given or representation made to anyone as to the "safety of any particular piece of plant or its suitability for any "particular work." Those words seem to me amply to cover the circumstances and the facts which I have found in regard to the way in which Macey told the plaintiff that he could use any of his, Macey's, ladders if he thought that they would serve his purpose. Macey did not in any sense of the word press the plaintiff to use the ladders or guarantee that the ladders were suitable for the job. That was a matter which lay within the competence of the plaintiff and within his competence alone. I think that that case affords a short answer to the plaintiff's claim against the second defendants. That is sufficient to dispose of this case, and accordingly the plaintiff's claim fails both against the first and against the second defendants.

Judgment for the defendants.

Solicitors: *Sprinz & Sons for J. P. Nolan & Janes, Southend-on-Sea; Carpenters; Isadore Goldman & Son for E. A. Morling & Son, Maidstone.*

J. F. L.

[15] Ibid. 457.

[QUEEN'S BENCH DIVISION.]

* REGINA v. BRIGHTON BOROUGH JUSTICES. *Ex parte* JARVIS.

1953 *Dec.* 18.

Lord Goddard C.J., Sellers and Barry JJ.

Licensing—Occasional licence—Application—Application for occasional licence in Brighton by holder of a full on-licence in Taunton—Justices' consent to occasional licence for off-licence premises "on "the occasion of Christmas shopping facilities"—Consent given on condition that no liquor sold for consumption on the premises—"Occasion"—Whether occasional licence can be off-licence—Validity of justices' consent—Where consent administrative or judicial act—Customs and Excise Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 44), *s.* 151—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 148.

Justices — Administrative or judicial decision — Licensing. Crown Practice—Certiorari—Application by party not interested—Disaction—Administrative or judicial decision—Licensing justices.

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The holder of an off-licence for the sale of intoxicating liquor in respect of premises in Brighton also held a full on-licence in respect of premises at Taunton. The permitted hours during which liquor could be sold at the off-licence premises in Brighton, which closed at 7 p.m., were from 10.30 a.m. to 2 p.m. and from 6 p.m. to 10.30 p.m. The licensee, in his capacity as the holder of an on-licence at Taunton, applied to the Brighton justices under section 151 of the Customs and Excise Act, 1952, for their consent to the grant of an occasional licence allowing him to sell liquor at his Brighton premises during the afternoons of Christmas week, for the convenience and accommodation of the public. The justices consented to the grant of an occasional licence authorizing him to sell liquor between the hours of 2.30 p.m. and 6 p.m. on December 22, 23 and 24 "upon the occasion of Christmas shopping facilities," their consent being given upon the licensee giving undertakings not to sell any intoxicating liquor for consumption on the premises between 2.30 p.m. and 6 p.m., and to close the premises for the sale of intoxicating liquor off the premises at 7 p.m. On an application by rival trader for an order of certiorari:—

Held, that the object of an occasional licence, which must be an on-licence, was to enable the public to obtain refreshment when attending at a certain place or occasion. Such a licence could not be restricted to off-licence purposes, nor could the holder of an off-licence be granted an on-licence which was, by conditions attached to it, in effect an off-licence, merely to enable him to sell liquor during the hours when his off-licence did not permit him to do so. The consent given by the justices was one which they had no power to give and, accordingly, an order of certiorari must go.

Held further, that "Christmas shopping facilities" was not an occasion for which an occasional licence should be granted.

APPLICATION for order of certiorari.

The respondent, Paul Dauthieu, was the holder of a Customs and Excise off-licence for the retail of spirits, wines and beer in respect of premises at 64, London Road, Brighton, and of other premises in various parts of the south of England. The respondent was also the holder of a full on-licence in respect of the Bear Hotel, Taunton. The permitted hours for the sale of intoxicating liquor at the respondent's premises in Brighton, and at other licensed premises in Brighton were between 10.30 a.m. and 2.30 p.m., and between 6 p.m. and 10.30 p.m., but the respondent closed his premises at 7 p.m. On December 11, 1953, the respondent, having served notice of his intention upon the chief constable of Brighton and the clerk to the justices, applied, in his capacity as the holder of an on-licence in respect of the Bear Inn, Taunton, to the Brighton justices for consent to the granting to him of an occasional licence under the Customs and Excise Act, 1952,[1] authorizing the sale by him of intoxicating

[1] Customs and Excise Act, 1952, s. 151: "(1) Where the appropriate "consent has been obtained by the "holder of a retailer's on-licence the "Commissioners shall grant to him "an excise licence (hereinafter in this "section referred to as an 'occasional "'licence') authorising the sale by "him of any intoxicating liquor to "which his retailer's licence extends "at such place other than the pre-"mises in respect of which his "retailer's licence was granted, dur-"ing such period not exceeding in "Great Britain three weeks or in "Northern Ireland three days at one

liquors at 64, London Road, Brighton, between the hours of 2.30 p.m. and 6 p.m. on December 19, and during the period December 21 to December 24, 1953, on the occasion of Christmas week, for the convenience and accommodation of the public. The grounds of the application were that in the period immediately before Christmas tremendous pressure was experienced by the respondent's staff with consequent strain on them, and that, if the application were granted, it would benefit afternoon shoppers.

At the hearing of the application the respondent offered to give an undertaking that no liquor would be sold for consumption on the premises and the justices, in exercise of their powers under section 148 of the Licensing Act, 1953, consented "to the grant "of an occasional licence to Paul Andre Schremer Dauthieu "(being the holder of a retailer's on-licence in respect of the Bear "Inn . . . Taunton in the county of Somerset) authorizing the "sale by him of intoxicating liquor on the 22nd, 23rd and 24th "days of December, 1953, between the hours of 2.30 p.m. and "6 p.m. . . . at 64, London Road, Brighton, . . . upon the occasion "of Christmas shopping facilities." The justices' order was endorsed "This occasional licence is granted on undertakings "given by the" [respondent] "(*a*) not to sell any intoxicating "liquor for consumption on the premises between 2.30 p.m. and "6 p.m., and (*b*) to close the premises for the sale of intoxicating "liquor off the premises at 7 p.m."

The applicant, a licensed victualler carrying on business in Brighton and a member of the General Purposes Committee of the Brighton and County Licensed Victuallers' Protection Society and Friendly Association, a rival trader, in common with the other members of his society and association, to the business carried on at 64, London Road, Brighton, moved for an order of certiorari

"time, and between such hours, as "may be specified in the consent: . . . "(2) In the foregoing subsection, the "expression 'the appropriate con-"'sent' means—(*a*) in England or "Wales, the consent of the justices "granted on an application made in "accordance with s. 64 of the Licens-"ing (Consolidation) Act, 1910; . . . "Provided that, without prejudice "to any discretion of the appropriate "authorities aforesaid to refuse their "consent or permission, they shall "not grant it unless they are of "opinion that the grant of an occa-"sional licence is expedient for the "convenience and accommodation of "the public."

Licensing Act, 1953 (which repeals and replaces the Licensing Act, 1910) s. 148: "(1) For the purposes of "section 151 of the Customs and "Excise Act, 1952 (which provides "for the grant of occasional licences "to the holders of retailers' on-"licences who have obtained the "appropriate consent), the expression "'appropriate consent' means con-"sent granted by justices of the peace "under this section. (2) The justices "shall not hear an application for "consent unless satisfied that the "applicant has served on the chief "officer of police at least twenty-four "hours' notice of his intention to "apply for the consent, stating the "name and address of the applicant, "the place and occasion for which the "occasional licence is required, the "period for which he requires it to be "in force, and the hours to be speci-"fied in the consent. (3) Without "prejudice to any discretion of the "justices under this section to refuse "their consent, they shall not grant "it unless they are of opinion that "the grant of an occasional licence "is expedient for the convenience and "accommodation of the public. . . ."

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to bring up and quash the justices' consent to the grant of the occasional licence on the grounds: that the justices had no power to grant the consent in respect of the occasion, or the period, or the premises for which it was given; that the respondent in his application for the consent did not state the occasion or any occasion for which the licence was required; that the justices gave the consent subject to conditions which they had no power to impose; and that the justices, in granting the consent, had exceeded their jurisdiction.

J. G. S. Hobson for the applicant.
Harold Brown for the respondent.

The following cases were referred to in argument: *Reg.* v. *Bath Licensing Justices* *; *Rex* v. *Rotherham Licensing Justices*,† and *Chandler* v. *Emerton and others, Justices.*‡

LORD GODDARD C.J. referred to section 151 of the Customs and Excise Act, 1952, and section 148 of the Licensing Act, 1953, and continued: The first objection that has been taken by Mr. Harold Brown for the respondent is that, quite apart from the particular facts of this case, certiorari will not lie because the granting of consent by the justices is an administrative and not a judicial act. I can only say that I think that that argument is made about sixty years too late. It has now long been held, since *Sharp* v. *Wakefield*,[1] *Boulter* v. *Kent Justices* [2] and that class of case, that what justices do in relation to licensing matters are judicial acts, and, if any more recent authority is required, *Rex* v. *Rotherham Justices*,[3] considered in *Rex* v. *Torquay Justices*,[4] is ample authority for the proposition that certiorari will lie. The court finds no difficulty in saying that this consent, which must be applied for to justices sitting in court and considered by them, and as to which they have to exercise a discretion whether the matter is for the convenience and accommodation of the public, is clearly a judicial act and an order which can be brought up and reviewed by this court.

The respondent holds an on-licence in respect of the Bear Inn at Taunton, in the county of Somerset, some 150 miles from Brighton, if not more. He also holds off-licenses in Brighton and other South Coast towns. For this purpose it must be remembered that, although licences can be sub-divided into many different classes, the main division is between on-licences and off-licences; on-licences permit the consumption of intoxicating liquor on the licensed premises during certain permitted hours, while

* [1952] 2 All E.R. 700.

† (1939) 55 T.L.R. 718; [1939] 2 All E.R. 710.

‡ [1940] 2 K.B. 261; 56 T.L.R. 790; [1940] 3 All E.R. 146.

[1] [1891] A.C. 173; 7 T.L.R. 389.

[2] [1897] A.C. 556; 13 T.L.R. 538.

[3] (1939) 55 T.L.R. 718; [1939] 2 All E.R. 710.

[4] [1951] 2 K.B. 784; [1951] 2 T.L.R. 652; [1951] 2 All E.R. 656.

off-licences permit the sale, but not the consumption on the premises, of intoxicating liquor during the permitted hours.

The respondent thought that it would be convenient for the public (and, I have no doubt, profitable for himself) if he could sell liquor at his shop at Brighton all through the day, irrespective of the permitted hours. Accordingly, he applied to the Brighton justices for an occasional licence. He could only do that as the holder of an on-licence, therefore he applied, not in his capacity of a Brighton or a Sussex licensee, but in his capacity of the holder of a licence at Taunton. I am surprised that in the circumstances the justices entertained the application at all. However, they granted this very curious licence, "upon the occasion of Christmas "shopping facilities." The occasion of Christmas shopping might be an "occasion"; but I do not know how "shopping facilities" can be an "occasion." It is a curious way of putting it but I am not going to determine this case merely upon that.

The justices put on the licence "This occasional licence was "granted on undertakings given by the applicant (*a*) not to sell "any intoxicating liquor for consumption on the premises between "2.30 and 6 p.m., and (*b*) to close the premises for sale of intoxi-"cating liquor for consumption off the premises at 7 p.m." It is to be observed that an occasional licence must be a full on-licence. The justices, therefore, can only grant the respondent a full on-licence; but what they have done here is to say: "We will give "you an occasional licence, that is to say, a full licence, on the "terms that you only use it as an off-licence; and, on the other "hand, you may sell at places where you have only got an off-"licence, so at the same time we will give you an occasional "licence on those premises."

The answer is that they have given a licence that they have no power to give. There is no power to turn an off-licence into an on-licence in this way and no power to restrict an on-licence into an off-licence. If a man is granted an on-licence, he can sell only during permitted hours and he is not obliged to close till the hours come to an end. If, on the other hand, he has an off-licence, he cannot have granted to him an on-licence which is really, in effect, an off-licence, merely to enable him to sell liquor during hours when his off-licence does not allow him to sell. The whole object of an occasional licence (which is granted for an occasion such as a flower show or a race meeting, or it may be now a festival occasion which may last as long as three weeks) is to give the public a chance of getting refreshment when attending at the place in question. Here, the licence that was granted is neither fish, flesh nor good—nor bad—red herring. In my opinion, it is not a licence, and therefore this application is granted.

I would add that, although I am not necessarily deciding it, the other licensees may not be interested persons; if they are not, the only difference would be that then the issue of certiorari would be discretionary and not as of right. Assuming, therefore, that the application must be one applying to us in our discretion to

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grant certiorari, I think that this is eminently a case in which we should exercise our discretion because, if this state of affairs were allowed—we are told (there is no actual evidence about it) that it has been tried on in other places—it would be an obvious way of getting round the provisions of the Licensing Act and justices would be acting in a way which, in our opinion, the law does not permit. It is, therefore, just as well that this question should be decided.

SELLERS J. I agree. I think that the justices misconceived the position here. They granted an on-licence for premises where no on-licence was required, and where there was no occasion to grant one. They then sought to make what was obviously an on-licence, granted to the holder of a retailer's on-licence, into something which was an off-licence and to restrict it in a way which I do not think that they were empowered to do. I agree with the decision of my Lord.

BARRY J. I agree.

Order of certiorari.

Solicitors: *Godden, Holme & Co. for Edwin Boxall & Kempe, Brighton; Blyth, Dutton, Wright & Bennett for Graham Hooper & Betteridge, Brighton.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

1953 *Dec.* 15, 16.

Barry J.

* WATT *v.* HERTFORDSHIRE COUNTY COUNCIL.

[1952 W. No. 1451.]

Negligence—Safe system of work—Fireman—Fireman injured while travelling to emergency in vehicle with unlashed jack—Obvious risk—Whether fire authority entitled to require fireman to travel in dangerous situation—Standard of duty owed.

Fire Brigade. Volenti non fit injuria.

Fire authorities are bound to provide proper equipment and to take reasonable care to avoid exposing firemen to unnecessary risks, but the primary object of the service is to save human life and property and, speed being an essential requirement in carrying out that object, fire authorities are entitled to require their firemen to undertake risks far greater than those encountered in other employments, not only when fighting a fire, but also when being transported to the scene of a fire or other emergency.

ACTION.

Since 1939 the plaintiff had been employed by the defendants, the local fire authority, as a fireman at Watford fire station. On July 27, 1951, the plaintiff was on duty at the fire station when an emergency call was received to the effect that a woman was

trapped under a heavy vehicle about 200 or 300 yards away. The sub-officer in charge immediately left the station in a pump-escape vehicle, but before going he gave instructions that the plaintiff's team should follow him to the scene of the accident transporting with them in a Fordson lorry heavy lifting gear, namely a large jack standing on four small wheels and weighing about two or three hundredweight. The jack was loaded into the back of the lorry and was accompanied by the plaintiff and two other firemen who steadied the jack. The lorry had a plain floor and sides and there was nothing to which the jack could have been lashed. Shortly after the lorry had left the fire station the driver had to apply the brakes suddenly; all three men were thrown off their balance, the men steadying the jack were unable to hold it and it slewed forward, catching the plaintiff's ankle and causing him serious injuries.

Three vehicles were in regular use at the fire station, a pump-escape and a water tender, which were both unsuitable for the carriage of the jack, and an Austin tender which was used as an emergency tender and which was properly equipped for the carriage of the jack, and in which it could be properly secured. The Austin tender was put to other uses and was out of the station and not available for the carriage of the jack during about 30 hours in the week; at the time that the emergency call was received it was not in the station. The Fordson lorry on which the jack was carried on July 27, 1951, was not one of the regular vehicles used by the fire authority at the Watford station, but had been lent to the station for the transport of training equipment only a few days before the plaintiff's accident. Emergency calls other than fire calls were fairly frequent at the fire station, but it was rare for the heavy jack to be required, and in the normal course, if the jack was required when the Austin tender was not available to carry it, another station would be notified and would answer the call. On the occasion in question it would have taken at least ten minutes for assistance to arrive from the nearest fire station.

The plaintiff, alleging negligence at common law, brought the action to recover damages for the injuries which he received. The defendants denied liability.

H. B. Grant for the plaintiff.
Lord Hailsham Q.C. and *Roland Brown* for the defendants.

The following case was referred to in argument: *Merrington* v. *Ironbridge Metal Works Ld.*[1]

BARRY J. stated the facts and continued: It was not suggested that the driver of the lorry was negligent in the way in which he controlled the vehicle, because it was recognized by the plaintiff that in travelling towards the scene of an accident

[1] [1952] 2 All E.R. 1101.

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of this kind it was incumbent upon the driver to cover the distance as quickly as possible, and in that endeavour it might well be necessary for him on occasions to apply his brakes with considerable violence. Unfortunately, the sudden application of the brakes threw all three men, including the plaintiff, who were travelling on the flat floor of the lorry, off their balance.

The principal question which I have to decide is whether the plaintiff has established that this accident was due to the negligence of his employers. It is very properly conceded by Lord Hailsham on behalf of the defendants that if the peculiar considerations associated with the fire service were to be eliminated from this case and it were to be treated as an ordinary case of master and servant in some commercial enterprise, then the defendants would have failed to have taken reasonable care to secure the safety of their workman. The lorry had a perfectly plain, flat floor, there was nothing on the floor or on the side or tail boards to which any ropes or wires could be attached, and the heavy jack could not have been lashed in any effective manner. The jack was highly mobile, particularly at one end supported by the castor, and any careful employer must have foreseen that, if it were carried in the back of that lorry, steadied only by the hands of two men, there was a very considerable danger of it slipping on some sudden movement of the lorry, such as a violent swerve or a violent application of the brakes, and, having regard to its weight, it would not be difficult to foresee that, if it did move, it was liable to do considerable damage to anyone who happened to be upon the lorry floor. I have, however, to look at the very special circumstances in this case.

[His Lordship referred to the situation at the fire station when the emergency call was received and continued:] When the call arrived, the sub-officer, in the exercise of his discretion, decided to transport the heavy jack, which he thought would clearly be required having regard to the nature of the emergency with which he was called upon to deal, in the Fordson lorry which was the only vehicle available on which it could be carried. I do not know whether he directed his mind to the possible risks involved in carrying the jack upon the flat floor of the Fordson, but had he done so, as I have already indicated, it must have been clear to him that the risk involved in transporting the jack in that way was, to put it at its lowest, a substantial risk.

The question which I have to answer is whether the defendants were negligent in these circumstances in requiring the plaintiff to travel on the floor of the lorry while the jack was being carried, unsupported by any platform and with its movement unchecked by any chocks upon the floor or by any system of strapping or lashing. This question is not an easy one, but on the whole I have come to the conclusion that the plaintiff has failed to establish negligence on the part of his employers. As Lord Hailsham pointed out, and as Mr. Grant conceded, an employer's obligations to his servants are, in the absence of some

statutory requirement, not absolute obligations. An employer is bound to exercise reasonable care to avoid exposing those employed by him to unnecessary risks, and it is obvious that it is part of his duty to take reasonable care to provide his workmen with proper equipment for the work which they have to undertake. What is "reasonable," however, must depend upon the circumstances and upon the nature of the employment in which any particular servant may be engaged.

In joining the fire service, it seems to me that the plaintiff voluntarily engaged himself in a type of employment which he knew involved very much greater risk than many other types of employment which he could have chosen. In fighting fires fire authorities are entitled to require their firemen to undertake, and their firemen gladly undertake, risks far greater than those which would be encountered in other kinds of employment. An employee is entitled to expect his employer to subject the scaffolding which he uses to minute scrutiny to ascertain that it is in every way safe for its purpose, and he is also entitled to require his employers to provide hand-rails and other safety precautions which will reduce the risk of any accident to any man, but similar considerations do not apply to men engaged in fighting fires. It is inherent in their employment that they take risks in and about a building which a bricklayer or a builder's labourer would never be called upon to undertake. A person who joins the fire service must be aware that, not only in actually fighting the fire but in being transported to the place where the fire is taking place he will be called upon to take risks which other persons travelling in motor-vehicles would not be required to undertake. The primary object of the whole service, of which the plaintiff I am sure is a most worthy member, is to save human life and property, and, to carry out those objects, speed is a most essential requirement.

I think that Lord Hailsham is right when he says that no negligence has been established against the sub-officer or any of the other men who were working with the plaintiff at the fire station on the afternoon of this accident. The sub-officer was faced with an emergency. Even vis-à-vis the plaintiff he was entitled to use his initiative and to do what he reasonably could to bring the necessary assistance to the injured woman in the shortest possible space of time. I think that in this emergency when there was a vehicle available he was entitled to use it even though he knew, or certainly ought to have known, that it was not ideally adapted for the use to which he proposed to put it. It has been suggested by Mr. Grant that he might have detailed one or two of the firemen to drag the jack to the scene of the accident by hand. I do not know whether the sub-officer had any exact information as to the distance between the scene of the accident and the fire station, but even if he had, it seems to me that it would clearly take longer to drag a heavy implement of this kind along the street than it would to transport it by lorry.

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Speed being the essential element, he was, in my view, justified in making that decision. If in fact the woman had died as a result of some delay in bringing the necessary equipment to the scene of her accident, her death would weigh very heavily on the sub-officer's conscience and I think the same would apply to any of the others engaged at the Watford station. It is forcibly argued by Mr. Grant that even though the sub-officer might have been under a duty to bring aid to the injured woman, as a member of the public, as soon as possible, that does not mean that, vis-à-vis the plaintiff and the other members of the brigade he was entitled to use the Fordson lorry and to answer this call. It was submitted that the defendants were not entitled to disregard the safety of their own servants in an effort to save other people's lives or property. Lord Hailsham agreed—and everyone must agree—that fire authorities are not entitled to subject their employees to unnecessary risk. The question here is: Was the risk unnecessary? In my judgment, it was not. The risk was an ordinary incident of the hazardous employment of a fireman. I think, in all the circumstances, it was a necessary risk and that the sub-officer was entitled to call upon the plaintiff and the remainder of the plaintiff's team to travel in the Fordson lorry although it was carrying the jack which was clearly inadequately secured.

It is also necessary to consider whether, even in the absence of any negligence on the part of the sub-officer and the other men employed at the Watford station, the defendants, as a fire authority, were in breach of their duty to the plaintiff. It is said that they ought to have foreseen that the Austin towing van, which was properly equipped for carrying the jack, might be engaged on other work when an emergency call requiring the use of a jack was received, and that some other vehicle at the station should have been equipped so as to enable it to carry a heavy jack of this kind in safety, or that the lorry which was temporarily in use at the fire station should have been fitted with some temporary device, such as chocks or clips, to enable the jack to be adequately secured to its floor.

Emergency calls of this kind requiring the transport of a jack are extremely rare and I do not think that I could properly find negligence on the part of the defendants in failing to equip, as possibly they could have equipped, their pump-escape or their water tender with some clips or chocks for carrying the heavy lifting gear. Lord Hailsham pointed out that examples of this kind can always be carried to absurd lengths. If two vehicles had been equipped for carrying this jack and both happened to be out of commission or unavailable, it could then be said that the fire authority was negligent in not having provided a third, and so on. I do not think that I can find negligence on the part of the fire authority in having only one vehicle equipped for this purpose. In the ordinary course of events if that vehicle happened to be away from the station when an emergency call

requiring the use of heavy lifting equipment arrived, the normal course to take would be to invoke the assistance of some other station, but on this particular occasion an alternative course was open to the sub-officer. The Fordson lorry happened to be available and he thought it right to use it in an endeavour to help the woman with the least possible delay. I think I would be doing a great disservice to the fire service as a whole if I were to hold that, in those circumstances, the defendants were negligent or in breach of their duty to the members of the fire brigade.

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I do not think that this is a case in which the defence of volenti non fit injuria has any real relevance. Lord Hailsham preferred to put his case on the basis that, in the circumstances, the plaintiff had failed to prove any negligence on the part of his employers. I think that is how this case must be put and I think that the plaintiff has so failed and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Denis Hayes for F. S. Ellis & Co., Watford; Berrymans.*

J. F. L.

[PROBATE, ETC., DIVISION.]

* PRACTICE NOTE (JUSTICES' CLERKS).

1954 *Jan.* 15.

Lord Merriman P. and Collingwood J.

Husband and Wife—Justices—Retirement of justices—Presence of clerk. Justices—Clerk—Retirement with justices—Matrimonial case.

LORD MERRIMAN P. In a statement made in the Divisional Court of the Queen's Bench Division on November 16, 1953, about clerks to justices being present when the justices have retired to consider their decision, Lord Goddard C.J. said that the ruling of that court did not apply to justices when exercising jurisdiction in matrimonial cases, as they were then subject to the directions and control of this Division. Before making any pronouncement in response to several requests for a ruling by this court on the subject, I wished to consult the judges of this Division. I now have their authority to say that they agree with the statement I am about to make. I am also authorized by the Lord Chancellor to say that he approves of it. Vaisey J. also asks me to say that he agrees with it.

I wish to say at the outset that it rarely happens that an allegation of undue interference by the clerk in the decision of a complaint under the Summary Jurisdiction (Married Women) Acts is made a ground of appeal to this Divisional Court. Nevertheless, it is at least as important in cases of this class as in other cases dealt with by magistrates' courts that the decision

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should be that of the justices themselves, and not that of the justices and their clerk; and that not only should this be so in fact, but that nothing should be done to give the parties or the public the impression that the clerk is influencing the decision. I am, therefore, in complete agreement with the Lord Chief Justice that it should not be regarded as a matter of course that, if justices retire to consider their decision, the clerk should retire with them; moreover, whether the justices invite the clerk to retire with them, or send for him in the course of their deliberations, I agree that the clerk should always return to his place in court as soon as the justices release him, leaving them to complete their deliberations alone.

Bearing in mind that domestic proceedings are often lengthy and may involve points of law in relation to the complaint itself or to the amount of maintenance, and that this court insists that a proper note of the evidence must be kept, and that, in the event of an appeal, justices must be prepared to state the reasons for their decision, I recognize that more often than not magistrates may properly wish to refresh their recollection of the evidence by recourse to the clerk's note, or to seek his advice about the law, before coming to their decision. Having regard to the high standard of care which is generally shown by magistrates' courts in dealing with these domestic proceedings, I do not think it is necessary for me to say more than that I am confident that justices taking part in them may be trusted to act, and to ensure that they appear to act, on the fundamental principle that they alone are the judges.

J. B. G.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1953 *Nov.* 30; *Dec.* 1, 4.

Lord Goddard C.J., Sellers and Barry JJ.

*REGINA *v.* DAVIES.

Criminal Law — Evidence — Evidence of accomplice — Murder — Boy attacked by gang—Subsequent death from stab wound inflicted by one of gang—Evidence by one of attackers previously acquitted on murder charge — Whether evidence of accomplice requiring corroboration.

The appellant, D., together with other young men, attacked with their fists some youths, including one B. A knife was used and B. subsequently died from stab wounds. D., and five of his companions including one L., were charged with murder, but when the matter came for trial, no evidence was offered against L. and three others, and verdicts of Not Guilty of murder were entered. At D.'s trial on a charge of murdering B., L. gave evidence. D. was convicted. His main ground of appeal was that L. and another witness were accomplices and that the judge had failed to warn the jury that it

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

would be dangerous to accept their evidence without corroboration, and it was submitted that L.'s evidence was not corroborated:—

Held, dismissing the appeal, that as when L. gave his evidence he had been acquitted of B.'s murder, he could not be an accomplice to the charge of murder. The facts negatived any participation by L. and the other witness in the murder. The fact that they were making an attack with their fists did not of itself associate them with the attack by one of their number with a weapon which caused death.

APPEAL against conviction.

The appellant, Michael John Davies, was convicted on October 22, 1953, at the Central Criminal Court of the murder of John Ernest Beckley, a youth aged 17, on Clapham Common on the evening of July 2, 1953. The following statement of facts is taken from the judgment of Sellers J.: Between 9.30 p.m. and 10 p.m. on the night of July 2, 1953, Beckley and three others named Ryan, Chandler and Carter were attacked by a gang of eight or ten youths including the appellant, all of whom were complete strangers to them. That attack seemed to have been instigated by a youth Coleman who thought that he had been insulted by Beckley and his companions who had been sitting near the bandstand on Clapham Common.

The fight began at a drinking fountain near the bandstand in the northern part of the common, and, after receiving considerable punishment, the four youths managed to escape and ran away in different directions. During that stage of the fight Ryan had received a knife wound over the right shoulder blade. Ryan and Carter managed to evade their pursuers, but Beckley and Chandler were less fortunate. Having broken away from their assailants, each of them ran by different paths to the main road which ran along the north side of the common. There they both boarded a bus which was stationary at some traffic lights at the junction of Cedars Road. Most of the attacking gang were still in pursuit and when the bus halted at a bus stop a short distance beyond the traffic lights, Beckley, who was still on the rear platform, was pulled off the bus. Chandler was either pulled from the bus or dismounted himself after Beckley had been dragged from the platform, and they were both again attacked on the pavement by at least six assailants, including the appellant.

During the fight which ensued a knife was again used, as Chandler undoubtedly received a stab in the stomach. Beckley at last managed to break away, almost certainly by that time severely wounded, and ran along the pavement in front of the bus. The appellant and the other attackers followed and closed around him. They then ran away and Beckley was left lying on the pavement with no less than eight stab wounds on his head and body, the most serious of which was one in the small of the back. Shortly afterwards Beckley died as a result of those wounds.

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The evidence of the prosecution showed that before the fighting at the fountain began the appellant produced a knife and opened it, saying as he did so: "I will be all right with "this." Before or during that part of the fight someone had shouted "Get out the knives," or words to that effect. No knife was ever discovered, but witnesses identified a knife which they saw in the appellant's hand as being similar to a knife produced at the trial, which was a cheap knife with a green handle, easily obtainable in shops in the neighbourhood of Clapham Common and elsewhere. In his own statement the appellant admitted that he was actively engaged not only in that part of the fight but also in the later attack on Beckley and Chandler at the bus stop. He also admitted that he followed Beckley along the footpath to the place where Beckley finally collapsed and crowded round him with the other youths. The appellant denied that he ever used a knife or had a knife in his hand.

Two women, who were sitting in the front seat on the top of the bus, witnessed the final stages of the attack. They saw the assailants running along the footpath, and one of them "seemed to go up to another boy and shake him. He seemed "to shake him, making a motion as if he shook his shoulders." Immediately afterwards the boy who had been shaken fell to the ground and there could be no doubt that that boy was Beckley. One of those witnesses, Miss Frayling, clearly identified the appellant as the youth who "seemed to shake" Beckley. The appellant afterwards crossed the road in front of the bus and Miss Frayling saw him make what she described as a "shutting "motion" and then put a green-handled object into the right-hand inside breast pocket of his coat. She thought it was a knife.

When the appellant's clothing was examined traces of blood were found inside this pocket and around the pocket opening. Blood in small quantities was also found on the right sleeve of his coat above the cuff, and on his waistcoat and shirt. Lastly, evidence was given of certain threats uttered by the appellant soon after those events had occurred and of remarks made by him to youths named Lawson and Wood.

The appellant appealed against his conviction for Beckley's murder.

David Weitzman Q.C. and *R. R. Russell* for the appellant.
Christmas Humphreys and *Maxwell Turner* for the Crown.

The following cases were cited in argument: *Rex* v. *Lewis* [1]; *Rex* v. *Mohamed Farid* [2]; *Attorney-General* v. *Lineham* [3]; *Rex*

[1] (1937) 26 Cr.App.R. 110; [1937] 4 All E.R. 360.
[2] (1945) 30 Cr.App.R. 168.
[3] [1929] Ir.Rep. 19.

v. *Baskerville*[4]; *Rex* v. *Atkinson*[5]; *Rex* v. *Lee Kun*[6]; *Rex* v. *Jennings*[7]; *Rex* v. *Carr*[8] and *Rex* v. *Rudd*.[9]

Cur. adv. vult.

SELLERS J. reading the judgment of the court, stated the facts as set out above and continued: The main ground of appeal was that the judge had omitted to warn the jury that the witnesses Lawson and Wood were accomplices or were to be regarded as accomplices and that it would be dangerous to rely on their evidence unless corroborated, and it was submitted that there was no corroboration of the evidence of Lawson. No such warning was given and at no time in the trial was it suggested by anyone that these two youths or either of them were accomplices or that the customary warning should be given by the judge, but this matter became the substantial ground of the appeal.

Wood had apparently taken some part in the fighting at the fountain, but not subsequently, and he was not charged with any offence. He spoke of the prisoner having a knife with a green handle before the attacks. Lawson was one of the number who started the attack at the fountain and he continued to the bus stop and remained throughout. He had originally been charged with the murder of Beckley together with Davies, Coleman, Power, Woodman and Allen, but when the matter came for trial no evidence had been offered against Lawson, Power, Woodman and Allen and a verdict of Not Guilty of murder was returned in each of those four cases. Lawson subsequently pleaded Guilty to a common assault and it was made clear at the trial that he came to give his evidence from prison where he was undergoing the sentence for that offence.

The position therefore was that when Lawson gave his evidence he had been acquitted of the murder of Beckley and the prosecution submitted before this court that he could not therefore be an accomplice to the charge of murder. We think that that is so and that the judge was not required to treat Lawson as an accomplice, still less Wood. These two men had been engaged with others in an assault or series of assaults which cannot be too strongly condemned, but the facts negatived any participation by them in the murder. The fact that they were making an attack with their fists, and perhaps by kicking too, does not in itself associate them with the attack by one of their number with a knife or other weapon which caused death. The judge was not, therefore, under any obligation to treat Lawson as an accomplice and to warn the jury in respect of his evidence, and it was a matter of discretion whether or not he should give any caution to the jury on other grounds.

[4] [1916] 2 K.B. 658.
[5] (1934) 24 Cr.App.R. 123.
[6] [1916] 1 K.B. 337; (1915) 32 T.L.R. 225; (1915) 11 Cr.App.R. 293.
[7] (1912) 7 Cr.App.R. 242.
[8] (1909) 2 Cr.App.R. 317.
[9] (1948) 64 T.L.R. 240; (1948) 32 Cr.App.R. 138.

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It was submitted on behalf of the appellant that if Lawson was not strictly an accomplice he should have been treated as one. Reliance was placed on *Rex* v. *Lewis*,[1] *Rex* v. *Mohamed Farid*,[2] and *Attorney-General* v. *Lineham*.[3] It may be that for the purposes of the rule which is concerned with the testimony of witnesses whose evidence may be influenced in the witness's own interest that the court should not seek to lay down a narrow or precise definition of an "accomplice." It may be that certain witnesses should, in the interest of a fair trial, be treated as accomplices. In *Rex* v. *Mohamed Farid*,[4] the witnesses in question were not accomplices with regard to the actual offence charged against the prisoner, but this court held that the warning should have been given. In the present case, however, we do not think it was obligatory for a warning to have been given in the customary terms as Lawson was not an accomplice, and because, in fact, the accused himself agreed in many respects with Lawson's evidence. When it was put to the accused that he was disagreeing with Lawson and that therefore Lawson was lying, the accused said he was under a misunderstanding.

Lawson's evidence was important. He said that shortly after the fighting and after Beckley had been left at the roadside, obviously seriously injured by the wound from which he died shortly afterwards, the accused came to the coffee stall at the Plough and was talking to Lawson and Woodman. This the accused in his evidence agreed. In the course of the conversation Lawson said that the accused said that all he tried to do was to run a knife up and down and that he did not stab Beckley. In examination in chief the accused admitted a conversation but stated that what he said was not Lawson's version but this: "I "said it looked like somebody had cut his face, cut Beckley's face. "(Q) And I think Lawson agreed, at any rate at one time, that "the words which might have been used were that somebody "must have put a knife up and down his face? (A) Yes, Sir. "(Q) Is that what you said or something like that? (A) Yes, "Sir. (Q) Was there any question of your saying anything like "you had done anything with a knife? (A) No, Sir, definitely "not." And in cross-examination: "(Q) Did you say to Lawson "at the café 'All I tried to do was to run the knife up and "'down?' (A) No, Sir. (Q) That is an invention on his part? "(A) Not necessarily an invention; a mistaken statement. (Q) "It is a very very different thing from 'He must have been cut' "or something of that kind is it not? (A) Not a lot of difference, "no." And later: "(Q) Leaver, Wood, and Miss Pilkington "telling lies about you with a knife in your hand before the "fight? (A) Yes. (Q) Lawson, Brenda Wood, Sylvia Chubb "and again Wood are all wrong in what you were saying after "the fight? (A) Lawson is mistaken; the others are wrong."

[1] (1937) 26 Cr.App.R. 110.
[2] (1945) 30 Cr.App.R. 168.
[3] [1929] Ir.Rep. 19.
[4] 30 Cr.App.R. 168.

The difference between the versions was put to the jury by the judge and the issue on this point for them was whether Lawson was mistaken or was inventing his version or whether the accused's statement was correct and what inference they would draw from or what effect they would give to the conversation. In these circumstances the accused corroborated the incident, the conversation and a substantial part of the statement and it is not surprising therefore that at the trial nothing was said about Lawson being an accomplice and about corroboration being necessary.

The jury came back and asked a question about Lawson's evidence and obviously attached importance to it. Several witnesses had spoken of the accused having a knife; there was no evidence that any one else had a knife. Miss Frayling, after the affair at the bus stop, saw the accused shake Beckley by the shoulders and afterwards close and place into the breast pocket of his coat a knife. The evidence of Lawson, if the jury accepted it, together with such bloodstains as were to be found on the accused's clothing, added pointers to the accused's guilt.

Complaint was made that the jury were informed, partly in evidence by Superintendent Davies and partly by counsel for the prosecution, that there was no evidence that any of the other boys had knives in this fight, and that that was why the prosecution offered no evidence against the four and ultimately against Coleman after the jury had disagreed at the first trial of Davies and Coleman, where it was not contended that Coleman had a knife, but that he knew that Davies had a knife and he entered into the attack alongside of him.

We think it is unfortunate that this matter was introduced in this way even though it may have been prompted by certain questions by the defence, but there was in fact no evidence before the jury that anyone of the other youths had a knife that night; it was not affirmatively suggested by the defence that any particular person had a knife; when Lawson was in the witness box it was not suggested that he had a knife, and the judge stressed to the jury that they must be satisfied that it was the accused who stabbed Beckley and inflicted the wounds upon him from which he died.

We cannot therefore give effect to that ground of appeal. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; Director of Public Prosecutions.*

[COURT OF APPEAL.]

C. A.

1953
May 7.

Lord Goddard C.J., Birkett and Hodson L.JJ.

* BLACKMAN *v.* RAILWAY EXECUTIVE.

Invitor and invitee—Railway station—Patch of oil—Injury to pedestrian—Standard of duty—Steps taken to render premises reasonably safe.

Fact or law.

The plaintiff, when walking along a part of a railway station—from which passengers were not expressly excluded—slipped on a patch of oil which had dripped from vehicles which normally used that area, and fell and received injury. The foreman on duty had seen the oil after a vehicle had been moved, and had immediately ordered sawdust, kept available for that purpose, to be put down and had called to passengers not to go that way. The plaintiff, who did not hear the foreman and who was not seen by him, slipped on the oil before the sawdust could be put down. In an action by her for damages for negligence Hilbery J. held that the plaintiff was an invitee of the defendants and, consequently that their duty to her was to take reasonable steps to keep their premises as free from danger as was reasonably possible; and that, there having been no failure to observe the danger from the oil or to render it innocuous within a reasonable time, the defendants had not been guilty of any failure to exercise reasonable care and were not, therefore, liable. The plaintiff appealed:—

Held, that Hilbery J. had applied the correct legal test and had accurately defined the duty owed by the defendants to the plaintiff; the question whether the defendants had taken adequate and reasonable steps was one of fact for the trial judge, and his finding should not be disturbed.

Decision of Hilbery J. [1953] 1 W.L.R. 2; [1953] 1 All E.R. 4, affirmed.

APPEAL from Hilbery J.

On May 19, 1948, the plaintiff was walking across Paddington Station on her way to the Bakerloo Tube station. Part of the great hall of Paddington station, known as the "lawn," was used for the loading and unloading of mail vans, which, with other vehicles used for the carriage of mails, stood there from time to time. Passengers were not prohibited from using that part of the station but they were not encouraged to do so. The vehicles standing on the lawn had to be kept lubricated and oil occasionally dripped from them on to the ground rendering the surface slippery. When that occurred, sawdust kept on the premises for the purpose, was put over the oil. On the day in question, just before the plaintiff arrived on the lawn, some vehicles, under which a patch of oil had formed, were moved. The foreman on duty noticed the oil and immediately shouted to passengers not to go that way and called to a trolley driver to bring some sawdust and put it down. At the time the plaintiff was passing behind the foreman. He did not see her and she did not hear him directing the passengers not to go that way. The plaintiff slipped on the oil and fell, injuring her back and

shoulder. She brought an action against the defendants claiming damages for negligence.

Hilbery J. held that the plaintiff, although on her way to the Tube station, was an invitee of the Railway Executive, and that the duty of the defendants was to take reasonable steps to have and keep their premises as reasonably free from danger as was reasonably possible and that there had been no failure on the part of the defendants to render the oil innocuous within a reasonable time. He therefore gave judgment for the defendants. The plaintiff appealed.

Edward Wooll Q.C. and *F. L. Clark* for the appellant.
Neil Lawson for the respondents.

LORD GODDARD C.J. stated the facts, and continued: Hilbery J. admittedly applied the correct principle of law in deciding the question before him, and correctly stated that it was the duty of the Railway Executive to keep their platforms reasonably safe so as to prevent a passenger from meeting with an unexpected danger. It was impossible to prevent some slippery places on the platforms, and the most that the Railway Executive could do, when they knew that there was oil on a platform, was to take reasonable steps to prevent members of the public from slipping on the oil. What more could be done than for the foreman porter to shout to people to go another way, or warn them against coming that way until the sawdust was brought, I do not know. Hilbery J. came to the conclusion, after hearing the evidence, that the defendants did take reasonable steps to avoid danger to passengers. It is impossible for us to interfere with his finding unless we were of opinion that he had applied either too high or too low a test so as to make his finding on that point obviously wrong. It must be borne in mind that questions of fact and law must not be confused. Once the standard of duty has been laid down correctly, the question whether the Railway Executive took adequate and reasonable steps was purely one of fact. Hilbery J. found and, I think, rightly found, that the Railway Executive did that which was reasonable in the circumstances, and that being so, we cannot disturb the judgment which he gave in favour of the defendants and we must, therefore, dismiss this appeal.

BIRKETT L.J. I agree, and have nothing to add.

HODSON L.J. I agree.

Appeal dismissed.

Solicitors: *Alfred Bieber & Bieber; M. H. B. Gilmour.*

P. B. D.

[COURT OF APPEAL.]

C. A.

1953
Dec. 9, 10.

Evershed M.R., Jenkins and Morris L.JJ.

* JONES *v.* GATES.

Agricultural Holding — Notice to quit — Validity — Meaning of "required" for use other than agriculture—Whether arbitration exclusive remedy—Minister's power to make regulations—Whether mandatory—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 24, 26—*Agriculture (Control of Notices to Quit) Regulations,* 1948 (*S.I.* 1948, *No.* 190), *reg.* 4.

Arbitration. Statutory Instrument. "Required."

The effect of section 24 (1) and (2) of the Agricultural Holdings Act, 1948, is that a landlord cannot, without the Minister's consent, serve an effective notice to quit on the tenant of an agricultural holding unless, inter alia, the notice to quit is given (section 24 (2) (*b*)) "on the ground that the land is required for a use, other "than for agriculture, for which permission has been granted on an "application made under the enactments relating to town and "country planning . . . and that fact is stated in the notice." Regulation 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948, provides that where a notice to quit is given on that ground, "it shall be open to the tenant, within one month from the "giving of the notice to quit, to serve on the landlord a notice . . . "requiring any question arising out of the reason stated in the "notice to quit to be determined by arbitration under the Act "of 1923."

The landlord of an agricultural holding who wished to sell the land as a sports ground but who had not entered into any negotiations for such sale, served a notice to quit on the tenant stating that the land was required for a use other than agriculture for which permission had been granted under the enactments relating to town and country planning. The tenant served a counter-notice complying with section 24 (1) of the Act of 1948:—

Held, (1) that the onus was on the landlord to prove that the land was "required" within the meaning of section 24 (2) of the Act of 1948 for a use other than agriculture, and he had not proved that it was so "required."

(2) That section 26 of the Act of 1948 did not bind the Minister to make regulations requiring questions arising under section 24 (2) to be determined by arbitration.

(3) That the fact that the tenant had not served on the landlord a notice under regulation 4 of the regulations did not preclude him from challenging the validity of the notice to quit since the question raised by his challenge—namely, whether section 24 (2) of the Act of 1948 had been successfully invoked—was not a question "arising out "of the reason stated in the notice to quit."

Budge v. *Hicks* [1951] 2 K.B. 335; [1951] 2 All E.R. 245; sub nom. *Hicks* v. *Budge* [1951] 2 T.L.R. 349 considered.

Decision of Judge Armstrong affirmed.

APPEAL from Judge Armstrong sitting at Bournemouth County Court.

On June 25, 1951, the plaintiff, John Clement Jones, served on the defendant, John Gates, who was the tenant of a field of 6·162 acres at Northbourne in the county borough of Bournemouth, the following notice: "We hereby give notice to quit

"and deliver up [the field] . . . The land is required for a "use other than agriculture for which permission has been "granted under the enactments relating to town and country "planning." On June 28, 1951, the tenant, or his agent on his behalf, served a counter-notice to the effect that section 24 (1) of the Agricultural Holdings Act, 1948, should apply, and that the notice to quit should not have effect unless the Minister of Agriculture and Fisheries consented to its operation.

At the hearing before the county court judge the landlord gave evidence that the field had at one time been used for a sports ground but had been let during the war to the present tenant, and that he now intended to sell it as a sports ground. He said that he had had inquiries from a business firm and a football club and that he would have no difficulty in selling the land for that purpose. The county court judge found, however, that the landlord had had no offers and was not then in negotiation with anyone; and he, therefore, decided that the landlord had not shown that the field was "required" for a use other than agriculture, and gave judgment for the tenant.

At the hearing of the landlord's appeal it was conceded that the field in question was an "agricultural holding" within the scope of the Agricultural Holdings Act, 1948.

R. R. D. Phillips for the landlord.
Robert Hughes for the tenant.

The following cases were referred to in argument: *Ireland* v. *Taylor*[1]; *Nuthall* v. *Entertainments and General Investment Corporation*[2]; *Cunliffe* v. *Goodman*[3]; *Budge* v. *Hicks*[4]; *Julius* v. *Bishop of Oxford*[5]; *Rex* v. *Barlow*[6]; *Reg.* v. *London County Council JJ.*[7]; *Rex* v. *Leicester JJ.*[8]

EVERSHED M.R. referred to the facts and continued: The form of notice and counter-notice is a reference to the terms of section 24 (1) of the Agricultural Holdings Act, 1948: "Where "notice to quit an agricultural holding or part of an agricultural "holding is given to the tenant thereof, and not later than one "month from the giving of the notice to quit the tenant serves on "the landlord a counter-notice in writing requiring that this "subsection shall apply to the notice to quit, then, subject to the "provisions of the next following subsection, the notice to quit "shall not have effect unless the Minister consents to the opera-"tion thereof." Parliament has there enacted in the plainest terms that where a cross notice is given within a month, then, subject only to what follows in the next subsection, the notice

[1] [1949] 1 K.B. 300; 65 T.L.R. 3; [1948] 2 All E.R. 450.
[2] [1947] 2 All E.R. 384.
[3] [1950] 2 K.B. 237; 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.
[4] [1951] 2 K.B. 335.
[5] (1880) 5 App.Cas. 214.
[6] (1693) 2 Salk. 609.
[7] (1893) 2 Q.B. 476, 487.
[8] (1827) 7 B. & C. 6.

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to quit is not to have effect unless the Minister consents. By section 24 (2): "The foregoing subsection shall not apply where "... (*b*) the notice to quit is given on the ground that the "land is required for a use, other than for agriculture, for which "permission has been granted on an application made under the "enactments relating to town and country planning or for which "(otherwise than by virtue of any provision of those enactments) "such permission is not required, and that fact is stated in the "notice."

It is apparent that the landlord, by the statement at the end of his notice, purported to invoke paragraph (*b*) of subsection (2) so as to exclude the operation of subsection (1). The tenant challenged the landlord's right to invoke section 24 (2), and called upon the operation of subsection (1), claiming that without the Minister's consent the notice was invalid.

In those circumstances the first question which the county court judge had to decide was whether the land was required for a need other than for agriculture for which permission had been granted on an application under the enactments relating to town and country planning. Nobody has suggested that a mere statement of the fact that the notice to quit is given on that ground is sufficient to satisfy subsection (2) and that the terms of the subsection are satisfied by the mere ipse dixit of the landlord. The conclusion of the county court judge was this: "As to its "being so required the plaintiff says that he intends to sell the "field as a sports ground and would have no difficulty in doing "so. He has, he says, had inquiries from a business firm and "a football club but has so far had no offer and is not, I gather, "now in negotiation with anybody. He does not propose either "to let it for that purpose or so to use it himself. On that "evidence Mr. Phillips says that a reasonable prospect of use "is shown and that that satisfies the word 'required.' I do "not think that in the absence of a definite person or persons "willing to negotiate there could be said to be such a reasonable "prospect and I am not, therefore, satisfied that the holding "is 'required' for the purpose." I agree entirely with that language of the county court judge: he said, there is no-one in negotiation with the landlord nor, as it seems to me on the evidence, was there anybody at any relevant time.

The matter may, I think, therefore, be put quite briefly thus: If the question be—Is this land required for a use referred to in section 24 (2), then who now requires it?—it is clear that the landlord does not so require it, for he does not propose to use it or to let it; and there is no other user except what Mr. Phillips calls "the prospective purchaser," who is an unidentified and possibly non-existent person. It follows, therefore, that, in my judgment, the county court judge rightly decided adversely to the landlord.

Only one of several other points considered by the county court judge arises here. Mr. Phillips has contended very

strenuously that the jurisdiction of the court is wholly ousted in this matter as the result of the joint effect of section 26 of the Act of 1948 and certain regulations made thereunder. I am by no means satisfied that this point is really open, for although I do not doubt that Mr. Phillips took the point generally before the county court judge, it seems from the place in which it appeared in the judge's note that he was dealing there with certain other points which Mr. Phillips adumbrated, and which might arise under the Town and Country Planning Act, 1947. If this point had been a valid point, it should have been taken at the beginning, because it could have led to the conclusion that in the circumstances of the case the tenant was not entitled to challenge the notice to quit at all, and, therefore, that the evidence which the plaintiff himself gave was inadmissible and was a waste of time. However, I will assume that the matter is open.

A second preliminary observation is that the language of section 24 makes it abundantly plain that a landlord is not entitled to serve an effective notice on a tenant of an agricultural holding without the Minister's consent, save in cases in which one or other of the provisions of subsection (2) are shown to be satisfied. Prima facie, therefore, it is for a landlord, if he desires to obtain an order for ejectment, to show that subsection (1) is excluded.

Section 26, which gives rise to the problem, provides, so far as relevant: "(1) The Minister [of Agriculture and Fisheries] "may make regulations: (*a*) for requiring any question arising "under subsection (2) of section 24 of this Act to be determined "by arbitration under this Act . . ." By subsection (2): "The "power conferred on the Minister by this section shall be exer- "cisable by statutory instrument . . ."

One of the points which was urged on us by Mr. Phillips was that section 26 was obligatory. He said that the Minister was bound to make regulations, and he drew attention, quite fairly and rightly, to the point that the general policy of the Agricultural Holdings Act, 1948, is that questions of fact which arise and require to be determined between landlord and tenant (for example as regards compensation and other matters) are to be decided by arbitration; but I am unable in its context to construe section 26 as making it obligatory upon the Minister to make regulations or to say that unless he does so section 24 is rendered wholly inoperative. The many references in the Act to arbitration—for example section 2 (2), which provides, "Any dispute "arising as to the operation of the foregoing subsection in "relation to any agreement shall be determined by arbitration "under this Act"—make it, I think, plain that when compulsory arbitration is intended formulae are used which are wholly different from those used in section 26. On the other hand, I will assume that if the Minister makes regulations which "require" a question to be determined by arbitration, the right to arbitrate may well be the exclusive means of challenge.

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As in *Budge* v. *Hicks*,[1] the relevant regulations are the Agriculture (Control of Notices to Quit) Regulations, 1948, which came into operation on March 1, 1948, that is before the Agricultural Holdings Act, 1948, came into operation. It is, however, conceded here, as it was in *Budge* v. *Hicks*,[1] that these regulations must now be treated as applicable under the present Act.

By regulation 4 of the regulations: "In any case where it "is stated in a notice to quit that the notice is given for one "or more of the reasons specified in the next following regula- "tions," where one of the reasons so specified is that the land is required for a use other than for agriculture for which permission has been granted under the enactments relating to town and country planning following the terms of section 24 (2), "it "shall be open to the tenant, within one month from the giving "of the notice to quit, to serve on the landlord a notice in writing "requiring any question arising out of the reason stated in the "notice to quit to be determined by arbitration under the Act."

Regulation 4 was considered by the Court of Appeal in *Budge* v. *Hicks*,[1] where a question arose about the scope of the regulation and whether, within its scope, it was obligatory. The three Lords Justices carefully left the matter open and, not unnaturally, each of them, particularly Denning L.J., drew attention to the fact that, if it was meant to be obligatory, the use of the formula "it shall be open to the tenant" was somewhat surprising, because ex facie it seemed to give an option. Somervell L.J. stated that for his part he would be in no way shocked or surprised if the effect of this regulation was to make any matter of fact exclusively a matter for arbitration; for he thought it natural enough and proper that technical agricultural matters should be dealt with by arbitration rather than in the courts. With all that I agree; but plainly the matter with which we are concerned is in no sense a technical agricultural matter. We have been asked to decide what is the true meaning of the Act and, particularly, of the word "required" in section 24 (2), and on such a matter it would be, I think, surprising if this regulation had the effect for which Mr. Phillips contends.

This notice was served on June 25, 1951, to take effect on July 19, 1952. According to the argument, unless the tenant by July 25, 1951, served a notice calling for arbitration of the question whether the landlord did in fact require the land for a use other than agriculture, and so forth, the tenant was for ever thereafter shut out from challenging the validity of the notice. On the view that we hold, it turns out that the notice was a fictitious notice, in the sense that it was based on a fictitious, or unreal, and wholly invalid ground (and in using the word "fictitious" I am not, of course, making any suggestion against the good faith of anybody: the notice did not in fact exist). I should have thought that a tenant would have very

[1] [1951] 2 K.B. 335; [1951] 2 All E.R. 245; sub nom. *Hicks* v. *Budge* [1951] 2 T.L.R. 349.

great difficulty in discovering to his own satisfaction in one month whether a landlord did, or did not, intend to use, or whether anybody else wanted or intended to use, the holding in a particular way, and whether permission had been granted and whether any other requirements of the section had been satisfied. The practical effect would be that in every case a tenant would have to serve an arbitration notice for his own protection in order to keep open the point that the notice might be challenged. Mr. Phillips says that there would be no great harm or expense in that; but it seems to me to be undesirable and, I think, it is very unlikely to have been the intention of Parliament.

The question, however, remains whether the terms of this regulation are such as clearly to exclude the jurisdiction of the court. In view of the wording of section 24 it is plain that nothing short of perfectly clear terms of exclusion will suffice. It is true that, by setting a time limit and providing that it shall be "open within one month," it is arguable that, unless that is done within one month, the right of challenge may be gone; but looking at this regulation according to its ordinary meaning, I am unable to hold that its effect has been to exclude this tenant's right to challenge the whole basis on which the notice has been given.

Without desiring to determine now what is the exact scope of this and other regulations, and whether as regards other matters they may have the effect of giving exhaustive and exclusive jurisdiction to an arbitrator, in this case I am not satisfied that the point which the tenant takes, namely whether subsection (2) has been effectively invoked, can be said to be a "question arising out of the reason stated in the notice to "quit." The question which the tenant raises by his challenge is whether the reason is a reason at all within the meaning of subsection (2); and I think that the language chosen, namely "any question arising out of the reason," is not apt to cover the question of the premises on which the validity of the notice rests. For those reasons I reject the argument that the tenant is now precluded from raising the point whether this land is required for a use other than agriculture, and so forth. It follows, therefore, that in my judgment the county court judge rightly concluded this case in giving judgment for the defendant, and in those circumstances this appeal fails and must be dismissed.

JENKINS L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed with costs.

Solicitors: *Sharpe, Pritchard & Co. for Rendall, Litchfield & Co. (Bournemouth); Peacock & Goddard for Luff, Raymond & Williams (Wimborne Minster).*

E. D.

[PRIVY COUNCIL.]

J. C.† 1954 *Jan.* 13.

* THABO MELI AND OTHERS . . . . APPELLANTS;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF BASUTOLAND.

Basutoland—Criminal Law—Murder—Erroneous belief of accused that blows caused death—Whether mens rea in respect of their subsequent acts which in fact caused death—Preconceived plot to kill—One inseparable transaction.

Criminal Law.

The appellants, in execution of a preconceived plot to kill the deceased, took him to a hut where he was struck over the head with an instrument, and then, believing him to be dead, they took him out and rolled him over a low cliff and dressed the scene to make it look like an accident. The medical evidence established, however, that the injuries received in the hut were not sufficient to cause the death, which was in fact due to exposure when he was left at the foot of the cliff. The appellants appealed against their conviction for murder, alleging, inter alia, that while the first act—the blows in the hut—was accompanied by mens rea, it was not the cause of death, but that the second act, while it was the cause of death, was not accompanied by mens rea, and contended that in those circumstances they were not guilty of any crime, except perhaps culpable homicide:—

Held, that it was impossible to divide up what was really one transaction in that way. The appellants set out to do all those acts as part of, and to achieve, their plan, and it was much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before it in fact was, therefore they were not guilty of murder. There was no difference relevant to the present case between the law of South Africa and that of England, and by both laws there could be no separation such as that for which the appellants contended merely because of their misapprehension.

Judgment of the High Court of Basutoland affirmed.

APPEAL (No. 28 of 1953), by special leave in forma pauperis, from a judgment and sentence given and passed in the High Court of Basutoland (Harragin Ag.J.) (March 26, 1953) whereby the four appellants were convicted and sentenced to death upon a charge of having murdered a Mosuto male, one Ntlobiseng Lekhoo. The appellants, who were jointly indicted and jointly tried, had pleaded not guilty to the charge.

It was alleged that the deceased had been brought to a hut on July 12, 1952, given beer, and while in a partially intoxicated condition was struck on the head with an instrument, and then carried out of the hut and left in the open. The main and substantial questions in this appeal arose from the conflict as regards the cause of the death of the deceased, between the

† *Present*: LORD GODDARD C.J., LORD REID, and MR. L. M. D. DE SILVA.

evidence of two self-confessed accomplices upon which the case for the prosecution was mainly based, and the medical evidence called on behalf of the prosecution.

Both the accomplices gave evidence to the effect that they believed the deceased to be dead as a result of the blows in the hut. The medical evidence was to the effect that the deceased had not died as a result of the blows, but that his death was due to exposure, and the trial judge found as a fact that he did not die from the blows but from exposure.

In those circumstances it was submitted for the appellants, inter alia, that they ought not to have been, and were wrongly in law, found guilty of having murdered the deceased; that according to the Roman-Dutch law, which was to be applied in Basutoland in accordance with the provisions of the General Law Proclamation (Laws of Basutoland, 1949 Rev., c. 26), a fundamental and essential requirement in the proof of a charge of murder was an animus occidendi or intention on the part of those charged therewith to kill, and the killing, in pursuance of such intention of the person murdered. That was to say that in the case of the appellants they could not according to that law have murdered the deceased, inasmuch as the death, as caused according to the medical evidence and found by the trial judge, was not and could not have been intended by them since they believed that the deceased was already dead when he was left out in the open, and his death by exposure, therefore, was, so far as the appellants were concerned, something unintended by them or which they could not have expected to have happened. They had, it was contended, in regard to the death of the deceased as caused according to the medical evidence and the finding of the judge no animus occidendi or mens rea.

1954. Jan. 13. *S. N. Bernstein* and *A. Hughes-Chamberlain* for the appellants.

Frank Gahan Q.C. and *J. G. Le Quesne* for the respondent.

The following cases and textbooks were referred to in argument: *Rex* v. *Ndhlovu* [1]; *Rex* v. *Valachia* [2]; *Rex* v. *Kuzwayo* [3]; Pittman's Criminal Law in South Africa, 3rd ed., p. 116; South African Criminal Law and Procedure, 5th ed., vol. 1, p. 31, by Gardiner and Lansdown.

Jan. 13. The judgment of their Lordships was delivered by LORD REID. The four appellants in this case were convicted of murder after a trial before Harragin J. in the High Court of Basutoland, in March, 1953. The appeal which has been heard by this Board dealt with two matters: first, that the conclusions of the judge on questions of fact were not warranted; and, second,

[1] [1945] S.A.L.R.(A.D.) 369, 371.
[2] [1945] S.A.L.R.(A.D.) 826, 831.
[3] [1949] 3 S.A.L.R.(A.D.) 761, 771.

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that, by reason of a matter which can be dealt with later, on a point of law the accused are entitled to have the verdict quashed.

On the first matter, there really is no ground for criticizing the judge's treatment of the facts. It is established by evidence, which was believed and which is apparently credible, that there was a preconceived plot on the part of the four accused to bring the deceased man to a hut and there to kill him; and then to fake an accident, so that the accused should escape the penalty for their act. The deceased man was brought to the hut. He was there treated to beer and was at least partially intoxicated; and he was then struck over the head in accordance with the plan of the accused.

There is at least doubt whether the weapon which was produced as being like the weapon which was used would have produced the injuries which were found, but it may be that this weapon is not exactly similar to the one which was used, or it may be that the blow was a glancing blow and produced less severe injuries than those which one might expect; but, in any event, the man was unconscious after receiving the blow.

There is no evidence that the accused then believed that he was dead, but their Lordships are prepared to assume that they did; and it is only on that assumption that any statable case can be made for this appeal. The accused took out the body, rolled it over a low krantz or cliff, and dressed up the scene to make it look like an accident. Obviously they believed at that time that the man was dead, but it appears from the medical evidence that the injuries which he received in the hut were not sufficient to cause the death and that the final cause of his death was exposure where he was left at the foot of the krantz.

The point of law which was raised in this case can be simply stated. It is said that two acts were necessary and were separable: first, the attack in the hut; and, secondly, the placing of the body outside afterwards. It is said that, while the first act was accompanied by mens rea, it was not the cause of death; but that the second act, while it was the cause of death, was not accompanied by mens rea; and on that ground it is said that the accused are not guilty of any crime except perhaps culpable homicide.

It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law. Their Lordships do not think that this is a matter which is susceptible of elaboration. There appears to be no case either in South Africa or England, or for that matter elsewhere, which resembles the present. Their Lordships can find no difference relevant to the present case

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between the law of South Africa and the law of England, and they are of opinion that by both laws there could be no separation such as that for which the accused contend, so as to reduce the crime from murder to a lesser crime, merely because the accused were under some misapprehension for a time during the completion of their criminal plot.

Their Lordships must, therefore, humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

C. C.

[COURT OF APPEAL.]

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Dec. 18.
Somervell, Denning and Romer L.JJ.

* BARROW GREEN ESTATE CO. *v.* EXECUTORS OF WALKER, DECD.

Agriculture—Agricultural holding—Repairs—Compensation—Compensation for dilapidation or deterioration—Arbitrator—Arbitrator entitled to refer to the terms of the contract of tenancy—Agriculture Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 9, 10 (3), 11 (1), (2) (*d*) (*e*) (*f*), (3), 37 (1)—*Agricultural Holdings Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 57 (1), 65—*Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations,* 1948 (*S.I.* 1948, *No.* 184).
Arbitration.

In an arbitration to determine claims under section 57 (1) of the Agricultural Holdings Act, 1948, for compensation "in respect of "the dilapidation or deterioration of, or damage to, any part of the "holding or anything in or on the holding caused by non-fulfilment "by the tenant of his responsibilities to farm in accordance with "the rules of good husbandry," the arbitrator is bound to have regard to (i) the terms and conditions of the lease or agreement under which the holding was held, (ii) any other contractual agreement between the landlord and tenant in relation to the holding and (iii) S.I. No. 184 of 1948 in so far as it applies. The words "non-"fulfilment by the tenant of his responsibilities" in the section cannot be construed as including an obligation which, under the contract of tenancy, the landlord has himself undertaken to perform.

APPEAL from His Honour Judge Clark sitting at Epsom County Court.

David Walker was lessee of an agricultural holding under a lease dated January 23, 1939. The lease contained a covenant by the landlord to repair the fixed equipment before the tenant went into possession; and both landlord and tenant entered into certain covenants as to their respective obligations to repair the fixed equipment after the tenant had gone into possession. David Walker died in 1950, and the landlord served a notice to quit on his representatives who quitted the holding on September 29, 1952.

[Reported by Miss P. STANLEY, Barrister-at-Law.]

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In arbitration proceedings the landlord claimed compensation from the tenant in respect of the dilapidation or deterioration of, or damage to, the holding under section 57 (1) [1] of the Agricultural Holdings Act, 1948. The tenant maintained that he was released from his obligation to repair under the lease as the landlord himself was in breach of his contract to put the fixed equipment into a state of repair. A question arose whether the arbitrator was (a) bound or (b) entitled to have regard to the terms and conditions (i) of the lease or agreement under which the holding was held; (ii) of any other contractual agreement between the landlord and the tenant in relation to the holding

[1] Agriculture Act, 1947, s. 9: "The following provisions of this "Part of this Act shall have effect "for the purpose of securing that "owners of agricultural land fulfil "their responsibilities to manage the "land in accordance with the rules "of good estate management, and "that occupiers of agricultural land "fulfil their responsibilities to farm "the land in accordance with the "rules of good husbandry."

S. 10: "(3) The responsibilities "under the rules of good estate "management of an owner of land "in the occupation of another person "shall not in relation to the mainten-"ance and repair of fixed equipment "include an obligation to do anything "which that other person is under an "obligation to do by virtue of any "agreement."

S. 11: "(1) For the purposes of "this Act, the occupier of an agricul-"tural unit shall be deemed to fulfil "his responsibilities to farm it in "accordance with the rules of good "husbandry in so far as . . . the occu-"pier is maintaining a reasonable "standard of efficient production. . . ."

"(2) In determining whether "the manner in which a unit is "being farmed is such as aforesaid, "regard shall be had . . . to the "extent to which— . . . (*d*) the neces-"sary steps are being taken to secure "and maintain crops and livestock "free from disease and from infesta-"tion by insects and other pests; (*e*) "the necessary steps are being taken "for the protection and preservation "of crops harvested or lifted, or in "course of being harvested or lifted; "(*f*) the necessary work of mainten-"ance and repair is being carried "out.

"(3) The responsibilities under the "rules of good husbandry of an occu-"pier of an agricultural unit which is "not owned by him shall not include "an obligation to carry out any work "of maintenance or repair which the "owner of the unit or any part there-"of is under an obligation to carry "out in order to fulfil his responsi-"bilities to manage in accordance "with the rules of good estate "management."

S. 37: "(1) The Minister may, "after consultation with such bodies "of persons as appear to him to "represent the interests of landlords "and tenants of holdings, make regu-"lations prescribing terms as to the "maintenance, repair and insurance "of fixed equipment which shall be "deemed to be incorporated in every "contract of tenancy of a holding, "whether made before or after the "commencement of this Part of this "Act, except in so far as they would "impose on one of the parties to an "agreement in writing a liability "which under the agreement is "imposed on the other."

Agricultural Holdings Act, 1948, s. 57: "(1) The landlord of an "agricultural holding shall be en-"titled to recover from a tenant of the "holding, on the tenant's quitting the "holding on the termination of the "tenancy, compensation in respect of "dilapidation or deterioration of, or "damage to, any part of the holding "or anything in or on the holding "caused by non-fulfilment by the "tenant of his responsibilities to farm "in accordance with the rules of good "husbandry."

S. 65: "(1) Save as expressly pro-"vided in this Act, in any case for "which apart from this section the "provisions of this Act provide for "compensation, a tenant or landlord "shall be entitled to compensation in "accordance with those provisions and "not otherwise, and shall be so en-"titled notwithstanding any agree-"ment to the contrary. Provided "." . . ."

and (iii) of S.I. No. 184 of 1948,[2] in so far as it applies, if at all, to the lessor only.

The arbitrator answered those questions in the affirmative (without stating whether he was entitled or bound to look at the documents) and stated a case. The landlord appealed to the county court judge who reversed the arbitrator's decision.

The tenant now appealed.

A. C. Goodall for the tenant.
J. Dean for the landlord.

SOMERVELL L.J. stated the facts, read section 57 (1) of the Agricultural Holdings Act, 1948, and continued:—Statutory Instrument No. 184 of 1948 was made under section 37 of the Agriculture Act, 1947, and is still in force although the rule-making power in that Act has been repealed and replaced by a rule-making power in the later Act. It provides: "The provi-"sions set forth in the schedule hereto relating to the mainten-"ance, repair and insurance of fixed equipment, shall be deemed "to be incorporated in every contract of tenancy of a holding, "whether made before or after the commencement of Part III of "the said Act, except in so far as they would impose on one of the "parties to an agreement in writing a liability which under the "agreement is imposed on the other"; that is to say, that if and so far as the claim in the present case came under the statutory instrument and its schedule the arbitrator would have to have regard to the terms of the original tenancy in order to see whether under it a liability which under the regulations was imposed on the landlord or tenant was under the tenancy agreement imposed on the other party. So far as the point of law is concerned, it was common ground before the judge and before us that this instrument is in the same category as the contract itself because, if I may put it in this way, the machinery by which this instrument attains its object is by deeming that its provisions will be incorporated into the contract. If you cannot look at the contract you cannot look at the provisions which are deemed to be incorporated in it. Before the county court judge, counsel who was then appearing for the tenants linked the three classes of documents together and referred to them as the contract of tenancy. The words of section 57 (1) of the Act of 1948 are: "non-fulfilment "by the tenant of his responsibilities to farm in accordance with "the rules of good husbandry." The relevant provisions regarding those rules are to be found in Part II of the Agriculture Act, 1947, and this Part of the Act has not been repealed. [His

[2] By S.I. No. 184 of 1948: "The "provisions set forth in the Schedule "hereto relating to the maintenance, "repair and insurance of fixed equip-"ment, shall be deemed to be incor-"porated in every contract of "tenancy of a holding, . . . except in "so far as they would impose on one "of the parties to an agreement in "writing a liability which under the "agreement is imposed on the other."

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Lordship read sections 9, 10 (3), 11 (1), (2) (*d*) (*e*) (*f*), and (3), stated that Mr. Dean relied on this last subsection and continued:] That subsection would seem more concerned to provide that there should be no overlap than to deal expressly with the terms of the agreement in favour of the tenant.

I think an important section in the Act of 1947 which assists in solving this problem is section 37, under which the Statutory Instrument to which I have already referred was made. [His Lordship read section 37 and continued:] Therefore, when the Act empowers the Minister to make detailed provisions regarding the maintenance and repair of fixed equipment, one of the matters under sections 10 and 11, there is an express provision that those regulations must not be deemed to impose on one party a liability which under an agreement is imposed on the other.

I will now come back to section 57 (1). The submission made on behalf of the landlord seems to me to be one which, on general principles of construction, would require the plainest possible words before it should be adopted in construing this subsection—let me assume that under the contract of tenancy the landlord has expressly undertaken an obligation in respect of maintenance and repair which, if the contract of tenancy had been silent as to it, would have fallen on the tenant either under the regulations or under the general principles which would be applied in such a matter by an arbitrator; let me assume that the landlord has failed to carry out his obligations; and let me assume that if the tenancy continued he could be sued; and, without begging any question as to the measure of damage, I will assume that the cost of making good the maintenance and repair which he had failed to carry out would be £500. The submission for the landlord would then mean this: he realizes that the lessee has died, that the relatives do not want to keep on the property and that the tenant will be shortly quitting, and he could say to himself: "Not only need I not now maintain what I ought to have "maintained and repair what I ought to have repaired but let "us hope it all gets rather worse by the time the tenant quits. "Assuming then the cost of doing what I should have done is "£700, I shall be able to recover £700 under section 57 (1) of the "Act of 1948." It would indeed be surprising if Parliament had conferred such a windfall on landlords.

Mr. Dean said with some force that there may be sections in the Act which confer benefits on tenants and it would not be surprising if one found somewhere benefits conferred on the landlord. That may well be, but one would not expect to find a benefit conferred on bad landlords, that is those who have not carried out their obligations. I think that these words, "non-"fulfilment by the tenant of his responsibilities," cannot be construed as including an obligation which, under the contract of tenancy, the landlord has himself undertaken to perform.

Reliance was placed as against that construction on the fact that under section 57 (3) a landlord may in lieu of claiming

compensation under subsection (1) claim compensation in accordance with a written contract of tenancy. I do not think that that helps the argument but is to cover the possibility of a contract of tenancy which puts on the tenant a liability greater than that which the statute puts on him. It was no doubt thought wrong to take away from the landlord a right to proceed under such a contract.

I need not refer in detail to section 7 (1) except to say that I think that reinforces the argument for the tenant. The judge referred to sections 10 and 11 of the Act of 1947, and he in part based his decision on the absence of any reference in section 11 (3) to the agreement. I am bound to say that, having regard to the general provisions of that Act, they lead me to the conclusion that they were not intended to shift burdens expressly undertaken by one or the other except in the case where express words were used. I would have expected a reference in that subsection to the agreement, but there may be some explanation of it consistent with my construction of section 57 (1), so I do not propose to go into it in detail because, even if an argument can be based on the absence of any reference there, I am quite clear that that would not entitle one to construe section 57 (1) as including a responsibility which by contract the landlord himself had undertaken.

Mr. Dean referred to section 65, the section which provides that one cannot contract out of the right which the Act confers for compensation, but I do not think that it is material in the present case.

For these reasons I have come to a different conclusion from that of the judge and I would allow the appeal and would answer the question by saying that, in my view, the arbitrator is bound to have regard to the terms and conditions of the lease or agreement under which the holding was held and any other contractual agreement between the landlord and the tenant in relation to the holding, and to S.I. No. 184 of 1948 in so far, if at all, as it applies.

Denning L.J. Under the Agriculture Acts of 1947 and 1948 the occupier of agricultural land is put under a responsibility "to farm the land in accordance with the rules of good husbandry." The question in this case is whether the occupier can, by contract, shift this responsibility on to the owner of the land. This question does not arise in regard to the actual cultivation of the land, but only in regard to the maintenance and repair of fixed equipment. Let me give an instance. "Fixed equipment" includes hedges and fencing. If there had been nothing in the contract of tenancy, the tenant would have been bound, under the statutory regulations, to provide all the material and labour to keep up the hedges and fences: but under the contract of tenancy, the owner was bound to provide the material (such as the posts and wire) and the tenant was bound

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to provide the labour. The owner says that, despite the contract, he can put on the tenant the responsibility of providing the material: and he says that if the tenant does not provide it, the owner can, at the end of the tenancy, get compensation for any deterioration on that account.

The question depends on the true interpretation of the Acts. It is quite clear from sections 9, 10 and 11 of the Act of 1947 that Parliament intended that the fixed equipment should be properly maintained and repaired, and that it should be maintained either by the owner or the occupier: but those sections do not make it clear on whom the responsibility should fall. That only appears from other parts of the Act and from the regulations. These show that if the contract of tenancy is silent on the matter, then by the regulations the tenant is bound to maintain and repair the fixed equipment: but if and in so far as the contract of tenancy puts the responsibility on the owner, then the contractual responsibility remains intact. There is nothing in the statutes which absolves the owner from his contractual responsibility, but on the other hand there is much to preserve it. I need only mention section 15 (3) of the Act of 1947, which shows that, in order to ascertain their respective liabilities, the Minister can call for a sight of the contract: and section 37 (1) of the Act of 1947 which provides that the regulations must not contradict the contract. Much reliance was placed by the owner on sections 10 (3) and 11 (3) of the Act of 1947, but the provisions are only designed to ensure that there shall be no overlap.

In my opinion, therefore, the arbitrator, in assessing the responsibility of the tenant to farm in accordance with the rules of good husbandry, must take into account any specific obligations which by contract are placed on the landlord. The tenant cannot be made to pay for the landlord's own breaches of contract.

I agree with my Lord that the appeal should be allowed.

ROMER L.J. I agree, and have very little to add, as my brethren have already covered the ground so completely. It seems to me that the only point of substance which can really be urged in support of the landlord's contention is the difference in phraseology which the legislature used in section 10 (3) as contrasted with that used in section 11 (3), the difference being that whereas in the first subsection, contained as it is in a provision concerning the responsibilities of the owner in relation to good estate management, it is enacted that these responsibilities "shall not in relation to the maintenance and repair "of fixed equipment include an obligation to do anything which "that other person is under an obligation to do by virtue of any "agreement"; in section 11 (3) there is excepted from the

responsibilities of the occupier in relation to the rules of good husbandry "an obligation to carry out any work of maintenance "or repair which the owner of the unit or any part thereof is "under an obligation to carry out in order to fulfil his respon- "sibilities to manage in accordance with the rules of good estate "management," which it is suggested means the statutory rules of good estate management as distinct from contractual responsibilities. There is that point, I quite agree. I am not sure what the explanation of the difference is in the language in section 10 (3) referring to an agreement, and in section 11 (3) where no such express reference is made. But, as I say, it is to my mind the only point which is really of any substance or weight in favour of an argument which leads to such remarkable results as have been indicated in the course of the discussion. I think that it would be putting upon it a weight which it is quite unable to bear as a base for the view which the landlord seeks to found upon it. The possible results have been illustrated by my Lord and Denning L.J., and it seems to me plain that the heavier the responsibilities which a landlord contractually undertook the more inevitably he would resort to this section instead of resorting to his right under the covenants, because he would then recover from the tenant more and more in respect of the damage caused by his own contractual omissions. It seems to me to be almost a ludicrous result and it would need language far clearer than is to be found in any of the statutory provisions to which we were referred to justify such a finding.

I would merely add in conclusion that, whatever the intention was in omitting from section 11 (3) the reference to the agreement which is to be found in section 10 (3), it seems to me perfectly plain that, in order to ascertain what the owners' obligations are in relation to good estate management, as also in order to ascertain what the occupier's duties are in relation to good husbandry, one has to look at the contract. One is compelled to do that in express terms by section 10 (3) and, as I think, by virtue of compelling inference under the provisions of section 11 (3). For these reasons, and for the reasons which my brethren have indicated, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Church, Adams, Tatham & Co., for Burges, Salmon & Co., Bristol; Wheeler, Brill & John, Oxted.*

[CHANCERY DIVISION.]

1954
Jan. 13.

Danckwerts J.

* *In re* BAGSHAW, DECD.
WESTMINSTER BANK LD. *v.* TAYLOR AND OTHERS.

[1952 B. No. 4649.]

Will—Bequest to charitable institution—War memorial cottage hospital—Nationalization—Hospital taken over by hospital management committee—Name and objects of charity altered—Permanent charity—Bequest retained by charity.

Hospital—Nationalization—Bequest to charitable institution—War memorial cottage hospital—Name and objects of charity altered—Bequest not acquired by hospital management committee—Retained by charity.

Charity—War memorial cottage hospital—Name and objects of charity altered—Permanent charity—Entitled to retain bequest—Not affected by nationalization of hospital.

A testatrix by her will made in 1942 gave her residuary estate to a charitable institution known as Bakewell and District War Memorial Cottage Hospital. By resolutions passed in 1946 and 1947 the governing body of the charity, under the powers contained in its rules and trust deed, altered the name of the institution to the Bakewell and District 1914–18 War Memorial Charity, and altered its objects to include certain charitable purposes other than the cottage hospital. On July 5, 1948, the National Health Service Act, 1946, came into force and the site, buildings and endowments of the cottage hospital vested in the Minister of Health. Certain funds were not, however, taken over under the Act.

The testatrix died in 1951; the bequest under her will was claimed by the charity under its new name, the hospital management committee, in whose area was the cottage hospital, and by the next-of-kin:—

Held, (1) that the claim of the next-of-kin must fail at the outset, since it was plain on the authorities that the bequest was either a gift for the charity which still existed or for the purpose designated by the description in her will;

(2) that it was established by *In re Faraker* [1912] 2 Ch. 488 and *In re Lucas* [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22 that a charity founded as a perpetual charity did not come to an end, although its objects and name be altered according to the due process of the law, and that there was no distinction in principle between the alteration of the objects and name under a scheme as in those cases and under the charity's own rules as in the present case; and the bequest being to a plainly identified charity, it took in effect in favour of the charity under its new name.

ADJOURNED SUMMONS.

Jane Bagshaw, by her will dated July 17, 1942, gave all her real and personal estate (subject to the payment of her debts and funeral and testamentary expenses) to the Bakewell and District War Memorial Cottage Hospital absolutely. She died on June 27, 1951, without having altered her will.

The cottage hospital was founded in 1921 as an unincorporated charitable institution, wholly maintained by voluntary contributions, "for the reception and relief of sick or temporarily disabled

"persons as a permanent memorial to the officers and men "belonging to Bakewell and District who fell in the Great War."

At a meeting of the general body of subscribers on November 19, 1921, rules were adopted, and it was resolved that trustees be appointed to hold any real and personal property belonging to the institution, and that a trust deed should be executed declaring the trusts of the institution's property, and of any other money which might from time to time become payable to the trustees on behalf of the institution. The trust deed was executed on December 31, 1921, pursuant to that resolution.

The object of the institution at the time of the will of the testatrix was declared by the rules as affording "accommodation "and facilities such as might not exist in the homes of the "patients for the remedial treatment of poor persons resident "within a radius of five miles from the Memorial Cross in Bake-"well when suffering from disease or bodily injury . . ." There was a proviso permitting the treatment of non-residents who became seriously ill or were injured within the area.

The cottage hospital so constituted was carried on continuously from 1921 until 1946, when the governing body of subscribers became anxious about the hospital's future having regard to the National Health Service Bill which had been introduced into the House of Commons. At meetings held in 1946 and 1947 the governing body of the subscribers, under the powers conferred by their rules to alter the rules, and under the power conferred by clause 8 of the trust deed, passed resolutions altering the objects and the name of the charity.

Clause 8 of the trust deed provided: "If at any time hereafter "in the opinion of a two-thirds majority of the governing body "a cottage hospital cannot be maintained the trustees shall hold "the capital and income of the trust premises for the time being "subject to the trusts hereof upon trust to apply the same as "capital or as income for such charitable purposes and objects "and in such manner for the benefit of the inhabitants of the "said parish of Bakewell and the surrounding parishes as the "governing body shall in their absolute discretion think fit "the governing body having power to settle any scheme or "schemes for such last-mentioned application." In accordance with that power, a resolution was passed expressing the opinion that two-thirds of the governing body were of opinion that a cottage hospital could not be maintained.

The name of the institution was altered to the Bakewell and District 1914–18 War Memorial Charity, and its objects were altered so as to provide: "Primarily, the provision of such "additional hospital, medical, and other benefits of a charitable "nature for the inhabitants of the parish of Bakewell, and "surrounding parishes within a radius of five miles from the "Memorial Cross in Bakewell, and secondarily towards such "relief as is charitable amongst necessitous ex-servicemen or

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"women of the war 1914–18 or the war 1939–45 or their depen-
"dants resident in the parishes aforesaid, and the provision of
"any necessary assistance . . ."

The hospital was carried on as hitherto until the National Health Service Act, 1946, came into force on July 5, 1948. At that date the site, buildings and endowments vested in the Minister of Health under the Act. Since that time the hospital had been carried on in the same building by the Sheffield No. 3 Hospital Management Committee under the name of the Bakewell and District War Memorial Cottage Hospital.

A certain residue of the funds of the institution were unaffected by the Act. In 1949 a new set of rules was adopted for the institution with its new name and new objects.

The question to be determined on this summons was whether the residuary bequest under the will of the testatrix was payable to the trustees of the Bakewell and District 1914–18 War Memorial Charity to be applied for the objects of that charity, or to the Sheffield No. 3 Hospital Management Committee to be applied for the purposes of the Bakewell and District War Memorial Cottage Hospital, or devolved as on intestacy on the next-of-kin.

W. S. Wigglesworth for the Westminster Bank Ld., executor of the testatrix's will.

R. O. Wilberforce for H. C. B. Taylor, chairman of and sued on behalf of the Bakewell and District 1914–18 War Memorial Charity.

Michael Browne for the Sheffield No. 3 Hospital Management Committee.

John Monckton for next-of-kin.

Denys Buckley for the Attorney-General.

Cases cited in argument: *In re Faraker* [1]; *In re Glass* [2]; *In re Hutchinson's Will Trusts* [3]; *In re Lucas* [4]; *In re Meyers* [5]; *In re Morgan's Will Trusts.* [6]

DANCKWERTS J., having stated the facts, continued: The objects of the charity have ceased to be for the purpose of providing a hospital for poor people within the limited district prescribed under the original trust, and different trusts have been constituted.

The fund is claimed, not only by the charity as constituted under the new name and with new objects, but also by the hospital management committee which, under the National Health Service Act, carries on the activities of the hospital in the hospital buildings formerly owned by the charity. It is claimed on behalf

[1] [1912] Ch. 488.
[2] [1950] Ch. 643n.; [1950] 2 All E.R. 953n.
[3] [1953] Ch. 387; [1953] 1 All E.R. 996.
[4] [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22.
[5] [1951] Ch. 534; [1951] 1 T.L.R. 435; [1951] 1 All E.R. 538.
[6] [1950] Ch. 637; 66 T.L.R. (Pt. 1) 1037; [1950] 1 All E.R. 1097.

of the latter that this was a bequest which operated not in favour of the charity whose name appears in the will, and which now bears a different name and has different objects, but for the purposes for which the hospital buildings were used at the date when the testatrix made her will; it is also claimed that those purposes are in substance maintained at the present time by the Sheffield No. 3 Hospital Management Committee.

A claim is also made, on the basis of failure of the trusts, by the next-of-kin of the testatrix. The last-mentioned claim is one which must fail in any event, because it is plain on the authorities that the bequest was either a gift to the charity which still exists, or for the purpose designated by the description contained in the will of the testatrix.

It is well established by cases such as *In re Faraker* [1] and *In re Lucas* [2] that a charity founded as a perpetual charity can never come to an end, even though its objects and its name may be altered according to due process of law. In those two cases the objects and name of the charity concerned had been altered by a scheme established either by the court or the Charity Commissioners. In the present case the alteration has not been effected by means of any scheme made by an outside body such as the Charity Commissioners or the court, but the objects and the name have been altered in a perfectly legal manner through the machinery provided in the trust deed created by the founders of the charity itself.

It seems to me that there is no distinction whatever in principle between the alteration by one method and the alteration by the other method, and the charity remains the same charity, although its name and its objects have been altered. The gift was to a plainly identified charity which existed at the date of the will under a particular name by which it is designated in the will of the testatrix, and the gift takes effect in favour of that charity and in favour of no other charity at all.

The bequest is therefore a gift for the general purposes of the charity described correctly by the testatrix as the Bakewell and District War Memorial Cottage Hospital, but now known as the Bakewell and District 1914–18 War Memorial Charity, and payable accordingly to the trustees of the charity.

Declaration accordingly.

Solicitors: *Woodcock, Ryland & Co. for Goodwin & Cockerton, Bakewell; Cree, Godfrey & Wood for Brooke, Taylor & Co., Bakewell; Gibson & Weldon for L. J. Thomas, Sheffield; Treasury Solicitor.*

I. G. R. M.

[1] [1912] 2 Ch. 488.

[2] [1948] Ch. 424; 64 T.L.R. 343; [1948] 2 All E.R. 22.

[CHANCERY DIVISION.]

1954
Jan. 14, 15

Harman J.

* WESTMINSTER BANK LD. *v.* INLAND REVENUE COMMISSIONERS.

[1952 W. 2130.]

Revenue — Estate duty — Annuity — Valuation for purposes of estate duty—Basis of calculation—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 7 (1), (5).
Annuity.

Under a deed of separation dated February 26, 1926, the estate of a testator, who died on May 10, 1947, was liable for an annuity payable, until appropriation, out of the residue, during the lifetime of the widow. There were at all times ample funds in the estate to provide for the annuity. A dispute having arisen between the executors' solicitors and the Controller of Death Duties on the sum to be deducted, in computing the principal value of the estate, to represent the amount of the liability attaching to the estate, at the date of the testator's death, because of the existence of the annuity:—

Held, that the amount to be deducted was the cost, at the date of the deceased's death, of a British Government annuity of the same amount.

In re Castle [1916] W.N. 195 and *Ford* v. *Batley* (1853) 17 Beav. 303 applied.

ADJOURNED SUMMONS.

By a deed of separation, dated February 26, 1926, George Wolsey became liable to pay to his wife Grace Mary Eleanor Wolsey (who was born on July 16, 1882) an annuity of £750 and a further sum up to but not exceeding £100 a year for outgoings in respect of her general residence. The annuity and the said £100 were paid by him to his wife down to the date of his death, which took place on May 10, 1947, and had since that date been paid to her by his executors.

By his will, dated August 3, 1940, the executors were directed to appropriate an annuity fund and until such appropriation to pay the annuity out of the residuary estate. The net principal value of the estate, subject to the deduction of the correct amount in respect of the liability represented by the annuity, was £71,286. No fund was constituted to provide for the annuity, as the executors acted on the view that it was charged on the whole of the estate.

Correspondence took place between the executors and the Controller of Death Duties, acting for the Commissioners of Inland Revenue, on the sum to be deducted in computing the principal value of the estate to represent the liability attaching to that estate at the date of the testator's death. The correspondence showed that four sums had been put forward as a correct sum to be deducted, namely; (1) the sum which it would have cost the executors to purchase a British Government annuity of the same amount; (2) the sum which, according to a statement

made by or on behalf of the Controller of Death Duties, it would have cost the executors to purchase a British Government annuity of the same amount "on the basis of the price of consols "at the time of the deceased's death"; (3) the sum which it would have cost the executors to purchase an annuity of the same amount from a first class British life assurance company; (4) a sum suggested by or on behalf of the Controller as acceptable to him "to avoid further correspondence and close this "particular estate."

A summons was taken out by the executors to determine whether, in calculating the principal value of the estate for purposes of estate duty, the amount to be deducted as the amount of the liability for the annuity was (a) the sum which the plaintiffs would have had to pay, at the date of the deceased's death, for purchasing a British Government annuity of the same amount; or (b) the sum which the plaintiffs would have had to pay at the said date for purchasing an annuity of the same amount on the basis of the price of consols at that date; or (c) the sum which the plaintiffs would have had to pay at the said date for purchasing an annuity of the same amount from a first class British life assurance company; or (d) some and, if so, what other sum.

N. E. Mustoe Q.C. and *G. B. Graham* for the plaintiffs.

Sir A. L. Ungoed-Thomas Q.C. and *J. H. Stamp* for the defendants.

Cases referred to in argument: *Ford* v. *Batley* [1]; *In re Castle* [2]; *In re Beecham's Settlement* [3]; *In re Rothermere* [4]; *In re Cottrell* [5]; *In re Ellis* [6]; *In re Bradberry* [7]; *In re Hollins* [8]; *In re Carew* [9]; *In re Thomas* [10]; *In re Barnes.* [11]

HARMAN J. This is an originating summons taken out under Order 54A, for the construction of a statute—a procedure sanctioned in the case of estate duty questions by section 3 of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

The question to be determined is the value to be put on a debt or incumbrance which falls to be deducted from the estate of George Wolsey. The debt or incumbrance in question is an annuity, but it is not an annuity bequeathed by his will. The annuitant is a creditor, or potential creditor, of his estate and comes before any beneficiary under it. It follows that the provisions in the will with regard to this annuity which the testator

[1] (1853) 17 Beav. 303.
[2] [1916] W.N. 195.
[3] [1934] 1 Ch. 183.
[4] [1945] 1 Ch. 72; 61 T.L.R. 69; [1944] 2 All E.R. 593.
[5] [1910] 1 Ch. 402.
[6] [1935] Ch. 193.
[7] [1943] Ch. 35; 59 T.L.R. 131; [1942] 2 All E.R. 629.
[8] [1918] 1 Ch. 503; 34 T.L.R. 310.
[9] [1939] Ch. 794; 55 T.L.R. 875; [1939] 3 All E.R. 200.
[10] [1946] Ch. 36; 62 T.L.R. 23; [1945] 2 All E.R. 586.
[11] [1939] 1 K.B. 316; 55 T.L.R. 248; [1938] 4 All E.R. 870.

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sought to make and indeed any other provisions of the will are in my judgment irrelevant.

Only one section is involved and that is section 7 of the Finance Act, 1894, which provides: "(1) In determining the "value of an estate for the purpose of estate duty allowance shall "be made for . . . debts and incumbrances . . . and any debt "or incumbrance for which allowance is made shall be deducted "from the value of the land or other subjects of property liable "thereto." This is an incumbrance for which the whole of this estate is liable. There is ample estate, far more than is sufficient to secure the annuitant in her rights. Those are the rights given by a separation deed made in 1926 between her and her husband, the testator.

By section 7 (5): "The principal value of any property shall "be estimated to be the price which, in the opinion of the Com-"missioners, such property would fetch if sold in the open "market at the time of the death of the deceased." This annuity is property, and one way of construing the statute is to suppose that the principal value of this annuity is the subject-matter of subsection (5) and that it is the opinion of the Commissioners which will settle it, subject of course to their opinion being properly arrived at.

But another view is possible, as was pointed out by Mr. Mustoe in reply, namely that subsection (5) of section 7 only applies to assets and not to liabilities and, after the Commissioners have arrived at their opinion as to the principal value of the assets of any estate, then you must deduct the debt or incumbrance under section 7, arriving at its value as best you may; and that the opinion of the Commissioners has no particular weight in the matter. I do not think that I need decide which is the true view, because, if it was open to the Commissioners by their opinions, as it were, to set up a prima facie case, they have not elected to do so.

There have been long negotiations between the executors and the Estate Duty Office, as to the method by which this annuity should be valued, but they have been unable to arrive at any conclusion on that matter. So that, although the testator died in 1947, the matter still remains unresolved.

The difference lies within a narrow compass and has resolved itself before me largely into a dispute, first as to the tables on which the annuitant's expectation of life is to be based, and secondly the rate of interest which the estate ought to be assumed to be earning for this purpose—both highly artificial matters. The evidence was begun by the evidence of Mr. Jenkins, an official of the Westminster Bank trustee department, who sets out four different methods which have been suggested to quantify this liability. They vary between £11,819 on the one hand and £9,750 on the other. That was in August, 1952. The considerable period which has elapsed since then has been occupied by two actuaries firing long range guns at one another at infrequent

intervals making clear that neither of them was prepared to accept entirely the other's premises. The differences between them appear to be, first, that one bases his valuation on the Consols rate of interest, and the other on the average rate of interest earned by average trustee securities at the time when the testator died. Secondly, one wishes to use the Registrar General's Table of Mortality for the whole country, and the other wishes to use the yardstick used by actuaries in general which is a publication by the Institute called "The Mortality of "Annuitants, 1900–1920," a book which is commonly used by insurance companies and those advising them when purchasing annuities. I do not think that I need go into the details.

The result is that no decision has been reached and the summons asks "whether, in calculating the principal value of the "estate for purposes of estate duty, the amount to be deducted "as the amount of the liability of an annuity of £850 a year "payable to Grace Mary Eleanor Wolsey pursuant to a deed "of separation made on February 26, 1926 is" and then three different methods are set out and there is added a general question, if none of those represents the true sum.

The matter differs from the ordinary case of an annuitant under a will and therefore from the cases, a large number of which have been cited to me, where the estate is insolvent and the annuities are valued for the purpose of paying an abated sum to the annuitants on principles which the Court of Chancery has followed for a great number of years with certain variations as required.

There has to be a valuation somehow, and it is a highly artificial matter because, there is no right in anybody to force a lump sum on the annuitant. I think, as there has to be a valuation, one way at least of doing it—and it seems to me a good practical way—is to consider what might happen if all the beneficiaries, being sui juris and all wishing to wind up this estate and take what capital they could at once, called on the executors to satisfy the annuitant and get her out of the way in order to free the rest of the estate. Supposing her to be recalcitrant and refusing to agree to such a course, the executors might, I should have thought, prudently ask the direction of the court in the matter. Of course they might and, Mr. Stamp says that they should, rely on their own fortitude and distribute the estate, except for what sum they thought was proper, but I do not think that the executors are bound to take that line. It is quite possible if they went to the court, everybody desiring the estate to be wound up at once, except the annuitant, the court might well say: "Give the annuitant the best security she can have for her "annuity and then she cannot have any cause of complaint." Whatever calculation you make of an actuarial kind the circumstances of the future cannot be foreseen; the interest on Consols might be reduced. But if one provides the annuitant with the best kind of annuity which society as we know it can provide, then she

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cannot be heard to complain. Therefore, I think, when one is considering what is the burden on this estate, which this annuity may be said to represent, it is the burden of procuring the best security which the annuitant might have for her money, short of having the whole estate preserved till the end of her life to answer her claims. If that be right, the answer is that the true burden, which should be deducted under the section, is the cost at the relevant date of buying an annuity from the National Debt Commissioners on the Government tables. As it seems to me, that is a convenient way of measuring this particular kind of liability, and it prevents the sort of technical argument between actuaries which has been carried on in this deliberate manner for the last few years without any result at all except the waste of a certain amount of paper. It provides a kind of rule of thumb which seems to me to be a reasonable one. Eve J. in a rather analogous case, took a somewhat similar view. I am referring to *In re Castle*,[1] in which there was a gift of an annuity, and the annuitant elected to take payment of a capital sum, and the question raised was, on what basis the capital value should be ascertained. In that case Eve J. said "it was desirable there should be a standardized rule in these "matters," and that "a Government annuity should be pur-"chased or the capital value should be calculated by reference "to the Government tables and not to the price at which the "annuity could be purchased from an insurance company. That, "he considered, was the course an executor should follow where "no other direction was given him."

I observe that, as long ago as 1853 Sir John Romilly M.R. said in *Ford* v. *Batley*[2]: "The annuitant is entitled to have "the best security for his annuity, which is a Government "security. I am, therefore, of opinion, that he is entitled to "a Government annuity." That I quote to show that that is the best kind of security an annuitant can have. Though in law she has not any right to have such an annuity, yet, as this artificial valuation has to be made, it seems to me to be a convenient way of measuring the burden imposed on the estate.

I propose therefore to answer the question raised by the summons in the sense of (a). I do not propose to give either side any costs.

Declaration accordingly.

Solicitors: *Griffinhoofe & Brewster; Solicitor of Inland Revenue.*

J. L. D.

[1] [1916] W.N. 195.

[2] 17 Beav. 303, 304.

[COURT OF APPEAL.]

* MARTIN-SMITH *v.* SMALE.

C. A.

1954
Jan. 11.

Denning and Romer L.JJ.

[1953 M. No. 3720.]

Agriculture—Agricultural holding—Notice to quit—Consent—Tenant's appeal to Agricultural Land Tribunal dismissed—Condition imposed on landlord—Approved bailiff to be appointed—Tenant's refusal to give up possession—Effect of condition—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 24, 25.

A landlord applied to the Minister of Agriculture and Fisheries for his consent to the operation of a notice to quit on the tenant of an agricultural holding in order that the landlord might herself farm the holding in the interests of efficient farming and good estate management. The Minister gave his consent. The tenant appealed to the Agricultural Land Tribunal which gave its consent to the operation of the notice to quit but imposed a condition that "the "landlord appoints a bailiff approved by the Hertfordshire Agri-"cultural Executive Committee before taking possession." Notice to quit was given on August 12, 1952, terminating the tenancy on September 29, 1953. On October 1, 1953, the Agricultural Executive Committee gave a somewhat qualified approval to the bailiff whom the landlord had appointed. The tenant failed to give up possession on the ground that the landlord had not fulfilled the condition imposed by the tribunal. Pearson J. gave the landlord leave to sign final judgment for possession. On appeal:—

Held, that the condition which had been imposed by the Agricultural Land Tribunal under section 25 (5) of the Agricultural Holdings Act, 1948, was valid having regard to the purpose for which the landlord proposed to terminate the tenancy; but that, if the condition had in fact not been fulfilled, it was not a matter of which the tenant could complain—it was the duty of the Minister and no one else to enforce it; that the condition could only operate when the tenancy had come to an end; and that, accordingly, the tenant had no defence to the landlord's claim to possession.

Decision of Pearson J. affirmed.

APPEAL from Pearson J.

In this action the plaintiff, Violet Mary Martin-Smith, claimed possession of Northchurch Farm, Berkhamsted, Herts, of which she was the owner, against the defendant, Cyril Smale, her tenant. The landlord had given the tenant notice to quit expiring on September 29, 1953. The requisite consent to the service of the notice to quit had been given by the Agricultural Land Tribunal subject to the condition that the landlord should appoint a bailiff approved by the local Agricultural Executive Committee. The tribunal had imposed that condition pursuant to the power conferred on them by section 25 of the Agricultural Holdings Act, 1948.[1] The tenant refused to give up possession,

[1] Agricultural Holdings Act, 1948, s. 25 (5): "Where . . . the Agricul-"tural Land Tribunal consent . . . "to the operation of a notice to quit, ". . . the tribunal may impose such "conditions as appear . . . to the . . . . "tribunal requisite for securing that "the land to which the notice relates "will be used for the purpose for "which the landlord proposes to ter-"minate the tenancy."

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contending that the landlord had not complied with the terms of the condition. Pearson J. gave the landlord leave to sign final judgment.

The tenant appealed.

Lord Hailsham Q.C. and *Gilbert Dare* for the tenant.
E. Dennis Smith for the landlord.

Denning L.J.: In this case the landlord of an agricultural holding of 148 acres in Hertfordshire claims possession from a farmer to whom it was let. By reason of the Agricultural Holdings Act, 1948, s. 24 (1) and (2), a landlord was not able to give an effective notice to quit, unless he first obtained the consent of the Minister. The landlord, therefore, applied for the consent of the Minister. The Agricultural Executive Committee inquired into the matter and recommended that the Minister should give his consent.

According to their findings, the landlord was a woman who was relinquishing public duties and proposed to take up farming with her son. She had the farm house of Northchurch Farm, but not the land (148 acres) attached to it because it was let to the defendant. The defendant was a farmer who was farming a good deal of other land besides these 148 acres. The Agricultural Executive Committee recommended that consent should be given on the ground that the tenant's general farming standard was low; and that, if he were farming a smaller area, his standard might improve. They found that the house and land of Northchurch Farm should be brought into one occupation, and that the grounds on which the landlord desired to terminate the tenancy were both desirable and in the interests of good estate management. They considered that the degree of hardship involved would be equal on each; and so the Agricultural Executive Committee recommended the Minister to give his consent, which he did.

The tenant thereupon appealed (as he had the right to do) to the Agricultural Land Tribunal, which also gave its consent. The formal decision stated that the tribunal, "having satisfied itself "that all parties have appeared before it or have been duly "summoned to appear and having heard the case tendered by "the parties and having inspected the said land hereby gives "its consent to the operation of the said notice to quit intended "to be served relating to the said land." But the tribunal added this condition: "Subject to the condition that the land-"lord appoints a bailiff approved by the Hertfordshire Agricul-"tural Executive Committee before taking possession."

The consent of the tribunal was given on July 30, 1952. On August 12, 1952, a notice to quit was given by the owner to terminate the tenancy on September 29, 1953. Shortly before the notice expired, the landlord appointed one as bailiff. On October 1, 1953, the Agricultural Executive Committee made

a report upon Page of a somewhat qualified character which was not a whole-hearted approval because of his youth. On this account it is said that the condition was not fulfilled, and that the tribunal's consent was inoperative.

In my opinion, even if this condition was not fulfilled (on which I express no opinion), it is not a matter of which the tenant can take advantage. This condition was imposed by the tribunal in the interests of the community at large, and it is the duty of the Minister and no one else to enforce it. Section 29 of the Act shows that, if a condition is not fulfilled, the Minister may take possession of the land and deal with it as he thinks fit; but it does not nullify the notice to quit or the consent to it. The tenant ought to have gone out before any question arose as to the fulfilment of the condition. The landlord was not bound to appoint a bailiff until the tenant had gone out. The notice to quit was good, because the tribunal had previously consented to it, and the tenant has no defence to the claim.

[His Lordship proceeded to consider a question raised in connexion with the constitution of the tribunal (which does not call for report) and continued:] Accordingly, in my judgment this appeal should be dismissed.

ROMER L.J. I agree. Under section 25 of the Agricultural Holdings Act, 1948, the tribunal had power to impose such conditions as appeared to them requisite for securing that the farm in question, to which the notice to quit related, would be used for the purpose for which the landlord proposed to terminate the tenancy. The purpose for which the landowner proposed to terminate the tenancy was not merely that she might farm the land in conjunction with her son, but that they might farm it in the interests of "efficient farming." That is the language also of section 25 (1) (*a*) of the Act. That was the purpose for which the tenancy was being terminated and in relation to which the tribunal had power to impose a condition.

The condition which they imposed on, or which they attached to, their consent to the operation of the notice to quit was that the owner should appoint a bailiff approved by the Hertfordshire Agricultural Executive Committee before taking possession. That condition was a perfectly valid one to impose having regard to the purpose for which the landlord proposed to terminate the tenancy. But whether it was a good condition (as I myself firmly believe it was) or whether it was a bad condition, I cannot see that it was a matter of which the tenant could complain. If anyone were to challenge the validity of that condition, it would surely be the landlord: because it was not intended to operate and in fact, having regard to the contract between the owner and the farmer, could not operate until the tenancy had come to an end; and when the tenancy came to an end it would follow that the tenant would have no further interest in the farm.

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The person who would have the sole interest in the farm would be the owner, and if his ownership was going to be fettered by this condition, it would be for the owner to complain and not the tenant. Accordingly, it appears to me that there is no ground for holding that the tenant has any defence.

I entirely agree with what my Lord has said that the defendant in this case ought not to have leave to defend on that ground.

Appeal dismissed.

Solicitors: *Lucien Fior; Sharpe, Pritchard & Co.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

1954
Jan. 21.
Lord Goddard C.J., Byrne and Parker JJ.

* HOPE *v.* BROWN.

Criminal Law—Attempt—Preparation—Sale at excessive price—Preparation of illegal price tickets—Intention to attach to meat before delivery to customers—Act preparatory to commission of offence—Defence (General) Regulations, 1939, *reg.* 55AB—*Meat (Prices) (Great Britain) Order,* 1952 (*S.I.* 1952, *No.* 1122), *art.* 3.
Emergency Legislation.

The manager of a butcher's shop, having prepared meat for delivery to customers, placed a ticket on each package of meat specifying the correct price in accordance with the Meat (Prices) (Great Britain) Order, 1952. In a drawer in the shop he placed another set of tickets each relating to one of the packages, but bearing a price in excess of that permitted by the order. The manager admitted that before the meat was delivered the tickets in the drawer would be substituted for those originally attached to the packages. On a charge of attempting to commit an offence against the Defence (General) Regulations, 1939, and the order of 1952:—

Held that, by making out the false tickets and placing them in the drawer the manager was merely doing an act preparatory to the commission of an offence, and the act was too remote from the actual transaction necessary to constitute the attempt; accordingly he was not guilty of the offence charged.

Dictum of Parke B. in *Reg.* v. *Eagleton* (1855) Dears.C.C. 515, 538 applied.

Dictum of Lord Goddard C.J. in *Gardner* v. *Akeroyd* [1952] 2 Q.B. 743, 750 explained.

CASE STATED by Wigan justices.

On August 7, 1953, 21 informations were preferred by the appellant, Fred Hope, an enforcement inspector of the Ministry of Food, against the respondent, Thomas Brown, each alleging that on or about June 19, 1953, at Higher Ince, Lancaster, the respondent attempted to commit an offence against the Defence (General) Regulations, 1939, reg. 55AB, in that he attempted to sell meat at a price exceeding the maximum applicable in

accordance with the Meat (Prices) (Great Britain) Order, 1952 (S.I. 1952, No. 1122), art. 3.

At the hearing of the informations the justices found the following facts: At all material times the respondent was employed as manager at a butcher's shop at 22, Peel Street, Higher Ince, by one Melling. On Friday, June 19, 1953, two enforcement inspectors visited the shop and found in a refrigerator 22 packages containing meat. On 21 of them respectively there was a ticket bearing the customer's name, the weight, and specifying a price which was in accordance with the Meat (Prices) (Great Britain) Order, 1952. Each of the packages had been prepared by the respondent. In a drawer in the shop there was another set of tickets each of which related to one of the packages. On each of these a total price was marked which in each case was in excess of that which could lawfully have been charged. After being cautioned by one of the inspectors the respondent made and signed a statement in the following terms: "All this waste and excessive fat had to be trimmed and I try "to oblige the customers, that's all. The extra price on the "second ticket is to cover up the trimmings. I do this entirely "on my own initiative to try to make the turnover and Mr. "Melling does not know a thing about it. When the orders go "out on the Saturday, the girl is instructed to change the "tickets over, and when she comes back, she brings the genuine "ticket back so I can sort the book out."

At the close of the appellant's case it was submitted on behalf of the respondent that there was no case to answer in that the facts relied on by the appellant were not sufficient in law to establish an attempt by the respondent to commit the offence charged. It was contended by the appellant that on the facts proved and in the absence of any other evidence the respondent ought to be convicted. The justices, being of the opinion that there was no case to answer, dismissed the informations.

J. P. Ashworth for the appellant.
John Newey for the respondent.

The following cases were cited in argument: *Reg.* v. *Eagleton*[1]; *Reg.* v. *Cheeseman*[2]; *Gardner* v. *Akeroyd*[3]; *Rex* v. *Woods*[4]; *Wiles* v. *Maddison*.[5]

LORD GODDARD C.J. stated the facts and continued:—The only question is whether or not the respondent can be convicted of an attempt to sell meat in excess of the maximum price to each of these 21 customers, to whom he had the intention that the meat should go on the next day. In my opinion, he

[1] (1855) Dears.C.C. 376, 515.
[2] (1862) Le. & Ca. 140.
[3] [1952] 2 Q.B. 743; [1952] 2 T.L.R. 169; [1952] 2 All E.R. 306.
[4] (1930) 143 L.T. 311; 46 T.L.R. 401.
[5] [1943] 1 All E.R. 315.

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cannot. He had merely formed the intention to commit an offence and his acts were only those preparatory to the commission of that offence. The locus classicus on what amounts to an attempt is *Reg.* v. *Eagleton* [1] where Parke B. said [2]: "Some act is required, "and we do not think that *all* acts towards committing a mis-"demeanour are indictable. Acts remotely leading towards the "commission of the offence are not to be considered as attempts "to commit it, but acts immediately connected with it are." Here, what remained to be done before there could be an attempt was the affixing to the meat of the false tickets. Until that was done, in my opinion the matter remained simply in embryo and in intention. The girl would have affixed the ticket, no doubt, because she was delivering the meat on behalf of the respondent on his instructions, and what she was doing was the act of the respondent, but, until she had done that, one cannot say that an offence had been committed. The preparation of the false tickets and putting them in the drawer is too remote from the actual transaction which would be necessary to constitute the attempt. There might be a sudden change of heart, or an intervention by the master, which would have prevented any attempt being made to sell this meat to the customers. In all these cases where it has been held that there has been an attempt; the court has always found that the crime would have been committed but for the intervention of someone. The crime here would not have been committed until, at any rate, the meat had got the false ticket on it and it had been sold with that false ticket on it to the customer. Therefore, the mere fact that the respondent prepared a false ticket is not enough.

No doubt this charge was preferred because of *Gardner* v. *Akeroyd*,[3] in which a butcher's manager was doing exactly the same thing as was done in the present case, but in those days it was an offence not merely to attempt to commit an offence in breach of the regulations, but it was also an offence to do an act preparatory to committing an offence. There the court was considering whether the doctrine of vicarious liability could attach to a master whose servant had done an act preparatory to the commission of, but which did not amount, to an attempt, and we held that the doctrine of vicarious liability could not be extended to that extent. Giving judgment in that case, I said [4]: "Now, applying the doctrine laid down in *Reg.* v. *Eagleton*,[5] "I should have no hesitation in holding that the servant in this "case was guilty of and could properly have been charged with "an attempt . . ." But in that case the false tickets had already been applied to the meat. In the present case the false tickets had not got on to the meat. For these reasons I think that the enforcement officers struck too soon, or did not think of a simpler way by which the respondent could have been prosecuted.

[1] (1855) Dears.C.C. 376, 515.
[2] Ibid. 538.
[3] [1952] 2 Q.B. 743.
[4] Ibid. 750.
[5] Dears.C.C. 515.

In my opinion, the justices came to a right decision in point of law and this appeal fails.

BYRNE J. Mr. Ashworth has drawn our attention to the definition of an attempt which is to be found in Stephen's Digest of the Criminal Law, 9th ed., p. 24: "An attempt to commit a "crime is an act done with intent to commit that crime, and "forming part of a series of acts, which would constitute its "actual commission if it were not interrupted." When one examines the facts in the present case, it appears to me that the respondent's acts were not interrupted because the time had not arrived for their completion. His acts, in my opinion, were for that reason too remote; they certainly indicated an attempt, but were not sufficiently connected with the offence with which he was charged as to constitute an attempt. I am of opinion that the justices were right, and that this appeal should be dismissed.

PARKER J. I agree with both judgments which have been delivered.

Appeal dismissed.

Solicitors: *Treasury Solicitor; Gregory, Rowcliffe & Co., for Frank Platt & Fishwick, Wigan.*

J. D. P.

[PRIVY COUNCIL.]

* HENRY CHARLES CHRISTIAN (OTHERWISE KNOWN AS KOFI AMPAH) . . . . APPELLANT;

AND

SAMUEL TAWIAH INTSIFUL . . . RESPONDENT.

†J. C.
1953
Dec. 14.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Will—Blind testator—Whether "by what appears on "the face of the will . . . he had . . . knowledge of its contents"—Court entitled to take cognizance of elaborate provisions of will—Courts Ordinance, Laws of the Gold Coast, 1936 *Rev., c.* 4, *Sch.* 3, *Ord.* 49, *r.* 29.

Will. "Blind."

By Ord. 49, r. 29, in Schedule 3 to the Courts Ordinance, c. 4 of the 1936 Revision, Laws of the Gold Coast: "Where the testator "was blind or illiterate, the court shall not grant probate of the "will, or administration with the will annexed, unless the court "is first satisfied, by proof or by what appears on the face of the "will, that the will was read over to the deceased before its "execution, or that he had at that time knowledge of its contents."

An elderly testator, whose eyesight was defective, handed a document to a man who had been a solicitor's clerk who, at the

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† *Present*: LORD PORTER, LORD OAKSEY, and MR. L. M. D. DE SILVA.

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testator's request, typed it out for him. It was then signed by the testator and witnessed as his will without it having been read over to him. The will was an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it was never suggested to the solicitor's clerk that he had any such knowledge of the testator's relationships and friendships. The evidence did not establish that the testator was incapable of reading the document:—

Held, that, if it could be shown plainly that the testator was incapable of reading, that would be sufficient proof that he was "blind" in this context; but that, even assuming that he was blind, the court, in determining under Ord. 49, r. 29, whether it was satisfied "by what appears on the face of the will . . . that he had at "that time"—when the will was made—"knowledge of its contents," was entitled to take cognizance of the elaborate nature of the contents of the will, which was not a document which one who was not intimately acquainted with the testator's life could possibly have devised. Taking that matter into consideration, as well as the question of the testator's eyesight, it appeared that the testator in fact understood what he was doing and intended to do it, and the will was accordingly valid.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 7 of 1953) from a judgment of the West African Court of Appeal (December 21, 1951) which reversed a judgment of the Supreme Court of the Gold Coast (March 12, 1951).

In the proceedings out of which this appeal arose the respondent, as plaintiff, claimed as one of the executors of the last will, dated November 20, 1944, of John Intsiful, who died on June 18, 1950, to have the will established, alleging its due execution on November 20, 1944. The present appellant (defendant) denied the respondent's claim, averring that on that date the testator was totally blind and could not have executed the will as alleged.

At the trial no serious question of due execution of the will or of the testator's testamentary capacity arose, but the dispute centred around the question whether the testator, whose eyesight was admittedly impaired, knew and approved of the contents of the will.

The trial judge (Dennison J.) found against the respondent's claim, and held that the testator had died intestate. On appeal by the respondent the West African Court of Appeal (Foster-Sutton P., Coussey and Korsah JJ.) unanimously allowed the appeal, holding that when he executed the will the testator was fully aware of its contents, knew what he was doing and wished to make his last will.

The defendant appealed.

1953. Dec. 14. *T. B. W. Ramsay* and *Sirimevan Amerasinghe* for the appellant.

James Petrie and *Gilbert Dold* for the respondent, were not called upon.

The following cases were cited in argument: *Battan Singh* v. *Amirchand* [1]; *Tyrrell* v. *Painton* [2]; *Fincham* v. *Edwards* [3]; *In the Estate of Wallace, Decd.* [4]

Dec. 14. The judgment of their Lordships was delivered by LORD PORTER. This case is one which in certain aspects has raised matters of difficulty for their Lordships' consideration. In making this statement their Lordships do not mean that, having regard to the evidence adduced in the courts in Africa, it presents difficulty as to the decision which they must reach. The difficulty rather occurs because certain matters which might have been elucidated in those courts were not dealt with, and consequently their Lordships are obliged to come to a conclusion upon the case as presented and to give their advice accordingly.

The case has been fully, accurately and impartially presented to their Lordships by Mr. Ramsay, who has said everything that could be said on behalf of the appellant, but their Lordships are not persuaded that it is a case in which they ought to advise Her Majesty to allow the appeal.

The facts are brief, and may be stated in a few sentences. The testator was at the time of his death in 1950, an old man of 93. The question at issue is whether a will which purports to have been, and indeed was, executed in 1944, represented the true and last will and testament of the testator, and in particular whether he understood the contents of the will as then executed.

It might be convenient at this moment to state that in consonance with the ordinary practice in this country, a provision is made in Ord. 49, r. 29, of the Courts Ordinance of the Gold Coast, c. 4, which runs in this way: "Where the testator "was blind or illiterate, the court shall not grant probate of the "will, or administration with the will annexed, unless the court "is first satisfied, by proof or by what appears on the face of "the will, that the will was read over to the deceased before "its execution, or that he had at that time knowledge of its "contents."

The actual question which their Lordships have to determine does not lie in the first part of the rule. The will in fact was, according to the evidence of a Mr. Arthur, who had been a solicitor's clerk but was not then acting on behalf of a solicitor, typed out by him. Some dispute took place as to what actually occurred when the will was made. The final evidence of Mr. Arthur is that it was made sometime after he had left a previous employer, which could not be earlier than 1943 and might be 1944, and that what occurred was this. He was called to the side of the testator, handed a document and asked to type it. He did so, and then gave it back to the testator, and the document was afterwards signed by the testator and witnessed by

[1] [1948] A.C. 161; [1948] 1 All E.R. 152.
[2] [1894] P. 151.
[3] (1842) 3 Curt. 63.
[4] [1952] 2 T.L.R. 925, 928.

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two witnesses, and then on the instructions of the testator placed in an envelope and put into the custody of the court in order to ensure that it was as regular as possible.

A good deal of discussion took place as to whether that was an accurate account of what had occurred. Apparently, by some mistake, the solicitor acting for the executor in the case who was propounding the will, had obtained what was not an accurate description of what had occurred at that interview. The inaccurate account was that the testator had dictated his wishes to the solicitor's clerk who took them down, and made a copy. The solicitor's clerk was called a second time in the course of the case, said that the proof taken by the solicitor was inaccurate, and, as their Lordships understand his evidence, adhered to the story which was first put forward. It is on that evidence that their Lordships have to decide the case.

It is admitted on all sides that the will was not read over to the testator by the solicitor's clerk, nor is there any evidence that it was read over to him by anyone else, and therefore their Lordships are thrown back upon the question whether by proof or by what appears on the will the testator had at the date of its signing knowledge of its contents. It is upon that matter that the dispute between the parties now turns. The first court thought that he was blind within the meaning of the relevant Order, and that as the document had not been read over to him there was not sufficient evidence to show that he knew of its contents. The Court of Appeal, on the other hand, took the view that there was sufficient evidence to show that he knew its contents, and unless the appellant can dispose of that finding their Lordships would not be entitled to alter the decision of the West African Court of Appeal.

The first problem is this: was there evidence that the testator in fact was blind? That is by no means clear; on the contrary, the onus being on the appellant to show that the testator was blind, in their Lordship's view that onus has not been discharged. The solicitor's clerk, Mr. Arthur, did not suspect him of blindness, nor is such a view necessarily inherent in the evidence given by the two persons who witnessed the will. They certainly thought that the testator understood what he was doing, and, if the evidence which they gave is looked at, the first witness, Mr. Hammond, said on p. 6: "The deceased was not totally blind, "but his eye-sight had been bad for some time before he died— "how long I cannot say." That deals with the question of the eye-sight of the testator at the time he died, but does not deal directly with his eye-sight in 1944 when the will was executed. The second witness, another Mr. Arthur, said: "I "cannot say if the deceased was totally blind; he was groping "with things on his table." From that, and from other evidence, it is plain that the testator's eye-sight was impaired, but that he was unable to read or unable to see what was on the document is not proved.

Their Lordships, on the whole, are inclined to agree with Mr. Ramsay that if it could be shown plainly that the deceased was incapable of reading, that would be sufficient proof of blindness because the word "blind" occurs in collocation with the word "illiterate." Apparently both matters are meant to be put on the same basis, namely, was the man incapable of reading the document which he had signed. In their Lordships' view that has not been sufficiently established.

Even supposing he were blind, there still remains the question whether he understood the document which was put before him. So far as the witnesses were concerned they obviously thought that he was capable of understanding what he had done. But the matter does not rest there. Their Lordships have had presented to them the will, which is marked "P.1", and have read it through in order to see what result was to be deduced from that reading. In reaching a conclusion as to the decision at which they should arrive, their Lordships find that in Ord. 49 one matter for their consideration is whether by what appears on the face of the will the testator "had at that time," that is, at the time of making it, "knowledge of its contents." The will is an elaborate one, leaving to a large number of parties, relations and friends of the deceased, various sums of money, and it is not a document which one who was not intimately acquainted with the testator's life could possibly have devised.

Their Lordships are entitled, in their view, to take cognizance of this fact. It was never suggested to Mr. Arthur, the solicitor's clerk, that he had that or any such knowledge of the testator's relationships and friendships, and their Lordships are entitled to take that matter into consideration, as well as the question of his eye-sight, in making up their minds as to what advice they should humbly tender to Her Majesty.

It is true that there has been some difficulty owing to the production of two documents, both of which are signed and purport, as Mr. Ramsay quite rightly says, to be witnessed by the same persons. If their Lordships had to speculate upon the matter they would be inclined to say that one was meant to be a copy of the other, one to be the will and the other to be a copy for the testator to keep, but there is no reason why they should have to speculate in this matter. Except for the omission of a certain gift, which might well occur in a case where there is a long list of persons to whom gifts were given, for all practical purposes the two documents are similar. That the one which has been numbered P.1. is the true will, appears from the fact that it was by the express wish of the testator deposited with the court, and therefore was meant to be the formal document which should bind the estate.

None of the cases cited throws light upon the decision to which their Lordships have come. Their Lordships think that the judge of first instance in Africa probably took too much cognizance of the fact that the man was somewhat blind, and

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did not pay enough consideration to all the other circumstances which appear to their Lordships to show that in fact the deceased man understood what he was doing and intended to do it.

In those circumstances, their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Burchells; A. L. Bryden & Williams.*

C. C.

[COURT OF APPEAL.]

C. A.
1954
Jan. 15, 18.
Somervell, Birkett L.JJ., and Vaisey J.

* MONTGOMERY *v.* A. MONK & CO. LD.

[1951 M. No. 4280.]

Building — Safety regulations — Secure handhold and foothold — Flat roof under construction—Inapplicability of statutory regulations—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 97.

Regulation 97 of the Building (Safety, Health and Welfare) Regulations, 1948, provides: "If the special nature or circumstances of any part of the work render impracticable compliance with the provisions of these regulations designed to prevent the fall of any persons engaged on that part of the work, then those provisions shall be complied with so far as practicable and except for persons for whom there is adequate handhold and foothold either there shall be provided suitable safety nets or safety sheets or there shall be available safety belts or other contrivances which will so far as practicable enable such persons who elect to use them to carry out the work without risk of serious injury."

The plaintiff, a workman in the employ of the defendants, while engaged in erecting a flat roof over the defendants' premises, by placing concrete tiles on concrete cross-runners, stepped backwards and fell over the edge of the roof, a distance of some 18 feet, and sustained injury. He could with safety have stepped on to the tiles already laid in place. He claimed damages from the defendants, alleging (inter alia) a breach of regulation 97:—

Held that, there being no provisions to be complied with which were rendered impracticable of compliance by the circumstances of the case, regulation 97 did not apply and the defendants were not liable.

Per Somervell L.J.: I do not think that the words of regulation 30 [guard rails for openings in a roof] are apt to describe the construction of a roof such as that with which we are concerned. I should have thought that it was concerned with openings in a roof and not with its construction. I do not think that any of the safety regulations apply to this case.

Appeal from a decision of Commissioner Goodman Roberts Q.C. at Liverpool Assizes on June 16, 1953.

The plaintiff, a man aged about 28 years, was employed by

the defendants on a flat roof which was being constructed on the defendants' oil refining premises. The roof consisted of concrete cross-runners, over which tiles were being placed from one runner to another and fitted into grooves, and ultimately concrete was to be poured over the tiles. In the normal course the roof would be a solid structure on which it would be possible to walk. It happened that when the rows had been laid, one row of tiles was found to be about three inches out of adjustment, and the tiles had therefore to be taken up and adjusted. While this was being done by the plaintiff, assisted by another workman, who was replacing the tiles, it became necessary for the plaintiff to move from where he was standing. Instead of moving on to other tiles, which he could have done with safety, the plaintiff stepped backward on to the edge of the roof and fell to the ground, a distance of some 18 feet, and suffered injury. In the present action the plaintiff claimed damages from the defendants, basing his claim on negligence at common law and a breach of the Building (Safety, Health and Welfare) Regulations, 1948. The commissioner dismissed the action, and the plaintiff appealed.

Edward Wooll Q.C. and *A. D. Pappworth* for the plaintiff.

Fenton Atkinson Q.C. and *Jacques Antelme* for the defendants.

The following cases were cited in argument: *Roberts* v. *Dorman Long & Co. Ld.*[1]; *Hutchison* v. *Cocksedge.*[2]

SOMERVELL L.J. [having stated the facts]: It was not suggested that there was any difficulty about the plaintiff stepping in other directions on to tiles, when he would have been safe. On work of this kind, whether on making the readjustment which was being made or while the roof was being constructed, there is, of course, the possibility, if a man does not bear in mind that there is an edge in the area on which he is standing, to step off or fall over the edge as one might if standing on a railway platform.

The plaintiff based his claim on negligence at common law and also he alleged there was a breach of the Building (Safety, Health and Welfare) Regulations, 1948. It is to the latter point that the argument on the appeal was in the main directed. With regard to negligence at common law, the learned commissioner, after citing a passage from Lord Normand, citing Lord Dunedin, in *Morton* v. *William Dixon Ld.*,[1] said: "I am satisfied that the "plaintiff has not shown a breach of duty, any failure to provide "a safe working place, in the sense of not providing guards or "scaffolding or nets to prevent the plaintiff from falling as was "pleaded." With that finding I agree. It would, of course, have

[1] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.
[2] [1952] 1 All E.R. 696n.
[1] 1909 S.C. 807.

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Somervell L.J.

been quite impossible to provide guard rails, as they would have to be moved as the work proceeded. It seems to me that it was one of those cases where, although the work was at a height, one cannot say that it was an unsafe place because if those working there did not remember there was an edge off which they could fall they might meet with an accident.

With regard to the Building Regulations, in the statement of claim the plaintiff relied on regulation 5, to which the sidenote is: "Provision of scaffolds and means of access." That provides that there shall be "suitable and sufficient scaffolds for all work "that cannot safely be done on or from the ground or from part "of the building." Reliance on that regulation was not really pressed in this court, and I think the finding to which I have referred as to negligence indicates that the work could be safely done from part of the building. Then there was reliance on regulation 30, which is concerned with openings in roofs, floors and walls, coupled with regulation 97. Paragraph 1 of regulation 30 provides: "every accessible opening in a roof . . . through which "any person is liable to fall a distance of more than 6 ft. 6 ins., "shall be provided with—(*a*) a suitable guard rail. . . ." Mr. Wooll agrees that regulation 30 is inapplicable, and that, he submits, brings in regulation 97, which reads, "If the special nature "or circumstances of any part of the work render impracticable "compliance with the provisions of these regulations designed to "prevent the fall of any persons engaged on that part of the work, "then those provisions shall be complied with so far as practicable "and except for persons for whom there is adequate handhold "and foothold either there shall be provided suitable safety nets "or safety sheets or there shall be available safety belts or other "contrivances which will so far as practicable enable such "persons who elect to use them to carry out the work without "risk of serious injury."

In answer to that allegation, the defendants relied on paragraph 5 of regulation 30, which provides: "Guard rails . . . "required by paragraphs 1, 2, 3 or 4 of this regulation may be "removed or remain unerected—(*a*) where and when this is or "becomes necessary in order to proceed with any . . . covering ". . . of the opening." The commissioner said that he assumed that, prima facie, paragraph 1 applied. He said, having regard to the work which was being done, paragraph 5 was in the nature of a proviso excepting the operation which was being done here from the regulation altogether and, therefore, that there was no room for the operation of regulation 97; that there were no provisions to be complied with which would have been rendered impracticable by the foregoing regulation, because the regulation itself excused or excluded compliance with its earlier provision. As a matter of construction I think that is right but, speaking for myself, I do not think that the words of regulation 30 are apt to describe the construction of a roof such as we are concerned with

in this case. I should have thought that it was concerned with openings in a roof and not with its construction.

Mr. Wooll referred us to various other regulations not relied on in the statement of claim, namely, 22, 24, 26 and 31. I do not think that any of them are applicable, so the question whether the plaintiff should be allowed to rely on them does not arise. I did at one time in the course of the argument wonder if it could be said that it was a working place within regulation 24, but having regard to the nature of the work and the provisions of the regulation with regard to guard rails, I do not think that it could.

That being so, I agree with the commissioner, though for slightly different reasons. I do not think that regulation 30 or any of the regulations apply at all. It is not a case therefore where there are prima facie regulations which have to be, as it were, modified by the operation of regulation 97. I therefore think the plaintiff fails on that basis of his claim. The commissioner did go on to consider whether it could be said that he had adequate handhold as well as foothold within regulation 97. I would have felt a difficulty about saying he had an adequate handhold, but I do not want to suggest any opinion about that, because as I have come to the conclusion that that regulation does not apply I think that it would be wrong to do so. For these reasons, I think that this appeal fails and must be dismissed.

BIRKETT L.J. I agree.

VAISEY J. I agree.

Appeal dismissed. By consent no order as to costs.

Solicitors: *Mawby, Barrie & Letts, for Silverman & Livermore, Liverpool; Laces & Co., Liverpool, for James Chapman & Co., Manchester.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

* DALY v. CANNON.

1954
Jan. 19, 20.

Lord Goddard C.J., Byrne and Parker JJ.

Public Health — Prevention of disease — Rags — Collection — Sale or delivery of article to person under 14—*Whether goldfish an article —Public Health Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *s.* 154. "*Article.*" "*Article or thing.*" *Statute—Construction—Penal Act—Doubt—Act to be construed against imposition of penalty.*

By section 154 (1) of the Public Health Act, 1936: "No person "who collects or deals in rags, old clothes or similar articles, and "no person assisting, or acting on behalf of, any such person as "aforesaid, shall—(*a*) in or from any shop or premises used for,

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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"or in connexion with, the business of a dealer in any such "articles as aforesaid; or (*b*) while engaged in collecting any such "articles as aforesaid,

"sell or deliver, whether gratuitously or not, any article of food "or drink to any person, or any article whatsoever to a person "under the age of fourteen years."

A goldfish is not an "article" within the meaning of section 154 (1) of the Act of 1936, and the delivery of a goldfish to a boy under the age of 14, by a rag and bone man, while engaged in collecting rags, is not an offence against the section.

CASES STATED by Essex justices.

The appellant Sidney Richard Daly, chief sanitary inspector for Ilford preferred an information against William James Cannon, charging that he "on April 29, 1953, being a person who collected "rags and was then engaged in collecting such articles in a "certain street called Uphall Road in the Borough of Ilford . . . "did deliver a certain article namely a goldfish to Lesley Cullen ". . . the said Lesley Cullen being a person under the age of "fourteen years contrary to the Public Health Act, 1936, "s. 154. . . ."

The following facts were proved or admitted before the justices: The respondent, being a person who collected rags, was so engaged on the date and at the place specified in the information when he delivered a live goldfish to Lesley Cullen who was a person under the age of 14 years.

The justices being of the opinion that a live goldfish was not an "article" within the meaning of section 154 of the Public Health Act, 1936, dismissed the information.

The prosecutor appealed.

A. E. Holdsworth for the appellant.

The respondent did not appear and was not represented.

The following cases were cited in argument: *Llandaff and Canton District Market Co.* v. *Lyndon* [1]; *Rex* (*Urban District Council of Portadown*) v. *Armagh Chairman and Justices* [2]; *McIntyre* v. *M'Intee* [3]; *Attorney-General* v. *Brown* [4]; *West Ham Corporation* v. *Markham.* [5]

LORD GODDARD C.J. stated the facts and continued: The question which we have to decide is whether a goldfish is an article within the meaning of section 154 (1), and although the case has been susceptible of a good deal of argument and, in some respects, is not easy, I cannot contend that our judgment will add a great deal to the jurisprudence of this country. [His Lordship read section 154 (1) of the Act of 1936, and continued:] That section replaced section 73 of the Public Health Act, 1925, in which it was made an offence to give to a person "in connexion

[1] (1860) 8 C.B.(N.S.) 515.
[2] [1931] N.I. 209.
[3] 1915 S.C.(J.) 27.
[4] [1920] 1 K.B. 773; 36 T.L.R. 165.
[5] (1953) 107 J.P. 24.

"with, the business of a rag and bone merchant any article of "food or any balloon or other toy." In the Public Health Act, 1936, section 154 appears in Part V of the Act, which is headed "Prevention, notification and treatment of disease," and no doubt the object of the legislature was to prevent as far as possible infected articles being passed from hand to hand so that disease might be spread. It is not what I may call a police section, introduced to prevent the receiving of stolen goods or matters of that sort. It is simply dealing with prevention of the spreading of disease.

It seems that in this case a boy under the age of 14 years took some rags to the respondent and received in return a live goldfish. We are told that goldfish are found to be an inducement to boys to bring rags; if, of course, the rag and bone man gave them a goldfish in a bowl, the bowl would no doubt be an article. There can be no question about that, and therefore persons collecting rags and bones, with the ingenuity of their trade, now insist on small boys bringing gallipots or bowls into which they put the goldfish.

The respondent wrote a letter to the court and said that he was sorry if he had done anything wrong, but he understood that a magistrate had held that it was not wrong and a goldfish was not an article. Mr. Eddy, the stipendiary magistrate at West Ham on December 11, 1952, had given a considered decision in *West Ham Corporation* v. *Markham* [1] on this point, and I may say at once—and I am speaking in this respect for Byrne and Parker JJ. as well as myself—that I think the decision is exceedingly sensible. This is a penal statute, because there is a penalty of £5 for breach of the section, and it is a very well-known canon of construction that if one has an ambiguity one always applies the construction which is most favourable to an accused person and a construction which will not involve the imposition of a penalty.

Would anybody in ordinary common parlance talk about a goldfish as an article? I do not think that they would. If the statute had said "article or thing," as some statutes have said, there could be no doubt, I think, that a goldfish would be a thing. That was a point which came before the High Court of Northern Ireland in *Rex* (*Urban District Council of Portadown*) v. *Armagh Chairman and Justices*,[2] where Moore C.J., having to construe a section which dealt with "article" and "thing," said he thought that "article" was applicable to something inanimate, and "thing" to both live and dead matter. I think that it is a difficult point in some respects and, if it is thought that goldfish spread disease—I do not know whether they do or not—it would be quite easy for Parliament to alter the law on this point; but bearing in mind that if there is a doubt as to the construction, we ought to prefer the construction which is against the imposition

[1] (1953) 107 J.P. 24.

[2] [1931] N.I. 209.

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of a penalty, I think that it is a straining of language to say that a goldfish is an article.

Accordingly, I think Mr. Eddy's judgment, to which I have referred, was quite right; in fact, I should be quite prepared to adopt it as my own. In these circumstances, I think the justices in the present case came to a right decision in point of law, and accordingly this appeal is dismissed.

Byrne J. I agree.

Parker J. I agree.

Appeal dismissed.

Solicitors: *K. F. B. Nicholls, Town Clerk, Ilford.*

[LEEDS ASSIZES.]

1953 *Nov.* 12; *Dec.* 19.

Glyn-Jones J.

* WRAITH *v.* NATIONAL COAL BOARD.

Mines and Minerals—Coal—Regulations—Breach of statutory duty—Reconstruction of disused roadway—Roof insecure—Injury to workman engaged on reconstruction—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *ss.* 49, 51, 52 (1), 102 (8)—*Coal Mines General Regulations,* 1913 (*S.R. & O.* 1913, *No.* 748), *reg.* 8.

"*Travelling road.*" "*Working place.*"

By the Coal Mines Act, 1911, s. 49: "The roof and sides of "every travelling road and working place shall be made secure, "and a person shall not, unless appointed for the purpose of "exploring or repairing, travel on or work in any travelling road "or working place which is not so made secure."

Section 51: "Where the work of erecting supports of the roof "and sides of working places is done by the workmen employed "therein, a sufficient supply of timber or other materials suitable "for supports shall be kept at or within ten yards of every working "place where, in pursuance of this Act, supports are required to be "erected. . . ."

Section 52 (1): "In any part of a mine where any work is being "carried out which necessitates the removal of roof supports, "temporary supports shall, in all cases, be set so as to secure the "safety of the persons employed."

The plaintiff was employed by the defendants in their mine in the reconstruction of a disused roadway which had fallen into disrepair so that over much of its length there had been falls of roof which had almost buried the crumpled steel arches which had formerly supported the roof, and there was an almost continuous cavity in the roof. The system of work was to clear a short length of roadway of debris and then fix a new arch-girder. Above the new arch-girder and projecting about 18 ins. to 2 ft. beyond it were placed pieces of timber which protected a workman in the

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[Reported by G. M. Smailes, Esq., Barrister-at-Law.]

roadway from a fall of roof from immediately above him. The workmen next cleared the roadway sufficiently to make room for the next arch-girder which was placed about 3 ft. from the first and then the old distorted arch or arches, which by this time carried no weight, were removed. While the plaintiff was engaged in clearing debris before removing one of the old arches, a large stone fell from the roof about six or seven feet from the last new arch-girder and rolled on to his hand which was crushed. In an action against the defendants for breaches of the above sections:—

Held, (1) if a roadway had fallen into disrepair because it was not used and was no longer needed it ceased to be a travelling road within the meaning of section 49; in the present case only so much of it as had been reconstructed became a roadway and there was, therefore, no travelling road at the point where the stone fell;

(2) section 49 drew a distinction between a roadway and a working place, but, although the roof was not secure, the place where the plaintiff was injured was not a working place; a roadway did not become at any given point a working place merely because at that place men were employed to repair it;

(3) even if the material place was a working place, section 49 did not in the circumstances impose on the defendants any duty to make the roof secure, as the section permitted workmen to be sent to a road or place which was insecure for the purpose of repairing it.

Dictum of Lord Asquith of Bishopstone in *Stapley* v. *Gypsum Mines Ld.* [1953] A.C. 663, 685; [1953] 3 W.L.R. 279, 293; [1953] 2 All E.R. 478 applied;

(4) if (contrary to the above findings) the defendants were in breach of section 49, the burden was on the defendants under section 102 (8) of the Act to prove that it was not reasonably practicable to make the roof secure, which burden the defendants on the evidence had not discharged;

(5) section 51 contemplated circumstances such as those which existed when colliers, who worked in the getting of coal at the coal face, were required to put in props, and, even if it had been proved (which it was not) that there was not a sufficient supply of timber within 10 yards of the working place, it was doubtful whether that section had any application to the facts of the present case;

(6) the work was not such as necessitated the removal of roof supports under section 52 (1), as, when the time came for the removal of the old arches, they were no longer serving as roof supports;

(7) if (contrary to the above findings) there had been a breach of duty by the defendants, no material responsibility should be allocated to the plaintiff for his breach of duty to withdraw from the working place under reg. 8 of the Coal Mines General Regulations, 1913.

ACTION.

The following statement of the facts is taken from the judgment: On June 6, 1952, the plaintiff Stanley Wraith, suffered injury by an accident arising out of and in the course of his employment as a coal miner by the defendant Board at their Houghton Main Colliery, when a large stone fell on the back of his right hand and crushed it against a steel arch-girder. There was a roadway connecting the colliery with certain workings, no longer in use, forming part of the neighbouring Grimethorpe Colliery. The roadway had not been used for a considerable time and had fallen into disrepair in two respects.

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First, as the result of the pressure of the surrounding earth, the steel arches supporting the roof and side of the roadway had been forced inwards and were crumpled. Secondly, over much, probably most, of the length of the roadway there had been falls from the roof which had almost buried the crumpled arch-girders so that not only was the roadway impassable, but also, above the heaps of debris, there was an almost continuous cavity in the roof. In many places, and particularly at the spot where the stone which injured the plaintiff fell, the heap of debris on the floor reached above the height of the old arches.

Some three or four months before the accident the defendant board began to reconstruct this roadway, and during one shift each day two miners called Shone, who were father and son, were employed thereat. The system of work was that first, a short length of roadway was cleared by loading the fallen debris into tubs; next the roof and sides were ripped down sufficiently to make room for a new arch-girder or ring which was fixed in position. Above the arch-girder were two pieces of timber known as runners, one end of each of which was wedged above the arch-girder so that the runners lay horizontally along the length of the road. They were set not quite parallel to each other, but diverging a little as they ran forward. Across them were placed side by side pieces of timber about 3 ft. to 4 ft. long so as to form a continuous strip of covering timber which would protect a man standing or working in the centre of the roadway from a fall of roof from immediately above him. Taking advantage of the protection of this strip of timber which projected beyond the newly fixed ring towards the point where the next ring was to be fixed, the men next cleared the roadway sufficiently to make room for the next ring which was placed about 3 ft. away from the first. Once the second ring was in position the next task was to remove and carry away the old distorted ring or rings which by this time carried no weight and were mere obstructions in the roadway.

In each shift the two men at work would not normally do more than put up one ring or arch-girder, clearing and ripping the roof and sides as far as was necessary for this purpose, removing the old ring and leaving, after they had finished, the last two runners projecting forward with or without covering timber across them. The distance between the rings varied as did the lengths of the timbers used for runners; thus the extent to which the runners projected beyond the last ring to be fixed varied, though as a rule it was about 18 ins. to 2 ft.

On the day of the accident the plaintiff was ordered to work with Arnold Shone, whose father, who had been in charge of this work on that shift, was away sick. That day was the first on which the plaintiff had been employed in this roadway, but he was an experienced miner and had done somewhat similar work elsewhere. When the two men, Arnold Shone and the plaintiff, reached the place they found that the men working on the

previous shift had not removed the old crumpled ring which stood beneath the last pair of new rings. Surrounding this ring was a quantity of debris and, projecting beyond the last ring, were the ends of the last two runners with one or two pieces of covering timber across them. Arnold Shone placed more covering timbers across the runners so as to form a strip projecting about 18 ins. to 2 ft. beyond the last ring.

The two men then set to work under the protection of the roof of the last completed section of new roadway to shovel up the debris and load it into tubs and also to remove the old ring which the night shift had left. The plaintiff, who had been kneeling while shovelling rubble, placed his right hand on the top of the crumpled arch next beyond the last fitted ring to help himself to his feet, and, as he did so, a large stone fell from the roof some 6 or 7 ft. away from the last ring, rolled down a heap of debris, which at this point rose to a height above the crumpled arch, on to the back of the plaintiff's hand and crushed it against the arch-girder, causing the injury of which he complained.

The plaintiff brought this action claiming damages from the defendants for negligence at common law and breaches of statutory duty under sections 49, 51 and 52 (1) of the Coal Mines Act, 1911.

G. R. Hinchcliffe Q.C. and *R. Withers Payne* for the plaintiff.
Geoffrey Veale Q.C. and *A. B. Boyle* for the defendants.
Cases cited are referred to in the judgment.

Cur. adv. vult.

December 19. GLYN-JONES J. stated the facts and considered the evidence of negligence at common law. He found that it was not possible to take steps to ensure that the roof of the disused roadway was supported beyond the point to which it had been reconstructed nor was there evidence of any safe means by which temporary protection could have been provided to support the next few feet of roof beyond the point to which the reconstruction had gone. His Lordship continued: In my opinion, the defendant board is not guilty of negligence at common law.

I turn to the alleged breaches of statutory duty. It is said first, that the roof from which this stone fell was the roof of a travelling road or working place within the meaning of section 49 of the Coal Mines Act, 1911; secondly, that by that section there is imposed upon the coal owner an absolute duty that such a roof should be secure and that the fact that the stone fell is of itself proof that the roof was not secure; and, thirdly, that the duty created by the statute was owed as well to the plaintiff and Shone as to any other workman, even though they, the plaintiff and Shone, were the very men employed by the board in the performance of the board's duty to make the roof secure. To this the board reply, first, that the roof from which the stone fell was not the roof of a roadway or working place; secondly, that on its

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true construction section 49 does not create a duty owed by the board to men actually appointed for the purpose of repairing and making secure an insecure roof; and, thirdly, that in any event the board had established the defence provided for it by section 102 (8) of the statute, namely, that it was not reasonably practicable to prevent the breach or breaches, if any.

I am of opinion that if a roadway in a mine has ceased to be used as a roadway and has been allowed to fall into disrepair because it is no longer needed, it ceases to be a roadway within the meaning of section 49 and there is no duty on the board to keep the roof and sides of a disused roadway secure. So much of it as had been reconstructed, but only so much, became a roadway, and the board then came under a duty to keep the roof and sides of that much of it secure; but the point from which the stone fell was beyond the point at which the reconstructed roadway ended. It follows that in my opinion there is no breach of the duty resting on the board to keep the roof and sides secure at the point where the stone fell on the ground that there was at that point a travelling road.

I have to consider whether this place may have been a "working place" within the meaning of section 49. If the spot where the plaintiff and Shone were working is to be called a working place rather than a roadway, it seems to me that the expression, "the roof of a working place" cannot be limited to the reconstructed roof but must be construed as extending at least to that area of roof above and beyond the spot where the plaintiff was working, from which a fall might put the plaintiff in peril. In my opinion, the section does draw a distinction between a roadway and a working place. I do not think that a roadway becomes at any given point a working place merely because at that place men are employed to repair it. If I am wrong and the place where the plaintiff and Shone were was a working place then I am of opinion that the point from which the stone fell was part of the roof of the working place and the roof had not been made secure.

The next question is whether or not the Board owed to the plaintiff any duty under section 49 to make the roof of this working place secure *Stapley* v. *Gypsum Mines Ld.*[1] was a case in which the House of Lords was invited to discuss the construction of article 7 (3) of the Metalliferous Mines General Regulations, 1938, an article in similar terms to section 49 of the Coal Mines Act, 1911. Lord Asquith of Bishopstone in his speech said[2]: "There was in this case, in my opinion, no breach "by the company, by itself or any servant or agent, of the "Metalliferous Mines Regulations (S.R. & O. 1938, No. 630), "made under section 86 of the Coal Mines Act, 1911. The "company carried out its obligations under regulation 7 (3) to "the letter, if the first line and a half of that regulation be read

[1] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

[2] [1953] A.C. 685; [1953] 3 W.L.R. 293.

"with the last two and a half lines. If the company detail X "and Y to repair a defect in the walls or roof to restore safety, "they cannot possibly, it seems to me, be told that they are "breaking the regulation by permitting the repairers to work in "a working place which, pending the completion of the repair, "is insecure."

The actual decision of the House in that case turned upon other considerations and Lord Porter, Lord Reid and Lord Tucker each stated that he thought it unnecessary to decide the question on which Lord Asquith had expressed his opinion, while Lord Oaksey made no reference to it. I do not think, therefore, that I can treat this question as having been determined by the House of Lords, but I humbly state my agreement with the view expressed by Lord Asquith and I hold that in the circumstances of the present case section 49 does not impose upon the Board a statutory duty owed to the plaintiff to make the roof of this working place secure.

Mr. Hinchcliffe, for the plaintiff, argued that the duty imposed on the board by the first line and a half of the section was absolute and universal and that the last two and a half lines did not in any way limit the generality of what came before them, but were intended merely to cast upon individual workmen a duty not to travel along or work in a road or in a working place, the roof or sides of which were not secure. It may be that these last two and a half lines do cast such a duty upon individuals, but I am satisfied that they also cast upon the board a duty not to permit workmen, other than those appointed for the purpose of exploring or repairing, to go along or into a road or working place which is not secure, and thus by implication the statute, in my view, does permit the board to send workmen to a road or place which is insecure for the purpose of repairing it.

I am mindful of the fact that in *Edwards* v. *National Coal Board* [3] Tucker L.J. said [4]: "There is no dispute that the . . . "effect of section 49 . . . is to impose on the mine-owner the abso-"lute duty to make the roof and sides of every travelling road "secure"; but in that case the point which I have to decide did not arise, for the injured plaintiff was a man who was not employed to repair a roadway which had become insecure, and to such a man, that is to say, a man who has not been employed to repair an insecure roadway, the board clearly does owe a duty to make the road or working place secure, and that is qualified only by the defence provided by section 102 (8). I prefer not to hold, unless I am bound by authority, that the statute provides that there is a duty on the coal owner to make secure the roof of a working place before he sends repairers in to make secure the roof of the working place, but I am fortified in this conclusion by the fact that Lord Asquith, whose opinion I have cited, was a member of the Court of Appeal which decided *Edwards'* case.

[3] [1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[4] [1949] 1 K.B. 704, 708.

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Assuming, however, that I am wrong and that the board was in breach of a statutory duty owed to the plaintiff under section 49, I have further to find whether or not it has been shown that it was not reasonably practicable to prevent or avoid the breach. I take the definition of "reasonably practicable" from the decision of the Court of Appeal in *Marshall* v. *Gotham Co. Ld.*,[5] and in particular from the judgment of Jenkins J. If, in the reconstruction of this roadway, the defendant board has done all that is capable of being done to make the roof and sides secure within the limits of what it is reasonable to do according to the best assessment of what is necessary and sufficient that could have been made at the relevant time, then the board has done all that is reasonably practicable.

The plaintiff has not called evidence to satisfy me that there were other means whereby the system of work could have been made safer so as to prevent or limit the risk of a fall from the roof. Here, however, the burden is on the defendant board to prove that it is not reasonably practicable to make this roof secure. I assume, of course, that contrary to my finding, there was a duty owed to the plaintiff upon them to make it secure. The board has called only one witness, the deputy, Wilkinson. I have no evidence from any mine manager or mining engineer that no better system of preventing falls could have been devised according to the best assessment which could have been made at the relevant time. If the point arises, I am bound to find, I think, that the board has not discharged the burden of proving that it was not reasonably practicable to avoid or prevent a breach of section 49, if, contrary to my view, there was such a breach.

I next consider the alleged breach of section 51 of the statute. I doubt whether this section has any application to the facts of this case. If the section had been intended to mean that, wherever the work of erecting supports of the roof and sides of a working place was being done, a sufficient supply of timber should be kept at or within 10 yards of the working place, it would have been easy to say so. The section provides however that the requirement that a supply of timber is to be kept at or within 10 yards applies only where the work of erecting the supports is done by the workmen employed at the working place. Obviously, in one sense, it is true that a workman who erects supports at a working place is working at the working place while he is erecting the supports. In my opinion, however, the section contemplates circumstances such as those which exist when colliers who work in the getting of coal at the coal face are required, as the coal is removed, to put in props to support the roof over the space from which the coal has been removed. I do not think the section applies to repairers in fixing arch-girders and timber supports to a roadway in course of reconstruction. The danger against which the section is intended to guard is that workmen, to whose work the setting of supports is merely

[5] [1952] W.N. 535; [1952] 2 T.L.R. 941; [1952] 2 All E.R. 1044.

incidental, may neglect to put in sufficient support if there is not timber close at hand, for if they are employed on contract work it is unremunerative to spend their time searching further afield for timber. If a repairer, whose work consists primarily in setting arch-girders and timber supports, has no arch-girders or timber, his work comes to an end. Assuming, however, that the section applies, I am not satisfied that there was any breach of it, for I am disposed to accept Wilkinson's evidence that there was timber by the side of the reconstructed roadway within 10 yards of the place where the plaintiff was working; in any case an adequate supply need not have included 8 ft. runners, and any shorter runners would not have prevented this accident.

Lastly, as to the alleged breach of section 52 (1), I am of opinion that the work was not such as necessitated the removal of roof supports, for the old crumpled arch-girders were doing little to support the roof, and, in any event, when the time came for their removal the roadway had been reconstructed above them and by that time they were no longer serving as roof supports.

I now turn to another matter. By their defence the defendant board charged the plaintiff with a breach of statutory duty in that, if there was not sufficient timber or other suitable material, then it was the plaintiff's statutory duty under regulation 8 of the Coal Mines General Regulations, 1913, to withdraw from the working place and report the circumstances to the deputy in charge, and that it was the plaintiff's own breach of statutory duty in not withdrawing that caused this accident. Since I find that there was no breach by the defendant board, it follows that there could not have been a breach by the plaintiff of this statutory duty; but if, contrary to my view, there was a breach by the defendant board, it follows that there was a corresponding breach by the plaintiff of his duty to withdraw, but I should not be disposed to allocate to the plaintiff any material responsibility for the injury which he suffered on the ground of this breach. For these reasons my judgment must be for the defendant board.

Judgment for defendants.

Solicitors: *Raley & Pratt, Barnsley; C. M. H. Glover, Doncaster.*

[COURT OF APPEAL.]

*RABIN v. MENDOZA & CO.

C. A.
1954
Jan. 12.
Denning and Romer L.JJ.

[1952 R. No. 1060.]

Practice and Procedure — Discovery — Privilege — Without prejudice negotiations to avoid litigation—Whether reports made for purpose of negotiations privileged from production—R.S.C., Ord. 31, *r.* 18.

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Before the plaintiff started an action for damages against the defendant firm for negligence in the surveying of a property, his solicitor had an interview with a member of the defendant firm with a view to avoiding litigation. At that interview, which was without prejudice, it was arranged that the defendants should make inquiries to ascertain whether a policy of insurance could be obtained to cover the risk in question; and as a consequence of the interview, the defendants obtained a report from a surveyor. No settlement having been reached, the plaintiff started proceedings and the defendants in their affidavit of documents claimed privilege from production for the letters and report prepared as a result of the without prejudice discussions:—

Held, that if documents came into being under an express or a tacit agreement that they should not be used to the prejudice of either party, an order for production should not be made; that the report was entitled to the protection of the without prejudice quality which characterized the interview; and that this was not accordingly a case where production should be ordered.

Observations of Lord Langdale M.R. in *Whiffen* v. *Hartwright* (1848) 11 Beav. 111, 112, considered and applied.

Decision of Croom-Johnson J. affirmed.

Appeal from Croom-Johnson J.

The defendants, a firm of surveyors, disclosed in Part II of the schedule to their affidavit of documents a surveyor's report and certain correspondence for which they claimed privilege from production. These documents were made as the result of certain without prejudice discussions which had taken place between the plaintiff's solicitor and a member of the defendant firm before the action was started. Master Burnand held that the documents were privileged from production and Croom-Johnson J. affirmed this decision. The facts are fully stated in the judgment of Denning L.J.

The plaintiff appealed.

Harry Lester for the plaintiff.

T. M. Eastham for the defendants.

Denning L.J. This appeal raises an interesting point on discovery. The plaintiff has brought an action against a firm of surveyors alleging negligence in the surveying of a property. Before the action was started the plaintiff's solicitor called on a partner in the defendant firm (who has since died) and told him that the plaintiff had had trouble about the survey which the defendants had made, because a building society had refused to lend money on the house. The interview was without prejudice. At that interview an understanding was reached that the defendants would make inquiries about the possibility and the cost of obtaining insurance cover with a view to an insurance company giving an indemnity against any possible risk of damage to the house, so that any litigation could be avoided entirely. After that interview, the defendants instructed another firm of surveyors to make a report, with a view to putting up a proposition to the insurers so as to obtain cover. The report was

obtained but no settlement was reached. The question is whether the defendants are bound to produce the documents, particularly the report, passing between this other firm of surveyors and themselves. The defendants have scheduled the documents in their affidavit of documents, but they claim privilege from production of all the letters and reports on the ground that "all of the said letters and reports were prepared "and made as a result of and in pursuance of to the best of my "knowledge and belief a without prejudice discussion between "the plaintiff's solicitors and" the partner in the defendant firm.

The question for us to decide is whether that claim for privilege from production is a good claim. This is not an ordinary case of legal professional privilege. The documents were not prepared for the purposes of litigation or for the purposes of obtaining the advice of the solicitors. They were prepared in order to avoid litigation. It is said, however, that, apart from legal professional privilege, there is a separate head of privilege on the ground that the documents came into existence on the understanding that they were not to be used to the prejudice of either party. "Without prejudice" does not appear as a head of privilege in the White Book; but in Bray on Discovery at p. 308 it is stated: "The right to discovery may "under very special circumstances be lost by contract as where "correspondence passed between the parties' solicitors with a "view to an amicable arrangement of the question at issue in the "suit on a stipulation that it should not be referred to or used "to the defendant's prejudice in case of a failure to come to "an arrangement."

That proposition is founded on *Whiffen* v. *Hartwright*,[1] where Lord Langdale M.R. refused to order the production of letters which passed "without prejudice," observing that he "did not "see how the plaintiff could get over this express agreement, "though he by no means agreed, that the right of discovery was "limited to the use which could be made of it in evidence." The Master of the Rolls there affirms the undoubted proposition that production can be ordered of documents even though they may not be admissible in evidence. Nevertheless, if documents come into being under an express, or, I would add, a tacit, agreement that they should not be used to the prejudice of either party, an order for production will not be made.

This case seems to me to fall within that principle. This report was clearly made as a result of a "without prejudice" interview and it was made solely for the purposes of the "without prejudice" negotiations. The solicitor for the plaintiff himself says in his affidavit that at the time of the interview it was contemplated that steps such as these should be undertaken. I find myself, therefore, in agreement with the decision of

[1] (1848) 11 Beav. 111, 112.

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Master Burnand and the judge that this is not a case where production should be ordered.

The appeal, therefore, should be dismissed.

Romer L.J. I agree, and I have only a word to add. On the first question whether the report is entitled to the protection of the without prejudice quality, if I may so describe it, which characterized the interview which took place, it is in my opinion abundantly clear that it is. The affidavit of the solicitor, who attended the conference with Mr. Mendoza, a partner in the defendant firm, states: "The interview terminated upon the "understanding that Mr. Mendoza would make inquiries of the "possibility and cost of obtaining insurance cover and then "come and see me again and let me know what he was pre-"pared to do, after which I would take my client's instructions."

It appears from the evidence that it was in pursuance of the understanding that was arrived at at that interview that the defendants gave instructions for an independent survey for production to the insurance company.

It seems to me perfectly plain in those circumstances that the only object of obtaining the report was to implement the understanding which was arrived at during the interview which was without prejudice; therefore, in my judgment, the protection extends to the report which was obtained in pursuance of that understanding.

The question then arises whether, notwithstanding that protection, it ought to be produced. I think that there is no question that it ought to be disclosed in the affidavit of documents, because it relates to a matter in question in the proceedings, and the defendants have rightly disclosed it; but they have disclosed it in Part II of the Schedule to their affidavit and they claim immunity from production and inspection. I quite agree with what my Lord has said, that this is a justified claim, partly on the ground on which Lord Langdale M.R. decided *Whiffen* v. *Hartwright*,[1] and partly because it is a matter for the discretion of the judge under Order 31, r. 18. It seems to me that it would be monstrous to allow the plaintiff to make use—as he certainly would make use—for his own purposes as against the defendants of a document which is entitled to the protection of "without "prejudice" status.

In those circumstances I agree with what my Lord has said, and this appeal fails.

Appeal dismissed.

Solicitors: *Manches & Co.; William Charles Crocker.*

B. A. B.

[1] 11 Beav. 111, 112.

* PRACTICE DIRECTION (COSTS AGAINST AIDED PERSON).

1954

Lord Goddard C.J., Evershed M.R.

Legal aid—Costs—Order against aided person—Form of order—Payment by instalments—Legal Aid and Advice Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 2 (2) (*e*)—*Legal Aid* (*General*) *Regulations,* 1950 (*S.I.* 1950, *No.* 1359), *reg.* 17.

Where an order for costs is made against an assisted person; by regulation 17 and in accordance with section 2 (2) (*e*) of the Act a judge is required to assess the amount which the assisted person is to pay and may give a direction for that amount to be payable by instalments. The successful litigant in such a case may thereafter make a subsequent application to the court under a proviso to regulation 17 for the order to be varied on the grounds that there has been a change in the assisted person's circumstances.

Where the judge at the trial orders the assisted person to pay, whether in one sum or by instalments, a sum which must be less than the full amount of the costs, the order should direct that the costs are not to be taxed and judgment be entered without further order for the amount of costs which has then been determined; otherwise the judgment must direct taxation and this will involve the successful party in extra and unnecessary expense.

If the judge orders payment by instalments, he should be asked also to direct that on failure to pay any instalment the whole sum should become due; otherwise there is no means of enforcing payment until the time has elapsed for the whole of the instalments to be paid owing to the rule that there can be only one execution on a judgment. So, supposing an order is made for £5 a month for six months, if a default is made in paying the first or second instalment no execution could issue until the six months had elapsed.

Fresh forms for the drawing up of orders to embody these directions are being prepared.

GODDARD, C.J.
EVERSHED, M.R.

[QUEEN'S BENCH DIVISION.]

* JOZWIAK *v.* SADEK AND OTHERS.

1953 *Dec.* 4.

Ormerod J.

Evidence — Libel and slander — Identification of plaintiff with person defamed—Article in newspaper alleged to be fiction—Statements made at public meetings—Anonymous telephone messages to plaintiff — Admissibility to prove plaintiff identified with fictitious character.

Libel and slander.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

1953

JOZWIAK
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OTHERS.

In an action for libel arising out of the publication in a Polish newspaper of an article which purported to be fiction, the plaintiff, in order to prove that he had been identified with an individual referred to in the article, sought to tender evidence (1) of statements made by persons present at meetings of the Polish community in London showing that they did so identify him; and (2) of anonymous telephone messages accusing him of being a murderer received by him after the publication of the article. The defendants objected on the ground that the evidence was hearsay and therefore inadmissible:—

Held, (1) that evidence of the statements made at the meetings was admissible to identify the plaintiff with the libel.

Cook v. *Ward* (1830) 4 M. & P. 99 and *Du Bost* v. *Beresford* (1810) 2 Camp. 511 applied.

Held, (2) that evidence of the telephone conversations was admissible since they contained similar statements to those made at the meetings.

ACTION.

The plaintiff, Stanislaw Jozwiak, sued the defendants, the author of an article in a newspaper, "The Polish Daily," and the proprietors, the editor, the printers and publishers of the newspaper, for damages for libel which he alleged was contained in a story written by the first defendant and published on February 20 and 21, 1953. The article which on the face of it was fiction told of the suicides of two people who had hanged themselves because of financial difficulties, and the article suggested that their difficulties had been caused indirectly by the actions of a man who was the chairman of an association. There had in fact been two suicides in those circumstances in the Polish community some time before the article appeared. At the time the suicides took place the plaintiff was and still remained the chairman of an association in the Polish community which was formed to bring members of the community together for business reasons.

The plaintiff alleged that the libel was intended to refer to him as the person responsible for the financial downfall and suicide of those two persons. The issue before the court was whether or not the person referred to in the article would be identified as the plaintiff in the minds of any persons knowing the circumstances.

Counsel for the plaintiff sought to tender evidence of statements made at public meetings of the Polish community to show that persons present at the meetings did in fact identify the plaintiff with the individual referred to in the article; and also evidence of anonymous telephone messages accusing him of being a murderer which the plaintiff had received after the publication of the articles.

Counsel for the defendants objected on the ground that the evidence was hearsay and was therefore inadmissible.

Helenus Milmo for the plaintiff.

H. Heathcote-Williams Q.C. and *L. I. Stranger-Jones* for the defendants.

Cases cited in argument are referred to in the judgment.

ORMEROD J. stated the facts set out above and continued: I have come to the conclusion that the evidence should be admitted, and I base that conclusion upon the authorities which have been cited to me by Mr. Milmo. In the first place he referred to *Hough* v. *London Express Newspaper Ld.*,[1] in which the question was whether the plaintiff could be identified with the alleged libel. It was there held that the evidence of persons who lived in the same street and in the same district as the plaintiff could be admitted, as it was necessary for the plaintiff to prove that they were persons who knew the special circumstances and might understand the words as having the meaning alleged.

There are two older authorities which are probably more in point. One of them is *Cook* v. *Ward*,[2] a libel action where, in order to identify the plaintiff with the libel, evidence was called of laughter and statements which had been made at a vestry meeting. It was held that that evidence was admissible on that ground, that is to say, on the ground that it identified the plaintiff with the subject of the libel.

Equally, in *Du Bost* v. *Beresford*,[3] which was not a libel action, the question arose whether the subject of a particular picture was libellous, and it was held that evidence about remarks made by persons who saw the picture when it was exhibited was admissible to show that those persons had identified the subject of the libel with the plaintiff. The report is a short one, with this note: "In the course of the trial, Lord Ellenborough held upon "argument, that the declarations of the spectators, while they "looked at the picture in the exhibition room, were evidence "to show that the figures portrayed were meant to represent "the defendant's sister and brother-in-law."

On the authority of those decisions and on the application of the ordinary principles of evidence, I feel that I ought to admit the evidence of statements made at meetings of the Polish community, or sections of the Polish community, which took place after the publication of this article; and if that be so, I fail to see how I am extending the principle if at the same time I hold that evidence of telephone messages with the plaintiff, in which similar statements were made, is admissible in evidence. It may be that that evidence is of no great value, and quite clearly the jury will have to be warned to treat it with the caution which is is necessary. I rule that the evidence is admissible.

Evidence admitted.

Solicitors: *H. Davis & Co.; George & George.*

[1] [1940] 2 K.B. 507; 56 T.L.R. 758; [1940] 3 All E.R. 31.

[2] (1830) 4 M. & P. 99.

[3] (1810) 2 Camp. 511.

[COURT OF APPEAL.]

C. A.

1954
Jan. 12.

Denning and Romer L.JJ.

* KRAKAUER *v.* KATZ.

[1941 K. No. 298.]

Practice and Procedure—Dismissal of action for want of prosecution—Long delay—Effect of plaintiff's twelve years' delay in prosecuting action—Notice of change of solicitors served with summons to dismiss for want of prosecution. Rules of the Supreme Court—Waiver—R.S.C., Ord. 7, r. 2 (1) and (6) not complied with—Irregularity waived—Proceedings not void—R.S.C., Ord. 70, r. 1. Court of Appeal—Evidence—Fresh evidence—Interlocutory matter—Affidavit evidence—Discretion of court as to admissibility of further evidence. Evidence.

In 1941 the plaintiff served on the defendant a writ claiming damages for breach of contract to which appearance was entered on the defendant's behalf by a firm of solicitors. The plaintiff took no further steps in the action until October, 1953, when his solicitors wrote to the defendant stating that it was proposed to revive the action. The defendant then went to new solicitors who filed notice of change in the Central Office and at the same time issued a summons to dismiss the action for want of prosecution. In so acting they were in error, since under R.S.C., Ord. 7, r. 2 (1) and (6) a copy of the notice ought to have been served on the plaintiff's solicitors before the summons was issued. No point was taken on this irregularity before the master, who dismissed the action for want of prosecution. Croom-Johnson J. reversed the master's decision. On appeal the defendant asked the court to admit in evidence certain further affidavits:—

Held, (1) that by analogy with the Statute of Limitations if a plaintiff allowed an action to go to sleep for six years the court in its discretion would usually dismiss the action for want of prosecution, unless the plaintiff could show good reason why he should be allowed to go on with it; and the plaintiff should not be allowed to proceed with the action;

(2) that as no point was taken before the master with regard to the irregularity resulting from the non-compliance with R.S.C., Ord. 7, r. 2 (1) and (6), it was not open to the plaintiff to avail himself of this irregularity on appeal. Order 70, r. 1, showed that non-compliance with the rules did not render the proceedings void, but would be dealt with as the court thought right;

(3) that an appellant in an interlocutory matter had no right to adduce further evidence by affidavit: it was a matter for the discretion of the court whether such further evidence should be admitted.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J.

The defendant Laszlo Namenji Katz on November 26, 1953, took out a summons asking that the action which was started by the plaintiff Alexander Krakauer by writ issued on June 19, 1941, should be dismissed for want of prosecution, the plaintiff not having delivered a statement of claim. The facts are fully stated in the judgment of Denning L.J. Croom-Johnson J., reversing the decision of Master Diamond, dismissed the summons.

The defendant appealed. At the hearing of the appeal counsel sought to read certain further affidavits which had been

filed in support of the defendant's application and in answer to affidavits filed on behalf of the plaintiff which had been read at the hearing before Croom-Johnson J. The judge at the time asked the defendant's counsel whether he wished for an adjournment to answer the plaintiff's evidence. Counsel then stated that he did not want to answer this evidence. On the appeal he sought to adduce further evidence, contending that on an interlocutory matter an appellant had a right to adduce such evidence.

John Marnan for the defendant.
Harry Lester for the plaintiff.

DENNING L.J. A preliminary point has arisen whether in an interlocutory matter this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter had a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right. It is a matter of discretion in this court whether or not further evidence by affidavit should be admitted.

In exercising our discretion in this case, there is an overwhelming obstacle in the way of the defendant. At the hearing below the judge in chambers asked his counsel whether he wanted to answer the affidavit of the plaintiff and whether he wanted an adjournment so to do, and counsel said that he did not. Counsel thus took his stand on the evidence as it then stood before the judge; and it would be contrary to the right exercise of our discretion if we were to allow counsel for the defendant to go back on that position and to introduce further evidence in this court.

We must therefore proceed with the case on the evidence as it stood before the judge.

The court proceeded to hear argument on the appeal.

DENNING L.J. The facts in this case are somewhat striking. On June 19, 1941, the plaintiff issued a writ against the defendant claiming damages for breach of contract, or alternatively an account. The writ was served upon the defendant and an appearance was entered on his behalf on July 25, 1941, by his then solicitors, and the plaintiff's solicitors ought to have delivered a statement of claim within ten days thereafter. Time may not have run during the vacation, but at all events the statement of claim ought to have been delivered in due time after entry of appearance.

In point of fact the plaintiff did nothing for over 12 years, and in October, 1953, by his solicitors, he wrote to the defendant intimating that this claim was being revived, and eventually his solicitors gave notice of their intention to proceed with the action. The defendant went to new solicitors, who gave notice of change and took out a summons to dismiss the action for

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want of prosecution. The summons came before Master Diamond, who took the view that after 12 years the action should be dismissed for want of prosecution. The plaintiff appealed to Croom-Johnson J. who took the opposite view and said that the action was not to be dismissed.

The judge was much influenced by a technical point. When the new solicitors filed notice of change at the Central Office, they at the same time issued the summons to dismiss for want of prosecution; whereas in truth they ought to have served a copy notice of change on the plaintiff's solicitors before they issued the summons, because under Order 7, r. 2 (1) and (6), it is quite plain that the copy notice ought to be served before the change is effective. There was, therefore, an irregularity, but it caused no injury to anyone, it was merely a day wrong in the order of procedure.

When the summons to dismiss came before the master no point was taken on this irregularity; the matter was argued on the merits and the master dismissed the action. I am clearly of opinion that thereafter it was not open to the plaintiff's solicitors to avail themselves of this irregularity. Order 70, r. 1, shows that non-compliance with the rules does not render the proceedings void, but they can be dealt with as the court thinks right. It is the right thing for the court to ignore that irregularity.

The real point is whether the plaintiff, having done nothing for 12 years in this action, should now be allowed to revive it. An affidavit was put in on his behalf in which he said that his solicitors' offices were destroyed by enemy action and could not proceed with the case; but when inquiries were made, it turned out that his solicitors' offices were destroyed before the writ was issued. They were destroyed on May 10, 1941, and the writ was issued on June 19, 1941. There was no difficulty in proceeding with the action: the defendant's solicitors were on the record all the time. Even if the plaintiff could not proceed with the claim during the war owing to various difficulties, there was no reason why he should not have pursued it during the eight years since that time. I am disposed to agree with what Mr. Marnan suggested, namely, that by analogy with the Statute of Limitations, if a plaintiff allows an action to go to sleep for six years, the court, in its discretion, will usually dismiss the case for want of prosecution unless the plaintiff can show some good reason why he should be allowed to go on with it. In this case it is not six but twelve years, and I am quite clear that this plaintiff ought not, after that length of time, to be allowed to go on with the action.

I think that the appeal should be allowed and the order of the master restored.

ROMER L.J. I agree. The plaintiff in the affidavit which he swore in these proceedings on December 11, 1953, made a

considerable point about his alleged ignorance of the whereabouts of the defendant throughout a long period of years; but it appears that it was not until some months after the writ was issued (and after he should have delivered his statement of claim) that he heard that the defendant was interned in the Isle of Man. He knew then where the defendant was and also he apparently knew in 1952, because he had an offer, so he says, from a man who knew the defendant. In any event, the plaintiff's knowledge of the personal whereabouts of the defendant during the whole time was a matter of little consequence, because the defendant had entered an appearance by a well-known firm of solicitors who were still carrying on their business—but that is what he says. It does not appear to be the reason which his solicitors gave in the letter which they wrote to the defendant on October 2, 1953, stating: "We understand that you have full "details of our client's claim and our client has delayed pressing "you because at the time your financial circumstances were such "that it would have been impossible for you to pay. He now "understands that you are in a far easier financial position. . . ." There is not a word there about not having proceeded before because he did not know where the defendant was. There may be some cases where it would be right to allow an action to proceed, even though there has been nothing done for 12 years, and where it would be right to make no order on a summons taken out by the defendant to dismiss the action for want of prosecution; but I am abundantly clear in my mind that this is not one of them. This is a case where apparently the real cause of the plaintiff not having proceeded with the action before is that he thought that the defendant was not worth pursuing; and the action only came to life again when he apparently discovered that the defendant's financial position had improved. I think that this is a clear case where the action should be dismissed.

On the question of practice which my Lord has decided, I entirely agree with what he says. It seems to me quite plain that the requirements of Order 7, r. 2 (6), which was the only provision of the rules which was not complied with in strictness in the present case, was one which it is open to the other side to waive; and I am clearly of the opinion that the plaintiff's solicitors, by appearing before the master after they had received the notice which sub-rule (6) requires to be given and having argued the case before the master, must be taken to have waived the strict compliance with that sub-rule.

Accordingly, I agree that this appeal should be allowed.

Appeal allowed.

Solicitors: *Simmons & Simmons; Charles Caplin & Co.*

B. A. B.

[HOUSE OF LORDS.]

H. L. (Sc.)† * INLAND REVENUE COMMISSIONERS . APPELLANTS;

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AND

WILSONS (DUNBLANE) LD. . . . . RESPONDENT.

Revenue—Income tax—Wear and tear allowance—Plant—Partnership converted into limited company—Plant sold at market value—Calculation of allowance—Income Tax Act, 1945 (8 & 9 *Geo.* 6, *c.* 32).

The Income Tax Act, 1945, enacts (inter alia) by section 59, in relation to the recovery of wear and tear allowances based on capital cost: "(1) The provisions of this section shall have effect in relation to sales of any property where . . . (*a*) the buyer is a body of persons over whom the seller has control . . . ; or (*b*) it appears with respect to the sale . . . that the sole or main benefit which, apart from the provisions of this section, might have been expected to accrue to the parties . . . was the obtaining of an allowance or deduction under any of the following enactments, that is to say, any of the provisions of this Act or of Rule 6 or Rule 7 of the Rules applicable to Cases I and II of Schedule D. . . . (2) Where the property is sold at a price other than that which it would have fetched if sold in the open market, then, subject to the succeeding provisions of this section, the like consequences shall ensue for the purposes of the enactments mentioned in subsection (1) of this section . . . in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the price which it would have fetched if sold in the open market. (3) Where the sale is a sale of machinery or plant . . . (*b*) . . . if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller, the last preceding subsection shall have effect as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge: . . . In this subsection the expression 'the limit of re-charge' means, in relation to a person who sells machinery or plant—(i) if he provided that machinery or plant for himself before the appointed day, the actual cost to him of the machinery or plant. . . ." ("The appointed day" for the Act to come into operation was April 6, 1946.)

On November 16, 1944, a partnership was formed to carry on a wool-spinning business. Subsequently the three partners formed a limited company, in which they were the shareholders, to take over the business and assets on November 16, 1945, and the partnership sold to the company the business and assets in accordance with an agreement of sale, under which the price paid for the plant and machinery was £17,554, the price which they would have fetched if sold in the open market at that date. From the coming into operation of the Act the wear and tear allowance made to the company on the plant and machinery was based on a figure of £8,000, which was the starting (written down) figure in the partnership's books for plant and machinery for the year commencing November 16, 1944, and was taken to represent the "limit of re-charge." The taxpayer challenged this basis of computation:—

† *Present*: LORD REID, LORD NORMAND, LORD MACDERMOTT and LORD KEITH OF AVONHOLM.

Held, that the words "as if for the reference to the price which "the property would have fetched if sold in the open market there "were substituted a reference to the . . . limit of re-charge" in section 59 (3) (*b*) did not direct the substitution in the initial condition of subsection (2) as well as at the end of the subsection; and that, accordingly, since the price paid by the company was that which the plant and machinery would have fetched in the open market and not "a price other than" that price, the condition for the application of subsection (2) was not satisfied and the company were entitled to an allowance calculated by reference to the price paid, viz. £17,554.

Decision of the First Division of the Court of Session (1952 S.C. 417) affirmed.

APPEAL from the First Division of the Court of Session.

This was an appeal from an interlocutor of the First Division of the Court of Session as the Court of Exchequer in Scotland answering in favour of the respondents, Wilsons (Dunblane) Ld., a question of law in a case stated by the Special Commissioners for the opinion of the Court of Session. The respondents were a limited company and carried on business at Dunblane, Perthshire. They appealed to the Special Commissioners against assessments to income tax made on them under Case I of Schedule D to the Income Tax Act, 1918, for the years 1946/47 to 1950/51 inclusive. They contended that they had not been allowed the deductions to which they were entitled in respect of wear and tear of machinery and plant in the said years under Rule 6 of the Rules applicable to Cases I and II of Schedule D. The issue turned on the proper construction of section 59 of the Income Tax Act, 1945, which contained special provisions regulating and restricting the amount of such deductions in certain circumstances and, in particular, in the event of the person or company claiming the deductions having bought the machinery or plant in the circumstances mentioned in the section, notably where the property was sold at a price other than that which it would have fetched if sold in the open market.

The facts are fully stated in their Lordships' opinions.

W. R. Milligan Q.C. (Solicitor-General for Scotland), *Sir Reginald Hills* (of the English Bar) and *W. R. Grieve* (of the Scottish Bar) for the appellants.

R. P. Morison Q.C. and *Watson Q.C.* (both of the English Bar, Q.C. of the Scottish Bar) for the respondent company.

Their Lordships took time for consideration.

January 25, 1954. LORD REID. My Lords, during the hearing by the Appellate Committee of this case and the cases following, which are to be decided by your Lordships this morning, Viscount Simon took the chair. It would be presumptuous on my part to seek to add to the tributes so recently paid to him in this House but I may perhaps be permitted to put on record our

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gratitude for his wise leadership in our discussions and our deep regret that he is not here to express the views which he had formed in each of these cases before his last illness. I desire further to express, on behalf of all Scots lawyers, our acknowledgment of the debt which Scots law owes to him for the many contributions which he has made in this House to the clarification and development of our law.

My Lords, after carrying on the business of wool spinning for many years, Mr. A. B. Wilson in 1944 took his two sons into partnership and brought into the partnership the whole assets of the business at the figures which then appeared in his accounts. The machinery and plant stood in his balance sheet at a written down value of £8,000. On November 16, 1945, the partners formed the respondent company to take over the business, all the shares being allotted to the partners. The company bought the machinery and plant for £17,554. It has been found by the Special Commissioners that this was the price which they would have fetched if sold in the open market at that date. The question in this case is whether allowances in respect of wear and tear of that machinery and plant from 1946 onwards should be calculated with reference to the sum of £8,000 or the sum of £17,554. It is admitted that before the Income Tax Act, 1945, came into operation the proper basis was the cost to the company, £17,554.

The Income Tax Act, 1945, contained a new and elaborate scheme for determining allowances: obviously this was designed at least in part to meet the situation at the end of the war when prices had risen steeply and new equipment was scarce. The Act covered other types of equipment besides machinery and plant, and various initial allowances, annual allowances, balancing allowances, and balancing charges were introduced: one difference between machinery and plant and other equipment is that allowances for other equipment are in general based on cost of construction, whereas allowances for machinery and plant are based on its cost to the trader seeking the allowances. In the case of a trader buying secondhand machinery or plant the cost to him might far exceed the original cost of construction. In that case he would get allowances much greater than those available to the trader who sold the plant or machinery to him. It was plain that this might possibly lead to arrangements between traders whereby machinery or plant changed hands in order to get increased allowances at the expense of the Revenue, and section 59 of the Act prevents this result in certain cases.

Section 59, so far as relevant to this case, is as follows: "(1) The provisions of this section shall have effect in relation "to sales of any property where either—(*a*) the buyer is a body "of persons over whom the seller has control, or the seller is a "body of persons over whom the buyer has control, or both the "seller and the buyer are bodies of persons and some other person "has control over both of them; or (*b*) it appears with respect to

" the sale or with respect to transactions of which the sale is one, " that the sole or main benefit which, apart from the provisions " of this section, might have been expected to accrue to the " parties or any of them was the obtaining of an allowance or " deduction under any of the following enactments, that is to say, " any of the provisions of this Act or of Rule 6 or Rule 7 of the " Rules applicable to Cases I and II of Schedule D or of section " 19 of the Finance Act, 1941, or of Part IV of the Finance Act, " 1944. References in this subsection to a body of persons " include references to a partnership. (2) Where the property is " sold at a price other than that which it would have fetched if " sold in the open market, then, subject to the succeeding pro- " visions of this section, the like consequences shall ensue for " the purposes of the enactments mentioned in subsection (1) of " this section . . . in their application to the income tax of all per- " sons concerned, as would have ensued if the property had been " sold for the price which it would have fetched if sold in the open " market. (3) Where the sale is a sale of machinery or plant— " (*a*) no initial allowance shall be made to the buyer; and (*b*) " subject to the provisions of the next succeeding subsection, if " the price which the property would have fetched if sold in the " open market is greater than the limit of re-charge on the seller, " the last preceding subsection shall have effect as if for the " reference to the price which the property would have fetched if " sold in the open market there were substituted a reference to " the said limit of re-charge: Provided that this subsection shall " not apply in relation to a sale of machinery or plant which has " never been used if the business or part of the business of the " seller was the manufacture or supply of machinery or plant of " that class and the sale was effected in the ordinary course of " the seller's business; Provided also that where the sale is one " to which paragraph (*a*) of subsection (1) of this section applies " and took place before the appointed day, and the seller " acquired the machinery or plant on or after the sixth day of " April, nineteen hundred and forty-four, paragraph (*a*) of this " subsection shall not apply. In this subsection the expression " ' the limit of re-charge ' means, in relation to a person who " sells machinery or plant—(i) if he provided that machinery or " plant for himself before the appointed day, the actual cost to " him of the machinery or plant, including in that actual cost " any expenditure in the nature of capital expenditure on " machinery or plant by way of renewal, improvement or " reinstatement: (ii) if he provided the machinery or plant for " himself on or after the appointed day, the expenditure incurred " by him on the provision thereof. . . ."

This section only applies where either there was an ulterior object behind the sale (subsection (1) (*b*)) or the buyer and seller were not independent (subsection (1) (*a*)). There is no suggestion in this case of any ulterior object but the fact that the partners controlled the respondent company which bought

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from them admittedly brings the case within subsection (1) (*a*) and so brings the rest of the section into operation. Subsection (4) has no application to this case: the question at issue turns on the proper interpretation of subsections (2) and (3).

Subsection (2) applies to sales of all kinds of equipment dealt with in the Act, but subsection (3) only applies to sales of machinery or plant. The only part of subsection (3) which directly affects this case is subsection (3) (*b*), which provides that, if the price which the property would have fetched if sold in the open market (in this case £17,554) is greater than the limit of re-charge on the seller (in this case £8,000), subsection (2) is to have effect subject to a certain modification set out in the latter part of subsection (3) (*b*). In order to discover the meaning of this latter part of subsection (3) (*b*) it is necessary to examine closely both the terms of subsection (2) and the terms of subsection (3) (*b*). I think it helpful to begin by noting the structure of subsection (2). It begins by stating a condition which must be satisfied before the subsection can have any operative effect—the property must have been sold at a price other than the market price. If that condition is satisfied "then subject to the succeeding provisions" of the section certain consequences are to ensue. That structure, in my view, indicates that the initial condition must first be satisfied in every case and that only then are the "succeeding provisions" to be looked at: if they do not apply then the consequences set out in subsection (2) itself will follow, but if any of the "succeeding provisions" apply, then the consequences enacted by that provision will apply instead of the consequences enacted in subsection (2).

The modification of subsection (2) which is directed by subsection (3) is that the former subsection is to "have effect as if "for the reference to the price which the property would have "fetched if sold in the open market there were substituted a "reference to the said limit of re-charge." I turn to look for the reference to that price in subsection (2) and I find at the end of subsection (2) a clear reference to that price and at the beginning of subsection (2) words which might or might not be interpreted as a reference to that price. Neither the words at the beginning of subsection (2) nor the words at the end of it correspond exactly with the words in subsection (3). The words in subsection (3) are "the price which the property would have "fetched . . . ," those at the end of subsection (2) are "the "price which it would have fetched . . . ," and the words at the beginning of subsection (2) are "that which it would have "fetched . . ." But the words "it" and "that" in these contexts plainly represent "the property" and "the price" respectively, and I cannot regard these changes as of any importance. The difficulty about the first reference in subsection (2) is of a different character. What is there being denoted is "a price "other than that which it would have fetched if sold in the open "market," and it is, I think, a nice question whether a statement

about a price other than X should be held to be a reference to X. The answer may depend on the context.

In subsection (3) the words used are not "as if for any "reference to the price," or "as if for references to the price," but are "as if for the reference to the price . . ." in the singular. When the draftsman of this section intended to refer to "references" in the plural he did so: at the end of subsection (1) I find "references in this subsection to a body of persons include "references to a partnership." So the change from the plural in subsection (1) to the singular in subsection (3) (*b*) must be taken to have been deliberate and therefore significant.

It is plain and not disputed that subsection (3) (*b*) directs the substitution of the limit of re-charge in one place—in the latter part of subsection (2). The question in this case is whether it also directs that substitution in another place—in the initial condition of subsection (2). If it does, it is agreed that the application of subsection (2) so altered reduces the sum on which the respondent company is entitled to allowances for wear and tear to £8,000 and the appeal succeeds. But if it does not, then, as the price paid by the company was the price which the machinery and plant would have fetched if sold in the open market and not "a price other than" that price, the condition for the application of subsection (2) is not satisfied, the price paid by the company stands, and the appeal fails. If the opinions which I have already expressed are correct there are two strong indications that subsection (3) (*b*) only directs the substitution of the limit of recharge in one place—in the latter part of subsection (2). These are the use of the singular "the reference" in subsection (3) (*b*) and the structure of subsection (2). And there is no real difficulty in holding that the phrase "a price other than "that which it would have fetched if sold in the open market" is not a reference to "the price which the property would have "fetched if sold in the open market." Therefore, simply taking the words which Parliament has used in section 59, the appeal must fail.

But the appellants found on more general considerations to show that the respondents' interpretation leads to results which are quite unreasonable and contrary to the general policy of the Act. I doubt whether section 59 is sufficiently ambiguous to make it right to take account of such matters, but I need not decide that because I cannot accept this argument on its merits. The argument in what seems to me its most attractive form is this. Subsection (2) in its unaltered form directs that if property is not sold at the market price consequences shall ensue as if it had been sold at the market price. If the respondent is right, subsection (2) in its altered form will direct that if property is not sold at the market price consequences shall ensue as if it had been sold for the amount of the limit of recharge. This is an unreasonable provision and the only reasonable provision would be that if property is not sold at the amount of the limit of

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recharge then consequences shall ensue as if it had been sold at that amount. This is the appellants' interpretation: the words of the section make it possible to adopt it and it should be adopted. I reject the argument because the result of the respondents' interpretation does not seem to me to be absurd or wholly inexplicable. When buyer and seller are at arm's length the purchase price which they agree to stands as the basis for allowances and that purchase price will normally be the market price. When buyer and seller are not at arm's length the sale is suspect and section 59 rejects the agreed purchase price, perhaps because it is likely to be something different from the market price. If that is so it would not be altogether unreasonable to say that although the sale is of the suspect class, yet if it is in fact made at the market price it shall be treated as a genuine sale. I am far from saying that that was in fact the intention: we are not concerned with intention except in so far as it can be deduced from the words of the Act. The argument I am dealing with is that the altered form of subsection (2) as the respondent would have it is so unreasonable that any possible alternative should be preferred, and it is enough to meet that argument to show that it is not impossible to suppose that it could have been intended.

I therefore move that this appeal should be dismissed.

Lord Normand. My Lords, before Lord Simon's lamented death I had intimated to him that I would concur with an opinion prepared and finally revised by him in this appeal. In these circumstances I am to deliver his opinion as my own. I shall thus have the privilege of preserving his judgment on one of the last Scottish appeals heard by him. Before I read it I may be allowed to associate myself with the words of my noble and learned friend on the Woolsack about Lord Simon. It is indeed true that Scottish lawyers share with their English brethren the grievous sense of loss that his death has brought to all of us. Here, then, is his opinion which I adopt as my own.

The Income Tax Act, 1945, provided for a series of "allowances" which could be claimed from the revenue authorities and enjoyed by taxpayers owning certain property (including machinery and plant) used in their business. These provisions were obviously intended to assist or give encouragement to trade after the war, and came into force on an "appointed day" which was April 6, 1946. These allowances were not deductions to arrive at assessable income, such as could be subtracted from gross income, but were treated separately and operated to reduce the taxpayer's liability to tax until the relief they gave from tax on the allowances was completely enjoyed. Thus, if assessable income in a given tax year was £5,000 and the allowances amounted to £2,000, income tax fell to be paid on £3,000. But if assessable income for the year was less than £2,000, while there would be no income tax to pay in that year, the balance of

the allowance remained available to be used to reduce tax in a future year.

The statute provides for "initial allowances," "annual "allowances," "balancing allowances," and "balancing "charges," the last named operating to increase the total tax due above the tax on assessable income. This might arise, for example, if the value of second-hand plant rose and it was sold at a figure above the price paid for it when it was new, or above the price to which it had been written down by wear-and-tear allowances made by the revenue authorities for the purposes of income tax. In such a case the sum total of such allowances would manifestly be more than was justified. To take figures: if an item of plant cost £1,000 and sufficient annual allowances for depreciation had been given by the tax authorities to reduce the balance of cost to nil, and if the plant were then sold at a figure equal to or in excess of its original cost, the seller would have to bear a "balancing charge" which would result in his paying tax on the £1,000. If, however, the allowances had only amounted in all to £600, the balancing charge would be £600 and tax would be borne on this figure.

The question of law to be decided in the present appeal arises upon a case stated by the Special Commissioners sitting in Edinburgh. It is a question of construction of section 59 of the Act subsection (3) (*b*)—a question easy to state, but involving a close reading of the words to answer. The appeal is against the interlocutor of the Court of Session which reversed the decision of the Special Commissioners in favour of the Crown.

Section 59, so far as relevant, runs as follows: "(1) The "provisions of this section shall have effect in relation to sales "of any property where either—(*a*) the buyer is a body of persons "over whom the seller has control, or the seller is a body of "persons over whom the buyer has control, or both the seller and "the buyer are bodies of persons and some other person has "control over both of them; or (*b*) it appears with respect to the "sale or with respect to transactions of which the sale is one, "that the sole or main benefit which, apart from the provisions "of this section, might have been expected to accrue to the "parties or any of them was the obtaining of an allowance or "deduction under any of the following enactments, that is to say, "any of the provisions of this Act or of Rule 6 or Rule 7 of the "Rules applicable to Cases I and II of Schedule D or of section "19 of the Finance Act, 1941, or of Part IV of the Finance Act, "1944. References in this subsection to a body of persons "include references to a partnership. (2) Where the property is "sold at a price other than that which it would have fetched if "sold in the open market, then, subject to the succeeding pro-"visions of this section, the like consequences shall ensue for "the purposes of the enactments mentioned in subsection (1) of "this section . . . in their application to the income tax of all per-"sons concerned, as would have ensued if the property had been

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"sold for the price which it would have fetched if sold in the open "market. (3) Where the sale is a sale of machinery or plant— "(*a*) no initial allowance shall be made to the buyer; and "(*b*) subject to the provisions of the next succeeding subsection, "if the price which the property would have fetched if sold in "the open market is greater than the limit of re-charge on "the seller, the last preceding subsection shall have effect as if "for the reference to the price which the property would have "fetched if sold in the open market there were substituted a "reference to the said limit of re-charge: Provided that this "subsection shall not apply in relation to a sale of machinery or "plant which has never been used if the business or part of the "business of the seller was the manufacture or supply of "machinery or plant of that class and the sale was effected in "the ordinary course of the seller's business; Provided also that "where the sale is one to which paragraph (*a*) of subsection (1) "of this section applies and took place before the appointed day, "and the seller acquired the machinery or plant on or after the "sixth day of April, nineteen hundred and forty-four, paragraph "(*a*) of this subsection shall not apply. In this subsection the "expression 'the limit of re-charge' means, in relation to a "person who sells machinery or plant—(i) if he provided that "machinery or plant for himself before the appointed day, the "actual cost to him of the machinery or plant, including in that "actual cost any expenditure in the nature of capital expenditure "on machinery or plant by way of renewal, improvement or "reinstatement; (ii) if he provided the machinery or plant for "himself on or after the appointed day, the expenditure incurred "by him on the provision thereof. (4) [not relevant] . . . (5) "As respects Rules 6 and 7 of the Rules applicable to Cases I "and II of Schedule D, the provisions of this section shall have "effect as respects tax for the year of assessment in which the "appointed day falls and any subsequent year of assessment."

The precise question is as to the proper interpretation and application of the words in subsection (3) (*b*).

The facts which give rise to this question are as follows.

For some thirty years up to November 15, 1944, the business now carried on by the respondent company had been conducted by Mr. Alexander B. Wilson as sole proprietor, trading as Alexander Wilson & Co. On November 16, 1944, Mr. Alexander Wilson took his two sons into partnership, himself taking a one-half share and each son taking a one-quarter share in the profits. Mr. Alexander Wilson brought into the partnership firm on November 16, 1944, the whole assets of the business, including the machinery and plant then belonging to him which had been acquired by him from time to time in the course of his business. These assets were taken into the accounts of the partnership firm at the figures at which they appeared in the accounts of Mr. Alexander Wilson immediately before the partnership firm acquired them. The aggregate figure for these assets was

£28,764 15s. 8d. At November 15, 1944, in the balance sheet of Mr. Alexander Wilson's business, the machinery and plant appeared at a written down figure of £8,000, and this formed a starting figure in the firm's books for machinery and plant for the partnership year commencing on November 16, 1944. Following the transfer of Mr. Alexander Wilson's business to the partnership, application was made under section 32 of the Finance Act, 1926, requiring that the tax payable for all years of assessment should be computed as if the trade carried on by Mr. Alexander Wilson had been discontinued at November 16, 1944, and a new trade had then been set up or commenced. The assessments on Mr. Alexander Wilson down to November 15, 1944, and those on the partnership from November 16, 1944, were respectively dealt with under the "cessation" and "new business" provisions of the Income Tax Acts. On November 16, 1945, the business of the partnership was transferred to the respondent company, which had been incorporated for this purpose on October 4, 1945; the whole of the issued shares of the company being allotted to the former partners in the proportion of 50 per cent. to Mr. Alexander Wilson and 25 per cent. to each of his sons. The assets of the partnership as at November 16, 1945, were bought by the respondent company in accordance with an agreement of sale, under which the price paid for machinery and plant was £17,554. This was the price which the machinery and plant would have fetched if sold in the open market on that date. The buyer, i.e. the respondent company, was "a body of persons "over whom the seller, i.e. the partnership, had control" and therefore section 59 of the Income Tax Act, 1945, could apply in relation to the sale. The actual question, however, now to be decided between the parties is whether subsections (2) and (3) of section 59 can, on a sound construction, be held to apply to the circumstances of this case. The Commissioners held that they could so apply. The Court of Session held that they could not. If the Commissioners' view were right, the annual allowance would be calculated on a figure of £8,000: if the Court of Session is right, the calculation would be on a figure of £17,554.

It will be seen that the expression "the limit of re-charge" is defined as meaning in relation to a person who sells machinery or plant, if he provided it for himself before the appointed day (which is this case), the actual cost to him of the machinery and plant plus expenditure upon it in the nature of capital expenditure. The Revenue authorities contend that the limit of re-charge was £8,000, but even so the application of subsection (3) (*b*) to subsection (2) is a question of some nicety.

Subsection (3) (*b*) directs us to look at subsection (2) to find in it "the reference to the price which the property would have fetched if sold in the open market" and to substitute a reference to the limit of re-charge. Where then do we find in subsection (2) a reference to the price which the property would have fetched if sold in the open market? There is plainly a reference to this

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price in the concluding words of subsection (2), but the Solicitor-General contends that there is also a reference to this price in the opening words of subsection (2) and that the phrase in that subsection, "where the property is sold at a price other than "that which it would have fetched if sold in the open market" is such a reference. This amounts to saying that a reference to a figure which is greater or less than x is a reference to x. I do not think that this is so. Moreover, the direction in (3) (*b*) is to search for "the reference" to the open market price, which is to be found in the previous subsection, and the inference from the language is that this is to be found in one place only in subsection (2) and not in two, for subsection (3) (*b*) speaks of "the reference," not "any reference" or "references." At the end of subsection (1), there is a contrasting phrase, "References "in this subsection to a body of persons include references to a "partnership," and in subsection (1) (*a*) there are no less than three references to "a body of persons."

There is a further consideration. When the structure of subsections (2) and (3) is considered, it is to be observed that subsection (2) lays down the condition that it applies "where the "property is sold at a price other than that which it would have "fetched if sold in the open market," and it is only if this condition, which I will call condition A, is satisfied that subsection (2) has any application at all. "Property" is not limited to plant and machinery, but would include buildings. Subsection (3), on the other hand, is limited to the case where the sale is a sale of one kind of property, viz., "machinery or plant," and subsection (3) (*b*) can only have an application in this case. Moreover, subsection (3) (*b*) only applies if the price which the machinery or plant would have fetched if sold in the open market is greater than the limit of re-charge on the seller. This I call condition B. It seems to me that the proper application of (3) (*b*) is therefore limited to the case where both condition A and condition B are satisfied, and subsection (2) cannot have effect unless this is so. In the present case condition B is satisfied, but condition A is not.

For the above reasons, I have come to the conclusion that the contention of the Crown fails and that the view taken by the Court of Session is right.

The statutory provisions under consideration, including the awkward and obscure modification of what is in subsection (2) by what is in subsection (3) (*b*) are copied into the consolidating Income Tax Act, 1952, without alteration (section 327 and Sch. XIV). And so the problem of interpretation remains. But your Lordships are not engaged in framing income tax proposals. That is the task of the legislature. We, as a judicial tribunal, are concerned only with the proper interpretation and application of the language which Parliament has employed. If the result is unsatisfactory, it is for the legislature to correct it.

At that point the judgment prepared by Lord Simon ends. I add only that I have had the advantage of reading the opinions of the other learned and noble Lords who took part in the hearing of the appeal and that I agree with their reasoning as well as with their conclusion that the appeal fails.

LORD MACDERMOTT. My Lords, the question for determination is whether section 59 of the Income Tax Act, 1945, applies to the computation of the wear and tear allowances of the respondent company in respect of certain plant and machinery for the fiscal years 1946–47 to 1950–51. This turns entirely upon the true construction of subsections (2) and (3) of that section which, omitting what is not material, read thus: "(2) Where the property is sold at a price other than that which it would have fetched if sold in the open market, then, subject to the succeeding provisions of this section, the like consequences shall ensue for the purposes of the enactments mentioned in subsection (1) of this section (other than the said section nineteen) in their application to the income tax of all persons concerned, as would have ensued if the property had been sold for the price which it would have fetched if sold in the open market. (3) Where the sale is a sale of machinery or plant . . . (*b*) . . . if the price which the property would have fetched if sold in the open market is greater than the limit of re-charge on the seller, the last preceding subsection shall have effect as if for the reference to the price which the property would have fetched if sold in the open market there were substituted a reference to the said limit of re-charge:"

On the facts as found, the sale relevant to this appeal was the sale to the respondent company of machinery and plant, the price paid therefor was £17,554, and this was the price which the said machinery and plant would have fetched if sold in the open market. The "limit of re-charge" mentioned in subsection (3) was, in the circumstances and according to the statutory definition of the term, the sum of £8,000, that being the actual cost to the sellers of the machinery and plant sold.

In the course of the debate three different ways of reading subsections (2) and (3) of section 59 were canvassed before your Lordships in relation to a sale of machinery and plant in which (as in this case) the open market price exceeds the limit of re-charge and the condition of paragraph (*b*) of subsection (3) is therefore satisfied. For brevity I shall refer hereafter to these facts—that is to say, the fact that what was sold was machinery and plant and the fact that the open market price was more than the limit of re-charge—as "the relevant facts."

The substance and effect of these three constructions may be stated as follows:—

Construction I. On the relevant facts, paragraph (*b*) of subsection (3) directs the application of subsection (2) after modification at two points, so that (i) its opening and conditional

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words are changed from "where the property is sold at a price "other than that which it would have fetched in the open "market" to "where the property is sold at a price other than "the limit of re-charge," and (ii) its concluding and operative words are changed from "the like consequences shall ensue . . . "as would have ensued if the property had been sold for the "price which it would have fetched if sold in the open market" to "the like consequences shall ensue . . . as would have ensued "if the property had been sold for the limit of re-charge." This construction was placed by the appellants in the forefront of their case. If it is sound, the appeal succeeds as section 59 then applies to the annual wear and tear allowance of the respondent company, with £8,000, the limit of re-charge, and not £17,554, the sale price, as the amount by reference to which such allowance should be calculated.

Construction II. On the relevant facts, paragraph (*b*) of subsection (3) directs the application of subsection (2) after modification at one point only, namely, by substituting a reference to the limit of re-charge for the reference to the open market price in the concluding and operative part of that subsection. This is the same as the second of the modifications required by construction I, the difference between these two constructions being that in II the opening and conditional words of subsection (2) remain unaltered. This construction was submitted on behalf of the respondent company and was upheld by the First Division. If it is sound, the appeal fails and section 59 is inapplicable, as the facts then take the case outside the opening words of subsection (2).

Construction III. This construction was advanced by the appellants as an alternative to construction I. It accepted the view that the only modification worked by subsection (3) (*b*) in the text of subsection (2) was that of construction II, namely, the substitution of the limit of re-charge for the open market price in the operative and concluding part of subsection (2); but it added that, on the relevant facts, the words "the last pre-"ceding subsection shall have effect," in subsection (3) (*b*), were mandatory and amounted to a direction that subsection (2) as so modified was to become operative regardless of the terms of its condition. On this interpretation the whole emphasis is placed on the expression "shall have effect." The relevant facts having occurred the operative part of subsection (2) is to come into force with a reference to the limit of re-charge inserted in lieu of the reference to the open market price. If this construction is sound, the appeal succeeds and £8,000 becomes the material "starting" figure instead of £17,554.

My Lords, these three constructions appear to cover the possibilities of the situation and it is now necessary to choose between them. I must confess that in this task I find no guidance in the general policy or intendment of the Income Tax Acts or in the scheme of the Act of 1945. That is not to say

that guidance of this kind is never available in this particular legislative field. For example, if, of two possible constructions, one would impose a tax on income and the other a tax on capital, the golden rule that income tax is a tax upon income and not upon capital would supply a solution. But the complicated subject of allowances for wear and tear does not seem to present any certain aid of this nature, at all events as respects the present question. Here I find no current of legislative purpose capable of carrying the issue one way or the other. Nor is any one of the possible interpretations to be preferred on the ground that it, unlike the others, avoids some manifest absurdity, some palpable injustice, or some gross anomaly. Speculation is possible but it leads nowhere. At the end of the day there remains, so far as I can discern, no good reason for asserting that any of the constructions enumerated would conflict with the general scheme and purpose of the legislation. In these circumstances all one can do is to take the statute and see what it says according to the ordinary and everyday meaning of the language used.

Proceeding thus, my choice falls at once on construction II. More than the others it seems to me to reflect the natural meaning of subsection (3) (*b*). Given the relevant facts, what that paragraph says is that subsection (2) shall have effect as if for "the "reference" to the open market price there were substituted "a "reference to the said limit of re-charge." Now that, with its use of "the reference" in the singular, appears to me to be an apt way of altering the concluding and operative part of subsection (2) but not of altering both that part and the opening and conditional part as well. And that aptness is, I think, emphasized by the way in which subsection (2) is drafted, for the expression "subject to the succeeding provisions of this section" which occurs therein qualifies only the concluding and operative part, and suggests that it, rather than the opening part, may be subject to later modification.

Construction I, on the other hand, involves applying "the "reference" to the open market price to both parts of subsection (2) and reading the words in the opening part of that subsection "at a price other than that which it would have fetched if sold "in the open market" as including a reference to the open market price. "Reference" is a comprehensive expression, and modifying enactments which operate, not by substituting one set of words for another set of words, but by substituting a reference to one subject-matter for a reference to another subject-matter, will not necessarily be ineffectual merely because of some descriptive variation, as a pronoun for a noun, the plural for the singular, or such as may be entailed by the use of shortened forms. I do not, therefore, say that construction I is bound to fail because the word "reference" is used in the singular in subsection (3) (*b*) or because the subject-matter of "open market price" cannot be spelt out of the wording of the opening part of subsection (2);

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what I hold is that, when every aspect is considered, this construction is markedly less apt and rests less easily on the language of the statute than construction II. Moreover, the position of the words "subject to the succeeding provisions of this section" in subsection (2) points as much against construction I as it points in favour of construction II. If construction I had been the intention of the legislature, I cannot but think that these words would have been found at the very beginning of that subsection.

Construction III must, in my opinion, also be rejected, though on somewhat different grounds. The words "shall have effect" do not appear to have a constant meaning when used in relation to statutory provisions. They may signify that the provision to which they relate is to apply and become operative, or they may be used to signify that if and when it becomes applicable it is to operate in a particular way. When used, as they are in subsection (3) (*b*), with respect to a conditional enactment, the latter seems to be the appropriate meaning. To read these words in that subsection according to construction III would be to ignore the condition in subsection (2) altogether. I cannot believe that such a drastic treatment of the text was ever intended. To hold that it was would be to disregard completely a condition depending on the facts of the actual sale and to substitute a condition which related only to open market value and the limit of re-charge and had nothing to say to the price obtained on the sale with which section 59 is primarily concerned.

For these reasons I am of opinion that the First Division was right and that the appeal should be dismissed.

Lord Keith of Avonholm. My Lords, the respondents are entitled to allowances in respect of machinery and plant used by them in their business of wool spinners, under rule 6, as amended by subsequent legislation, of the Rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918. The question raised in this appeal by the Revenue is what is the figure on which these allowances are to be calculated. This depends on whether or not section 59 of the Income Tax Act, 1945, in some of its provisions, applies to the circumstances in which the machinery and plant were acquired by the respondents.

Section 59 of the Income Tax Act, 1945, is a section hedged round by conditions and qualifications. To bring the section into operation at all it is necessary that either subsection (1) (*a*) or subsection 1 (*b*) shall apply to the transaction in question here. It is common ground that subsection (1) (*a*) does apply. We are entitled thus to look at subsections (2) and (3) of the section and see whether these subsections are applicable in the circumstances of the present case.

The material facts are that on November 16, 1945, the respondents in the present appeal (whom I shall call "the "company") took over from a partnership the business of wool spinners carried on by the partnership and the whole assets of the

business. The assets included machinery and plant for which the price of £17,554 was paid and this price, it is found, "was "the price which the machinery and plant would have fetched "if sold in the open market on November 16, 1945." The Income Tax Act, 1945, did not come into operation until the appointed day, which was later fixed as April 6, 1946, and the present case is concerned with what are the proper allowances to be made to the company in respect of wear and tear of machinery and plant subsequent to the Act of 1945 coming into operation. The company says that the wear and tear allowances should be made on a cost to it of £17,554, paid for the machinery and plant. The Revenue say that these allowances should be made on a figure of £8,000, which they say was the cost to the seller (the partnership) of the machinery and plant at the date of the sale and which according to them becomes "the limit of re-charge" as that phrase is defined in subsection (3) of section 59 of the Income Tax Act, 1945. The exact significance of this phrase will become clearer when I come to refer more particularly to the language of subsection (3).

To succeed in their appeal the Revenue must show that subsection (3) of section 59 can in some way be invoked as applicable to the circumstances of this case. It is conceded that subsection (2) taken by itself cannot assist them. To make the position clear I quote subsection (2): "Where the property is sold at a "price other than that which it would have fetched if sold in "the open market, then, subject to the succeeding provisions of "this section, the like consequences shall ensue for the purposes "of the enactments mentioned in subsection (1) of this section . . . "in their application to the income tax of all persons concerned, "as would have ensued if the property had been sold for the "price which it would have fetched if sold in the open market."

My Lords, I said at the outset that the provisions of section 59 were hedged round with conditions. The condition in subsection (2) is that the property is sold at a price other than that which it would have fetched if sold in the open market. That is not this case, for it is agreed that the machinery and plant were sold at the open market price. Accordingly it is recognized that subsection (2) by itself does not help the Revenue's case. But it is said the subsection is substantially modified and, as so modified, fits the present case by invocation of the language of subsection (3) (*b*). I quote subsection (3) (*b*) so far as relevant: "Where "the sale is a sale of machinery or plant . . . (*b*) subject to the "provisions of the next succeeding subsection, if the price which "the property would have fetched if sold in the open market is "greater than the limit of re-charge on the seller, the last pre-"ceding subsection shall have effect as if for the reference to the "price which the property would have fetched if sold in the open "market there were substituted a reference to the said limit of "re-charge: . . . In this subsection the expression 'the limit of "'re-charge' means, in relation to a person who sells machinery

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"or plant—(i) if he provided that machinery or plant for himself "before the appointed day, the actual cost to him of the "machinery or plant, including in that actual cost any expendi-"ture in the nature of capital expenditure on machinery or plant "by way of renewal, improvement or reinstatement; . . ."

The learned Solicitor-General submitted two separate and, I think, mutually exclusive arguments as to the effect of this provision. First, by a process of substitution of words from subsection (3) (*b*) he sought to read subsection (2) as if it commenced: "Where the property is sold at a price other than the limit of "re-charge, etc." Starting thus, he would be well on the road to invoking subsection (2) in his favour, because if £8,000 is the limit of re-charge, there is no doubt that the machinery and plant were sold to the company at a price greater than the limit of re-charge. But I have come to reject this contention because, in my opinion, the opening words of subsection (2) are not a reference to "the price which the property would have fetched if sold in "the open market" but the very opposite, a reference to a price which the property would not have fetched in the open market. There is a reference in the concluding words of subsection (2) to the price which the property would have fetched if sold in the open market, but if "limit of re-charge" is substituted here, it does not aid the Revenue for the whole subsection is still qualified by the opening words of the subsection.

The second contention for the Revenue is more subtle and, I think, more difficult. Their first contention involved taking subsection (2) and modifying it by the substitution of words taken from subsection (3) (*b*). Their second contention proceeds rather on taking subsection (3) (*b*) and reading into it words taken from subsection (2). It is to be noticed that subsection (3) (*b*) is again dependent on a condition, namely, "if the price which the "property would have fetched if sold in the open market is greater "than the limit of re-charge on the seller." This the Revenue say is the case here. The sum of £17,554, the open market price, is greater than the sum of £8,000, the limit of re-charge. They then say this is a new and independent condition which takes the place of the condition precedent with which subsection (2) opens. They accordingly ignore this condition in subsection (2) and on a combined reading of subsection (2) and subsection (3) (*b*) read the statutory provision as if it ran as follows: "(3) Where the "sale is a sale of machinery or plant— . . . (*b*) subject to the "provisions of the next succeeding subsection, if the price which "the property would have fetched if sold in the open market is "greater than the limit of re-charge on the seller, the like conse-"quences shall ensue for the purposes of the enactments men-"tioned in subsection (1) of this section . . . in their application "to the income tax of all persons concerned, as would have ensued "if the property had been sold for the limit of re-charge."

My Lords, this reading is attractive, but it takes certain liberties in the matter of rewriting the terms of the statutory

provisions. It assumes, for instance, that the opening condition of subsection (2) falls to be deleted, or at least ignored. But that is not to give subsection (2) effect with the substitution merely of limit of re-charge for open market price. It may be that the legislature intended both the opening condition of subsection (2) and the condition precedent of subsection (3) (*b*) to operate. To illustrate. It might be that machinery or plant was sold at a price greater or less than the open market price. This would satisfy the condition in subsection (2). The open market price then becomes the datum line for the purposes of subsection (2). But assume that the open market price is greater than the limit of re-charge on the seller. Under subsection (3) (*b*) this introduces a new datum line, viz., the limit of re-charge. To say, however, that, if the machinery or plant is in fact sold at the open market price and this is greater than the limit of re-charge, the limit of re-charge is to be substituted for the open market price seems to me to be pure speculation as to the intention of the legislature. The statute nowhere says so. The words in subsection (3) (*b*) "if the price which the property would have "fetched if sold in the open market" are, I think, important. They seem to be a reference back to the concluding words of subsection (2) and these in turn are dependent on the opening words of the subsection: "Where the property is sold at a price "other than that which it would have fetched if sold in the open "market."

My Lords, I think I have said enough to show that in any event the meaning of this statutory provision is surrounded with much doubt and confusion. It is impossible, in my opinion, to say that there is any of the relevant and material provisions of section 59 which clearly and unambiguously operates to deprive the taxpayer, in the circumstances of this case, of the right to have his wear and tear allowances based, as would normally be done, on the cost to him of his machinery and plant. That is in this case on the sum of £17,554. I draw no distinction between a statutory provision invoked as a taxing provision and a statutory provision said to deprive, or restrict, the taxpayer in the matter of some established taxation allowance or relief. In each case the impact of the statute on the taxpayer must be clear on a fair reading of the statute. The language of Rowlatt J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*,[1] as approved by my late noble and learned friend Lord Simon in *Canadian Eagle Oil Co. Ld.* v. *The King*,[2] is, in my opinion, here very apt. I would only say that when Rowlatt J. says "There is no room for any intendment" I think he means there is no room for any presumption of intention and I would go no further than this. It may often be the case that from a reading

[1] [1921] 1 K.B. 64, 71; 37 T.L.R. 33.

[2] [1946] A.C. 119, 140; 61 T.L.R. 577; [1945] 2 All E.R. 499.

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of the language of a statute, or a particular provision of a statute, it is not difficult to extract the policy or intention of the legislature. But that is not so in this case. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Peacock & Goddard for Fraser, Stoddart & Ballingall, W. S., Edinburgh, and Tho. & J. W. Barty, Dunblane.*

Jan. 27. 1954

Lord Goddard C.J., Byrne and Parker JJ.

[QUEEN'S BENCH DIVISION.]

* PERCIVAL *v.* STANTON AND ANOTHER.

Fishery—Salmon—"Fixed engine"—Use of—Net with light anchors attached acting as brake—Whether offence committed—"Secured by "anchors"—"Stationary"—Salmon and Freshwater Fisheries Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 16), *ss.* 11 (1), 92 (1).

Three light anchors were attached to a net which was placed in the sea to catch salmon. The anchors were not intended to fix the net to the sea-bed, but to act as a brake or drag on the net when it drifted with the tide:—

Held, that the net was not "secured" by anchors or "made "stationary" within section 92 of the Salmon and Freshwater Fisheries Act, 1923, and, therefore, was not a "fixed engine" of which the use was a breach of section 11 of the Act. A "fixed "engine" must be fixed, i.e., stationary.

CASE STATED by Northumberland justices.

On September 5, 1953, an information was preferred by the prosecutor, John Percival, against the defendants, William and George Robert Stanton, charging them that they on July 30, 1953, did unlawfully use a fixed engine, namely a net secured by anchors, for taking salmon in tidal waters, namely the sea, south of Alnmouth, contrary to the Salmon and Freshwater Fisheries Act, 1923, s. 11.[1]

The following facts were found by the justices: On the date in question the defendants were fishing for salmon in the open sea off the Northumberland coast. They were using a net which was shot from a fishing coble in the form of a letter "T," and was suspended in the water by means of cork floats. The

[1] Salmon and Freshwater Fisheries Act, 1923, s. 11: "(1) No fixed "engine of any description shall be "placed or used for taking or facili-"tating the taking of salmon . . . or "for detaining, or obstructing the free "passage of, salmon . . . in any "inland or tidal waters."

S. 92 "(1) . . . The expression 'fixed "'engine' includes—(*a*) stake net, "bag net, putt, putcher; and (*b*) any "fixed implement or engine for taking "or facilitating the taking of fish; "and (*c*) any net secured by anchors "and any net or other implement for "taking fish fixed to the soil, or made "stationary in any other way, not "being a fishing weir or fishing mill "dam."

headpiece measured 100 yards, and the tailpiece 200 yards. The approximate weight of the net when wet was 8 cwts. The end of the tailpiece was close to the water's edge, and the headpiece was some 200 yards out to sea, lying approximately parallel with the water's edge. At the place in question strong tidal currents ebb and flow. To keep the net in formation the defendants attached a bundle of metal quoits to the end of the tailpiece and three anchors to the headpiece. The three anchors were made of iron and were of conventional two-fluked pattern, each weighing about three pounds. The effect of the anchors was to act as a drag or brake on the drift and movement of the net, and they did not act so as to secure the net to the sea-bed as a stationary object. The sea-bed consisted of smooth, soft, shingly sand and the net drifted substantially with the currents. Without some means of keeping the net in formation, the action of the wind and currents would reduce the net into a shapeless tangle. The defendant, William Stanton, had followed this method of fishing for upwards of thirty years.

The prosecutor contended that the three anchors made the net a "fixed engine" within section 11 of the Act inasmuch as it thereby became "a net secured by anchors" within section 92, and that it was not necessary for the court to find that the net, by reason of the anchors, became affixed to and stationary on the sea-bed. The defendants contended that the phrase "secured by anchors" in section 92 meant moored to the sea-bed as a fixed and stationary object, and that, inasmuch as the anchors in the present case did not have that effect, but merely acted as a brake or drag and allowed substantial drift the anchors did not "secure" the net and make it a "fixed engine." Further, that the words "secured by anchors" should be construed ejusdem generis with the words "or made stationary in "any other way." Finally, it was contended that the Act of 1923 was a penal Act, and the words "secured by anchors" must be read in their ordinary meaning of making fast, and that a wider meaning should not be attached to the phrase.

The justices, being of the opinion that the net was not a "fixed engine" within section 11, dismissed the charge. A further issue as to whether the sea at the place in question was "tidal waters" within the section was raised before the justices, but was not dealt with by the Divisional Court.

The prosecutor appealed.

J. P. Widgery for the prosecutor.
C. D. Aarvold and *R. A. Percy* for the defendants.

The following cases were cited in argument: *Thomas* v. *Jones* [2]; *Olding* v. *Wild* [3]; *Gore* v. *English Fisheries Commissioners.* [4]

[2] (1864) 5 B. & S. 916.
[3] (1866) 14 L.T. 402.
[4] (1871) L.R. 6 Q.B. 561.

1954

Percival
v.
Stanton.

Lord Goddard C.J. stated the facts and continued: The definition of "fixed engine" in section 92 of the Act of 1923 is not an absolute one. It states what a "fixed engine" includes, but I do not see how, whatever the definition clause says that it is to include, that could remove the necessity of a "fixed "engine" being fixed, and if a thing is fixed, it seems to me, it must be stationary. The words of that definition are: ". . . "any net secured by anchors and any net or other implement "for taking fish fixed to the soil or made stationary in any "other way . . ." I confess that, applying the ordinary canons of construction, I think that the words "secured by anchors" show, in view of the words which follow, that it is meant to be secured so that it is fixed and stationary. That is supported by the history of these Acts. The Act of 1923 is a consolidating and amending Act, and it is obvious that, being a consolidating Act, it has borrowed the words of the definition from the previous Acts which it consolidated. The Salmon Fisheries Act, 1861, by section 2 provided: "'Fixed engine' shall include stake nets, "bag nets, putts, putchers and all fixed implements or engines "for catching or facilitating the catching of fish." There again I emphasise the word "fixed." By section 11 of that Act, the definition is somewhat expanded. That section, which prohibited the placing of "fixed engines" in any inland or tidal waters, provided: "A net that is secured by anchors or other-"wise temporarily fixed to the soil shall be deemed to be a "fixed engine."

While that was the state of the law, *Thomas* v. *Jones*[1] came before a court of the Queen's Bench Division, in which the facts were that a net was used on the River Tiefi, near Cardigan, by a fisherman who had got his net secured at one end, but the court held that it was not a "fixed engine" because, being unsecured at the other end, directly the salmon hit the net the net rolled round the salmon. I doubt whether I would have decided that case in the same way as the Court of Queen's Bench decided in 1864 if I had been alive and sitting then. But that was a decision which was not open to appeal and accordingly, by the Salmon Fishery Act, 1865, an amending definition of "fixed engine" was introduced by section 39, which provided: "'Fixed Engine' shall in this Act and the Salmon Fishery "Act, 1861, include any net or other implement for taking fish "fixed to the soil, or made stationary in any other way." Therefore, first, one gets the definition in the Act of 1861 of "a net that is secured by anchors or otherwise temporarily "fixed"; then under the Act of 1864 one gets "a net or other "implement fixed to the soil or made stationary in any other "way"; and finally, by the consolidating Act of 1923 the legislature naturally incorporates both of these definitions in section 92. I do not think that that means that one ought to contrast

[1] (1864) 5 B. & S. 916.

"secured by anchors" with "made stationary in any other "way." The history of the section makes it clear that Parliament has used the words which it has used in 1923, because it has had the words "secured by anchors" standing since 1861 and it has incorporated them into this Act together with the extended definition that was put in because of *Thomas* v. *Jones*.[2] But it seems to me that in all these cases to some extent it must be a question of degree, and therefore a question of fact for the justices, and the justices have found that this was not a "fixed engine" because it was not fixed.

I do not want it to be said that, if one can show that a net has been let down and some anchors attached to it, it ceases to be a "fixed engine" merely because the anchors have dragged, as they might in a storm. If they are put down with the intention of anchoring the net to the sea-bed, then I think it becomes secured by anchors; but if, as the justices found in the present case, these light anchors were not used for that purpose, but were merely used to act as a brake or a drag upon a net which was intended to drift with the tide, it seems to me that one cannot say that it is a "fixed engine," first, because it is not "fixed," and secondly, because it is not "secured by anchors." Nor is it "made stationary in any other way," because it is not stationary; it moves. It is partly a question of fact and partly a question of construction, but I have come to the conclusion that we cannot interfere with the decision of the justices in this way. Indeed, I think they were right.

BYRNE J. I agree.

PARKER J. I also agree.

Appeal dismissed

Solicitors: *Sharpe, Pritchard & Co. for N. H. Thomas, Newcastle-upon-Tyne; Crossman, Block & Co. for Adam Douglas & Son, Alnwick.*

J. D. P.

[2] 5 B. & S. 916.

[HOUSE OF LORDS.]

H. L. (Sc.)†

1953 *Nov.* 17, 18, 19, 23, 24; 1954 *Jan.* 25.

* ANDERSON . . . . . APPELLANT;

AND

LAMBIE AND ANOTHER . . . . . RESPONDENTS.

[PRACTICE NOTE.]

Legal Aid—Costs—House of Lords—Assisted person in court below—Appeal to House of Lords—Former assisted person unsuccessful respondent—Appearance not in forma pauperis.

† *Present*: LORD MORTON OF HENRYTON, LORD MACDERMOTT, LORD REID AND LORD KEITH OF AVONHOLM.

H. L. (Sc.)

1954

ANDERSON v. LAMBIE.

APPEAL from the First Division of the Court of Session.

The pursuer and appellant, James Alastair Anderson, in this action sought to have a disposition which he granted to the defenders and respondents, Samuel Milligan Lambie and Mary Ferguson Lambie, reduced on the ground that more land was conveyed by it than had been agreed to be conveyed by the missives which preceded it. The appellant maintained that a discrepancy between the disposition and the missives occurred "through essential error on the part of both the pursuer's agents "and the defenders' agents" and he further maintained that, of the two documents, it was the disposition that was wrong. The missives were dated December 15 and 16, 1948. The disposition was dated January 22 and 26, 1949, and was recorded in the General Register of Sasines on February 2, 1949. The alleged error was not discovered until the end of 1949. The First Division of the Court of Session, reversing the decision of the Lord Ordinary, having given judgment for the respondents, the appellant appealed to the House of Lords. In the Inner House, though not in the Outer House, the respondents were assisted persons under the Legal Aid Scheme. In the House of Lords they did not appear in forma pauperis.

Hector M'Kechnie Q.C. and *R. Smith Johnston* (both of the Scottish Bar) for the appellant.

W. I. Fraser Q.C. and *R. Taylor* (both of the Scottish Bar) for the respondents.

Their Lordships took time for consideration.

January 25, 1954. The House allowed the appeal. On the question of costs their Lordships made the following observations.

LORD MORTON OF HENRYTON. My Lords, Having regard to all the circumstances of the case, I am of opinion that the respondents should pay to the appellant three-quarters of the costs of his appeal to this House and of the proceedings in the Outer House and the sum of five guineas in respect of his expenses in the Inner House.

LORD REID. My Lords, On the questions of costs your Lordships are confronted with a difficult situation. In the Inner House (though not in the Outer House) the respondents were assisted persons. One must presume therefore that they are persons of such modest means that they could not properly be expected to bear the full expense of litigating in the Court of Session. Under the Legal Aid Scheme in its present form there is no provision for legal aid in this House even for a respondent who has been successful as an assisted person in the Court of Session or the Court of Appeal. In the present case we are deciding against such respondents, and, if the usual order as to costs

were made, they would be ordered to pay the whole costs of the appellant in this House. Costs in this House may far exceed expenses in the Court of Session yet the scheme operates to relieve such a litigant from part at least of the lesser liability in the Court of Session and does nothing to protect him against a greater liability in this House which he can in no way avoid. Even if he failed to appear and the appeal were heard ex parte he would normally be ordered to pay the costs of the successful appellant; and in this important and difficult case it would have deprived us of much assistance if the respondents had failed to appear by counsel. I can quite understand that it may be good policy to refuse assistance to one who seeks to appeal to this House, but it may be that the position of a respondent who had been an assisted person was not specially considered when the present scheme was made. Of course a respondent who is sufficiently poor can be allowed to appear in this House in forma pauperis but it would seem probable that this was not open to the present respondents. So in a case like the present both that privilege and the protection of legal aid must be refused to a respondent in this House who has had protection in the court below and has been brought here against his will. I realize that if we do not make the usual order in favour of the appellant in this case we would be discriminating against him for no fault of his, but it seems to me that the facts which I have stated ought not to be entirely neglected, and I think that the situation might properly be met by ordering the respondents to pay only a part of the appellant's costs in this House.

I agree with my noble and learned friend, Lord Morton of Henryton, as to expenses in the Court of Session and I also agree that the respondents should be required to pay three-quarters of the appellant's costs in this House.

LORD KEITH OF AVONHOLM. My Lords, In the matter of costs in this House I agree with my noble and learned friends, Lord Morton of Henryton and Lord Reid. The position is anomalous. There is no suggestion that the respondent financially is any better off than he was when he received legal aid in the Inner House. It may be that so long as legal aid is not available generally in connexion with proceedings on appeal from the Court of Session to this House the special position of a respondent who has received legal aid in the Court of Session and is brought here on appeal could be met by a regulation under section 12 (3) (*c*) of the Legal Aid and Advice Act, 1949, or some other provision of that Act, but that is for the appropriate authority to consider.

Solicitors: *William Charles Crocker for Hunter, Harvey, Webster & Will, W.S., Edinburgh; Shaen, Roscoe & Co. for Robert White & Co. S.S.C., Edinburgh.*

[QUEEN'S BENCH DIVISION.]

1954
Jan. 25.

Lord Goddard C.J., Byrne and Parker JJ.

* FARRIER *v.* WARD.

Education—School—Attendance—"Walking distance"—Direct route not safe for children unless escorted—Meaning of "nearest available "route"—Question of safety—Education Act, 1944 (7 & 8 *Geo.* 6, *c.* 31), *s.* 39 (5).

Section 39 (2) of the Education Act, 1944, provides that a child under eight years of age shall not be deemed to have failed to attend school regularly if his parent proves that the school is not within walking distance of the child's home. By subsection (5): ". . . the "expression 'walking distance' means, in relation to a child who "has not attained the age of eight years two miles . . . measured "by the nearest available route."

The words "nearest available route" in section 39 (5) of the Act refer only to measurement of the distance between the child's home and the school; if a route fulfils the requirements of that section as to distance, the fact that it may be unsafe is not material.

CASE STATED by Kent justices sitting at Canterbury.

On July 13, 1953, informations were preferred by Francis George Ward, the County Education Welfare Officer, against Bertie Herbert Harold Shaxted and Albert George Farrier, charging that each, being the parent of a child of compulsory school age, was guilty of an offence in that the child who was a registered pupil at Preston county primary school failed to attend regularly thereat between April 21 and August 26, contrary to section 39 (1) of the Education Act, 1944.

At the hearing of the informations the following facts were proved or admitted. Each defendant was the parent of a child of compulsory school age who was under eight years of age and a registered pupil at the Preston school and who failed to attend during the material period. Each child lived in the hamlet of West Stourmouth and the route from his home to the school was under two miles. These routes were safe for the children to use, if escorted. Both children had to travel by a bit of road near the school where an escort would be desirable for small children. It was usual and the duty of parents to provide escort for their children but nevertheless the education authority arranged for an omnibus which took children from Stourmouth to and from Preston school during the period in question. On the return journey the bus reached Preston school at 4.45 p.m. to collect the children, the children at that school having finished their lessons at 3.45 p.m. The defendants wanted a special omnibus from school and would not provide any escort for their children.

It was contended for the defendants (a) that the direct routes were not safe for their children to use when returning from

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

school in a party; (b) that the afternoon bus provided by the education authority was not suitable transport for the return journey; and (c) that for those reasons they were prevented by unavoidable cause within the meaning of section 39 (2) (*c*) of the Act from sending their children to school. They also contended that the words "in relation to a child" in section 39 (5) referred not merely to the words "walking distance" appropriate to the respective ages specified in the subsection but to the later words "nearest available route," limiting them to such routes only as were safe for a child of the ages specified to use, and that the nearest available safe route was more than the distance specified in the section.

The prosecutor contended that "available route" meant a route which could be followed without committing trespass.

The justices were of opinion that the direct routes were safe for children when escorted; that there was no unavoidable cause within the meaning of section 39 (2) (*c*) because the direct routes were safe if the parents had escorted the children or arranged for their escort; and that in the circumstances the bus provided was suitable. They considered, therefore, that the suggested interpretation of the words "available route" was irrelevant, but that if it were relevant the defendants' interpretation of the words "available route" would be strained and unnatural. Accordingly, they held that the Preston school was within "walking distance" of the home of both appellants, who were not entitled to transport for their children. The justices convicted the defendants.

The defendant Farrier appealed.

M. D. Van Oss for the appellant.
Gerald A. Thesiger Q.C. and *K. Jupp* for the prosecutor.

Hares v. *Curtin* [1] was cited in argument.

LORD GODDARD C.J. The short point that arises is this: The justices found that the route which these children had to travel was "safe for these children to use, if escorted. The bit "of road near the school, where an escort would be desirable for "small children, was common to both the children in question." I think that the justices recognized that it would be desirable for children to be escorted or in some way conducted along or across a certain piece of road where there was probably a good deal of traffic. They found that it was usual for parents to provide escort for their children to and from school, when necessary.

The real question is whether the school is within walking distance of the children's home because section 39 of the Education Act, 1944, provides that it is a reasonable excuse for the

[1] [1913] 2 K.B. 328.

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parent to prove "that the school at which the child is a registered pupil is not within walking distance of the child's home, "and that no suitable arrangements have been made by the "local education authority either for his transport to and from "the school or for boarding. . . ." By section 39 (5): "walking "distance" means "in relation to a child who has not attained "the age of 8 years two miles, . . . measured by the nearest "available route." The justices have to find whether the school is within walking distance; and it is said that the route which the children took, which was under two miles, was not the "nearest available route" because part of it was said to be dangerous for children to walk along unescorted. I cannot read the word "available" as meaning necessarily safe, because we can see how these words came to be included in the Act.

By section 74 of the Elementary Education Act, 1870, the excuse was if "there is no public elementary school open which "the child can attend within such distance, not exceeding three "miles, measured according to the nearest road from the residence "of such child, as the by-laws may prescribe." In section 49 (6) of the Education Act, 1921, the reasonable excuse was "that "there is no public elementary school open which the child can "attend within such distance, not exceeding three miles, measured "according to the nearest road from the residence of the child, "as the by-laws may prescribe." There is no difference in the words in those Acts.

Before the Act of 1921, it was suggested in *Hares* v. *Curtin*,[1] which was decided in 1913, that a cart track could not be the nearest road because the walking distance had not been measured according to the nearest road; and Lord Alverstone, giving judgment, said[2]: "It does not mean a road of any particular class, "but simply a route from the residence of a child to the nearest "school."

In the Education Act, 1944, the words used are two miles "measured by the nearest available route." I do not think that it was meant to make any change in the law at all, except that it omits a number of somewhat unnecessary words and substitutes the expression which was used in this court in *Hares* v. *Curtin*.[2]

To some extent I sympathize with the views of the parents in this case, and it may be that they would like to bring pressure upon the Kent County Council to have a person on the road to see that "this bit of the road," as the justices call it, is safe for the children to cross. Those, however, are matters for the education authority to consider and to put into operation if they think fit. I can only say that, if there is a road which measures not more than two miles or a route along which a child can walk and its measurement does not exceed two miles, that is the nearest available route. It may sometimes be unsafe; sometimes the route might be flooded, and, if that happened and

[1] [1913] 2 K.B. 328. [2] Ibid. 331.

the person could not walk along the road, that might be a reasonable excuse for not using it on that particular day, but we are not concerned with that but with a case where the parents think that the route is not safe. Parliament has not substituted safety as the test but the distance. Any question with regard to safety must be, and I have no doubt will be, taken into consideration by the education authority. In my opinion, therefore, the justices came to a right decision and the appeal fails.

BYRNE J. I agree. Mr. Van Oss contends that the meaning of the word "available" is that there is no sound reason why that route should not be used by children. I am bound to say that I cannot read that meaning into the word but, as it appears in the Act of 1944, all that is meant by the "nearest available "route" is the method by which the two miles are to be measured from the child's house to the school in order to ascertain whether it is a walking distance.

PARKER J. I agree with both judgments which have been delivered.

Appeal dismissed.

Solicitors: *Jaques & Co. for Girling, Wilson & Bailey, Margate; Sharpe, Pritchard & Co. for Gerald Bishop, Maidstone.*

[CHANCERY DIVISION.]

* *In re* GOOD'S LEASE.
GOOD *v.* TRUSTEE OF THE PROPERTY OF W., A BANKRUPT, AND W.

1954
Jan. 19, 20.
Harman J.

[1953 G. 2631.]

Landlord and Tenant — Forfeiture of lease — Mortgage — Relief for underlessee—"Underlessee"—Agreement to execute legal charge—Whether mortgagee an "underlessee" — Assignment of lease — Guarantee for sum lent by bank to assignee—Deposit of documents relating to the property by assignee with guarantor—Bankruptcy of assignee — Action by landlord against trustee in bankruptcy and assignee for forfeiture—Intervention in action by guarantor—Application under Law of Property Act, 1925, *for order vesting property in guarantor—Law of Property Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *ss.* 87 (1), 146 (4) (5) (*d*).
Mortgage. "Underlessee."

A lessee, with the lessor's permission, assigned a lease of certain premises to an assignee, who subsequently became bankrupt. Before the assignee was adjudicated bankrupt, his bank account was guaranteed and, in consideration of the guarantee, he deposited the lease and the assignment with the guarantor, together with a

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document under hand, whereby he undertook, in the event of the guarantor being called on to pay any sum under the guarantee, to execute a proper legal charge or mortgage of the property to secure all moneys for the time being paid under the guarantee.

In view of the rent being in arrear and of the bankruptcy of the assignee, the lessor commenced an action against the trustee of the property of the bankrupt and the bankrupt, claiming possession, arrears of rent and mesne profits.

The bank having called on the guarantor to pay a sum of money under the guarantee, the guarantor applied, under section 146 (4) of the Law of Property Act, 1925, by summons in the lessor's action, for an order vesting the premises in him for the residue of the term of the lease:—

Held, that the guarantor was a person entitled to ask for relief as underlessee within section 146 (4) of the Act; and that, if he was able and willing to pay all arrears of rent payable up to the time when the new instrument was executed, and to execute a proper instrument putting on himself all the covenants in the lease in so far as the lessor required them, it would be right to give him the relief for which he asked.

Procedure summons.

On November 16, 1945, Leslie Thomas Good granted a lease of certain property to a limited company. On April 19, 1950, the company, with the lessor's permission, assigned the term to W. Harold Tussell, the applicant, guaranteed to Barclays Bank Ld. repayment by W. of £1,000, lent by the bank, and he deposited with the guarantor the deeds and documents of the property set out in the schedule thereto, being the lease and assignment, and by an instrument under hand undertook, in the event of the guarantor being called on to pay any sum under the guarantee, to execute at his own cost, when called on, a proper legal charge or mortgage of the property to secure all moneys for the time being paid by the guarantor under the guarantee.

By a letter dated June 15, 1953, the bank made a formal demand on the guarantor for payment of the amount of his liability under the guarantee on June 8, 1953, the date on which a receiving order in bankruptcy was made against W. Since the date of that letter the guarantor had paid to the bank £300 on account of the guarantee and had agreed with the bank to discharge the balance by monthly instalments.

On November 3, 1953, an action was commenced (by a specially indorsed writ) by the lessor against the trustee of the property of W. and W., in which the lessor claimed possession, arrears of rent and mesne profits.

The applicant by summons in the action under section 146 (4) of the Law of Property Act, 1925, sought an order vesting the property in him for the residue of the term of the lease on such terms as the court might deem fit including the execution by him of a deed covenanting to perform during the residue of the term all the lessee's covenants and conditions contained in the lease.

M. J. Roth for the applicant.

B. L. A. O'Malley for the respondents.

Case cited in argument: *Warden, etc., of Sir Roger Cholmeley's School at Highgate* v. *Sewell.*[1]

HARMAN J. This is an application by summons in an action for possession by the landlord against one W., a permitted assign of a lease created by the landlord, but who had been adjudicated bankrupt. The action was brought against the trustee as the person in whom the term had become vested, and against the bankrupt as being the person in occupation or possession of the property. [His Lordship stated the facts and continued:]

The defendant W. had an overdraft at Barclays Bank, and they, on June 15, 1953, called on the applicant, as guarantor, to pay them a sum of money under that guarantee. He has paid them a sum of £300 on account and has therefore become entitled under the instrument of charge, if he calls on W., to have executed a proper legal mortgage, which, if called on, W. and his trustee would be bound to execute. The applicant now applies by summons in the lessor's action to have relief against the forfeiture. He asks for an order vesting the leasehold premises in him for the residue of the term of the lease in reliance on section 146 (4) of the Law of Property Act, 1925, which repeated section 4 of the Conveyancing Act, 1892, by which later enactment for the first time underlessees were given a right to relief in forfeiture actions. Subsection (4) of section 146 of the Act of 1925, provides: "Where a lessor is proceeding by action or "otherwise to enforce a right of re-entry or forfeiture under "any covenant, proviso, or stipulation in a lease, or for non-"payment of rent,"—here the action is on both counts—"the "court may, on application by any person claiming as under-"lessee any estate or interest in the property comprised in the "lease or any part thereof, either in the lessor's action (if any) "or in any action brought by such person for that purpose, make "an order vesting, for the whole term of the lease or any less "term, the property comprised in the lease or any part thereof "in any person entitled as under-lessee to any estate or interest "in such property upon such conditions as to execution of any "deed or other document . . ." as the court thinks fit.

"Underlease" is defined by subsection (5) as including "an "agreement for an underlease where the underlessee has become "entitled to have his underlease granted." It is comparatively familiar law that relief under that section or its predecessor, the Act of 1892, has been given to mortgagees by sub-demise. That is not surprising, because a mortgagee by sub-demise, of course, has a term vested in him. But, so far as I know, there is no authority—none has been called to my attention—for similar relief being given to a person not having a legal term or any term vested in him and therefore having no estate in the property, though in a sense he has an interest in it, as having a right to a charge on it.

[1] [1893] 2 Q.B. 254.

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Harman J.

But the definition does include in the word "underlease" "an "agreement for an underlease." That must mean that the legislature intended a person having not only an underlease but having an agreement for an underlease to be included in the scope of the section.

The right of the applicant is a right to call on the debtor to execute a proper legal charge or mortgage. It is said that that right is a right to have a charge by way of legal mortgage such as is envisaged by section 87 of the Law of Property Act, which, as is well known, does not demise a term or do anything but charge property by way of legal mortgage. But the effect is that (subsection (1)) "the mortgagee shall have the same protection, "powers and remedies . . . as if (*b*) where the mortgage is a "mortgage of a term of years absolute, a sub-term less by one "day than the term vested in the mortgagor had been thereby "created in favour of the mortgagee." Therefore, as between him and his mortgagor, he is in the same position as if he had a mortgage by sub-demise. I think, on the whole, that it cannot make any difference that the equitable chargee is entitled under the covenant to have a charge by way of legal mortgage. He is in the same position as though he were entitled to have a mortgage direct by sub-demise.

Apart from that, the words of this charge are "a proper legal "charge or mortgage," and I think that the mortgagee could choose which form his security should take, and could ask for a mortgage of a sub-demise of the term from W. or his trustee. But he has not made that demand, and another point taken is that he does not come within the definition because by definition an underlessee is a person having an agreement for an underlease only where he has become entitled to have his underlease granted. In my judgment, he became entitled to have his underlease granted, in effect, directly he paid the money to the bank, and the fact that he did not make a formal demand cannot make any difference to his position. It appears to me, therefore, that the applicant is a person in a position to come as underlessee within section 146 (4) and ask for relief.

But that is not the end of the matter, because the giving of such relief is a discretionary matter. The applicant offers to pay up all the arrears of rent and to enter into direct covenants with the landlord in terms which correspond, so far as the landlord requires it, with those of the lease itself. It is true that there was in the lease a covenant by the lessee binding him not to assign or underlet without permission, but there is no suggestion that Mr. Trussell, the applicant is not a respectable and responsible person. If the landlord had wished to take the point that he was not bound to permit an assignment to the applicant or to allow him to become an underlessee because he was not a responsible party, it was for the landlord to take that point, but he has not done so. It appears to me that, if the applicant is able and willing to pay all the arrears of rent payable up to the

time when the new instrument is executed, and to execute a proper instrument putting on himself all the covenants in the lease of November 16, 1949, in so far as the landlord requires them, it would be right to give the applicant the relief that he asks.

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Order accordingly.

Solicitors: *Albin, Hunt & Stein; Cartwright, Cunningham, Haselgrove & Co.*

J. L. D.

[QUEEN'S BENCH DIVISION.]

** STUDHOLME *v.* SOUTH WESTERN GAS BOARD.

[1951 S. No. 4156.]

1954
Jan. 11, 12, 13, 14, 15, 20.
Lynskey J.

Gas—Nationalization—Liabilities transferred—Agreement by solicitor with gas undertaking—Undertaking vested in area board—Reference to undertaker in agreement to be read as if reference to area board—Remuneration to be calculated on the basis of undertaker's share and loan capital—Whether board's share and loan capital to be substituted—"Loan capital"—Meaning—Gas stock—Finance Act, 1899 (62 *&* 63 *Vict. c.* 9), *s.* 8 (5)—*Gas Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 67), *s.* 17 (3) (*b*).
Company. Revenue—Stamp duty.

By a service agreement made between the plaintiff and the Severn Valley Gas Corporation Ld. the plaintiff was appointed solicitor to the corporation. Clause 2 provided that the plaintiff was to do all routine legal and administrative work, for which he was to be paid a general retaining fee calculated at £600 per annum per million on issued share and loan capital of the corporation at end of each financial year. Clause 3 provided that the plaintiff was to be given the refusal of parliamentary and legal work for the corporation's subsidiary companies to be charged to the party concerned at professional rates. By virtue of the Gas Act, 1948, on May 1, 1949, the corporation and six of its 26 subsidiaries vested in the defendant board. The plaintiff claimed the balance of his remuneration from April 1, 1949, to March 31, 1951. He claimed that by virtue of section 17 of the Gas Act any reference in his agreement to the corporation, whether express or implied, should be read as if the name of the defendant board were substituted for that of the corporation and, therefore, that his retaining fee should be calculated by reference to the issued share and loan capital of the defendant board, and that the services to which the agreement related were to be reasonably equivalent services under the defendant board:—

Held that, section 17 (3) (*b*) only required a reference in the agreement to the undertaker [the corporation] to be substituted for that of the appropriate area board "as respects anything falling "to be done on or after the vesting date." The agreement only required the undertaker to pay the retaining fee fixed by the agreement; it did not require it to issue shares or create loan capital and, therefore, paragraph (*b*) did not operate to substitute a

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[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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reference to the defendant board's issued share and loan capital for that of the corporation's. Since the corporation was dissolved on May 1, 1949, by virtue of section 17 (9), there was no share or loan capital existing at the end of the financial year on which the plaintiff's retaining fee could be calculated; accordingly, the board's obligation to pay the fees in accordance with clause 2 of the agreement became impossible of performance and the agreement became frustrated from the vesting date.

Held also that, although the board might have been able to find services reasonably equivalent to those which the plaintiff should have performed for the subsidiary companies, since the fees were to be paid by the subsidiary companies concerned, 20 of which were allocated to other area boards, the defendant board had no power to remunerate the plaintiff in accordance with the terms of clause 3 of his agreement, and in this respect also the agreement became impossible of performance and frustrated as from the vesting date.

If, contrary to the first holding, the plaintiff was entitled to have his retaining fee calculated on the basis of the issued share and loan capital of the defendant board, it having been admitted that the board had no issued share capital, the question arose as to what was the board's loan capital, if any:—

Held that, loan capital, adopting the definition in section 8 of the Finance Act, 1899, meant any funded debt and any capital raised by any corporation, company or body of persons which was borrowed or had the character of borrowed money; that the ultimate responsibility of the area board to the gas council for meeting obligations of gas stock issued by the council for the purpose of satisfying any right to compensation, the responsibility for which was allocated to the area board, was a statutory debt owed by the board to the council and was the loan capital of the board; and that money raised by the gas council by the issue of stock for general purposes permitted by the Act and actually lent to the defendant board was loan capital.

Action.

The plaintiff, Richard Home Studholme, claimed the balance of his remuneration from April 1, 1949, to March 31, 1951, under an agreement for service made between him and the Severn Valley Gas Corporation Ld., which he alleged was due to him from the South Western Gas Board. As a result of the Gas Act, 1948, the plaintiff claimed that his agreement with the corporation became vested in the defendant board on May 1, 1949, and that by virtue of section 17 [1] of the Act the agreement

[1] Gas Act, 1948, s. 17: "(1) Subject to the provisions of this Part of this Act, all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister (in this Act referred to as 'the vesting date'), were property, rights, liabilities and obligations of an undertaker to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such area board as may be determined by order of the Minister: . . . (3) Subject to the provisions of this Part of this Act, every agreement to which any undertaker to whom this Part of this Act applies was a party immediately before the vesting date, whether in writing or not, and whether or not of such a nature that rights, liabilities and obligations thereunder could be assigned by the undertaker, shall, unless its terms or subject matter make it impossible that it should have effect as modified in manner provided by this subsection, have effect as from the vesting date as if—(*a*) the appropriate board

had to be construed as if made with the defendant board and any reference however worded, and whether express or implied, to the corporation had to be read as if the name of the defendant board were substituted in the agreement for that of the corporation.

The following statement of facts is taken from the judgment: The plaintiff was admitted a solicitor in 1929. In 1934 a Major Day and a Colonel Dawnay formed the Severn Valley Gas Corporation Ld., a holding company formed with the object of obtaining control of various gas undertakings by acquiring the majority holding of their shares or stock. A second company, known as Gas Consolidation Ld., was later formed, which was also a holding company with similar objects to those of the corporation. The two companies operated from the same office, using notepaper bearing both their names. They employed the plaintiff at a joint salary of £1,000 a year to do legal, administrative, technical and financial work for both the companies. At a meeting of the directors of the Severn Valley Gas Corporation Ld. held on June 7, 1938, the plaintiff's position with both companies was defined in the following resolution: "That Mr. "Studholme be appointed solicitor to the corporation and to its "subsidiary companies and that for such services as outlined "in a memorandum dated June 7, 1938, he be paid a retaining "fee at the rate of £400 per annum per million pounds of issued "share and loan capital of the corporation to the nearest "£100,000, such fee to date from 1st April, 1938." The memorandum there referred to was described as "Summary of "arrangements with Mr. R. H. Studholme" and headed "Severn "Valley Gas Corporation Ld." It provided: "(1) Mr. Stud-"holme to be appointed solicitor to the company. (2) General

"had been a party to the agreement; "(*b*) for any reference (however "worded and whether express or im-"plied) to the undertaker there were "substituted, as respects anything fall-"ing to be done on or after the vesting "date, a reference to the appropriate "board; . . . (*e*) in the case of an "agreement for the rendering of per-"sonal services to the undertaker, "the services to which the agreement "relates were, on and after the vest-"ing date, any services under the "appropriate board, to be selected by "that board, which are reasonably "equivalent services; and (*f*) save as "provided by the three last preceding "paragraphs, for any reference (how-"ever worded and whether express "or implied) to the undertaking of "the undertaker or any part of that "undertaking or to the limits of "supply of the undertaker or any "part thereof there were substituted, "as respects anything falling to be "done on or after the vesting date, a "reference to so much of the business "carried on by the appropriate board "as corresponds to the undertaking "or part of the undertaking of the "undertaker or, as the case may be, "a reference to the area comprised in "the said limits immediately before "the vesting date or part thereof. "(4) Every agreement, whether in "writing or not, and every document "(not being an agreement or a docu-"ment to which the last preceding "subsection applies or an enactment) "which refers whether specifically or "generally to any such undertaker "shall be construed in accordance "with the provisions of the last "preceding subsection, so far as "applicable. . . . (9) Subject to the "next following section, every under-"taker to whom this Part of this Act "applies, being a body corporate, "shall be dissolved on the vesting "date."

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"work for retaining fee. Minor professional work for the company and for all its subsidiary companies present and future advising on legal, Parliamentary and secretarial questions, drawing service agreements, simple public lighting agreements (not drafting complicated agreements or disposing of differences with other parties), routine drafting such as tariff contracts, forms, notices, resolutions, etc., operation of insurance scheme, watching Parliamentary Bills and Orders, attending board meetings as hitherto, acting as director of subsidiaries as required and for Mr. Dawnay when on holiday, all to be covered by a general retaining fee calculated at £400 p.a. per million on issued share and loan capital at end of each financial year (plus travelling expenses), payable half yearly, or as otherwise arranged. (3) Other work. Parliamentary or legal work not covered by retaining fee, such as special orders, bills, special agreement, incorporation of companies, trust deeds, prospectuses, new articles, etc., and conveyancing, all to be charged to the party concerned at or below normal professional rates. Mr. Studholme will be given the refusal of the legal and Parliamentary work of the subsidiary companies. (4) Office accommodation, staff, etc. Office accommodation will be provided by Dawnay Day & Co. Ld. as part of their secretarial services. Mr. Studholme pays his own office staff. (5) Generally. (*a*) Work covered by the retaining fees from Dawnay Day & Co. Ld. and the gas holding companies is to be given precedence over other work so far as reasonably possible, and other work must not include litigation, unless otherwise agreed. (*b*) These arrangements have effect from 1st April, 1938. (*c*) Unless otherwise agreed, the arrangements would be subject to twelve months' notice by either side expiring on any 31st March." That document was signed by the plaintiff. A similar resolution was passed by the directors of Gas Consolidation Ld.

In August, 1939, the plaintiff was called up and remained with the Armed Forces until 1946, when he returned to the employment of both companies. On March 5, 1946, he became a director of the Severn Valley Gas Corporation and was also appointed general manager of the associated gas companies at a salary of £2,000. On July 1, 1947, the plaintiff's retaining fee for the Severn Valley Gas Corporation was increased to £600 per annum per million pounds of issued share capital and loan capital for routine legal work for the corporation and its subsidiaries.

On July 31, 1948, the Gas Act was passed, by which 12 area gas boards were created, being geographically divided throughout the country, each board being responsible for the supply of gas in its particular area. A gas council was also established. Section 5 set out the constitution of the area boards and the gas council and by subsection (1) provided: "Every area board and the gas council shall be a body corporate. . . ." Section 15 included as undertakers holding

companies having one or more subsidiary companies which were undertakers on certain conditions.

The vesting date under the Gas Act, 1948, was May 1, 1949. At that date the Severn Valley Gas Corporation had 26 subsidiary companies in various parts of the country. Of those 26, six were vested in the defendant board and the other 20 in three other area boards. The Gas Consolidated Co. Ld. undertaking was vested in the West Midland Gas Board and its subsidiaries were also divided amongst that and other boards.

For three years prior to the vesting date the plaintiff's remuneration from the Severn Valley Gas Corporation averaged by way of retaining fee under clause 2 of the agreement £754 8s. 11d. a year, and under clause 3 £1,310 14s. 7d. a year, a total remuneration under the agreement of £2,065 3s. 6d. a year. The remuneration under clause 3 was paid in part by the Severn Valley Gas Corporation and in part by its 26 subsidiaries.

Gilbert Paull Q.C. and *Maurice Lyell* for the plaintiff.
John Megaw Q.C. and *Michael Kerr* for the defendant board.

The following cases were cited in argument: *John Hudson & Co. Ld.* v. *Kirkness*[2]; *Attorney-General* v. *South Wales Electrical Power Distribution Co.*[3]; *Drive Yourself Hire Co. (London) Ld.* v. *Strutt*[4]; *Atlantic Maritime Co. Inc.* v. *Gibbon*[5]; *Barnsley District Coking Co. Ld.* v. *East Midlands Gas Board*[6]; *The Glamorganshire*[7]; *Cox* v. *Hawkes*[8]; *Nokes* v. *Doncaster Amalgamated Collieries Ld.*[9]; *Shepherd* v. *Henderson*[10]; *Hirji Mulji* v. *Cheong Yue Steamship Co. Ld.*[11]; *In re Dominion Students' Hall Trust*[12]; *Branca* v. *Cobarro.*[13]

Cur. adv. vult.

Jan. 20. LYNSKEY J., having stated the facts as set out above, continued: The agreement which I am considering is an agreement for rendering personal services. If it had not been for the provisions of subsection (3) of section 17 it would be impossible of performance (*Nokes* v. *Doncaster Amalgamated Collieries Ld.*[1]) as the contract was only to render personal services to the Severn Valley Gas Corporation. By the provisions of section 17 (9) that corporation, being a body corporate, was dissolved on the vesting date. The question I have to consider is whether,

[2] [1954] 1 W.L.R. 40; [1954] 1 All E.R. 29.
[3] [1919] 2 K.B. 636; 36 T.L.R. 126.
[4] [1953] 3 W.L.R. 1111; [1953] 2 All E.R. 1475.
[5] [1953] 3 W.L.R. 714; [1953] 2 All E.R. 1086.
[6] Unreported decision of Roxburgh J. dated June 27, 1952.
[7] (1888) 13 App.Cas. 454.
[8] (1890) 15 App.Cas. 506; 6 T.L.R. 465.
[9] [1940] A.C. 1014; 56 T.L.R. 988; [1940] 3 All E.R. 549.
[10] (1881) 7 App.Cas. 49.
[11] [1926] A.C. 497; 42 T.L.R. 359.
[12] [1947] Ch. 183; 63 T.L.R. 90.
[13] [1947] K.B. 854; 63 T.L.R. 408; [1947] 2 All E.R. 101.
[1] [1940] A.C. 1014, 1023.

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assuming the contract is modified as provided by subsection (3), it would still be possible of performance. So far as the plaintiff's services are concerned, subsection (3) (*e*) enables the board to substitute for the contractual services, reasonably equivalent services selected by the board, and although the services may be varied under paragraph (*e*) of subsection (3), there is no express power given by the section (or indeed any part of the Act) to vary the remuneration for those services. The scheme of the whole section appears to be that persons contracting with the undertakers shall retain the rights they had as against the undertakers with the substitution of the board as the party liable.

It is said, however, in this case on behalf of the plaintiff that, as his retaining fee was to be calculated at £600 per annum per million on issued share and loan capital at the end of each financial year, the section requires that "the issued share and "loan capital of the Severn Valley Gas Corporation" must be read as "the issued share and loan capital of the South Western "Gas Board" which, according to the statement of claim, means substituting £16,713,032 for £1,382,971 as the figure on which the £600 per million per annum has to be calculated. I feel sure that this result was never envisaged by those who drafted or passed the Act.

The defendants did not avail themselves of the plaintiff's services. They sought to give him notice shortly after the vesting date, but he insisted on notice in accordance with the terms of his agreement to expire on March 31, 1951. The notice was given on March 20, 1950, to expire on March 31, 1951. The defendants, or those representing them, appear to have thought the agreement was binding on them, but there is no plea of estoppel and no point was made as to this before me.

It seems to me that the real issue in this case is what is the proper construction of section 17 (3) (*b*). Section 17 (3) (*a*) enables the board to be treated as a party to the agreement: but (*b*) sets out the extent to which the board as from the vesting date is to become liable under the agreement. Paragraph (*b*) does not provide that for any reference in the agreement to the undertaker there shall be substituted a reference to the appropriate board. The words are limited. The substitution is only to be made "as respects anything falling to be done on or after "the vesting date." The words "falling to be done" means falling to be done under the agreement, but by the board in substitution for the undertaker. What falls to be done by the board here is to pay the plaintiff the retaining fee fixed by the agreement. That fee was fixed in relation to the undertakers' issued share and loan capital of the Severn Valley Corporation. The issued share and loan capital was the yardstick by which the basis of the retaining fee was fixed. There is nothing in the agreement which called on the undertaker to issue shares or acquire loan capital. The agreement was made on the basis that

shares had been issued and might vary from time to time, but there was no obligation on the undertaker to issue such shares in the future or acquire such loan capital. In fact, the Severn Valley Gas Corporation had no loan capital. The issue of shares or the creation of loan capital was not something falling to be done under the agreement with the undertakers, and paragraph (*b*) therefore, in my view, does not operate to substitute a reference to the board's issued share and loan capital at the end of each financial year for that of the Severn Valley Gas Corporation.

As by the Gas Act the Severn Valley Gas Corporation was dissolved on May 1, 1949, there was thereafter no issued share or loan capital existing at the end of each of the succeeding financial years and nothing therefore on which the plaintiff's retaining fees could be calculated. The obligation of the Area Gas Board to pay the retaining fee assessed in accordance with clause 2 of the plaintiff's agreement became impossible of performance. Under paragraph 3 of his agreement the plaintiff was to be given the refusal of the legal and Parliamentary work of the subsidiary companies and was to charge his professional fees for such work to the party concerned, that is, in the proper case, to the subsidiary company. At the date of the vesting order there were some 26 of these subsidiaries and 20 of these had been allocated to other area boards. It might have been possible for the area board under section 17 (3) (*e*) to direct the performance by the plaintiff of reasonably equivalent services, but they had no power to remunerate him under the terms of his agreement for such services in place of the services he would previously have rendered the subsidiary companies. The result was that this part of the plaintiff's agreement also became impossible of performance by the board. A basic part of any agreement for the rendering of personal service is the remuneration the employer is to pay under the agreement for such service. Applying the modifications provided for in section 17 (3) as I understand them, the board would not be able to pay the retaining fee called for under clause 2 of the plaintiff's agreement as the basis on which it was calculated had ceased to exist after the vesting date. They would not have been able to procure the giving of the offer to the plaintiff of the work of some 20 of the subsidiary companies or procure payment by such companies for such work as those companies had ceased to exist on the vesting date and their property, rights and obligations vested in other area boards.

In my view, therefore, the agreement between the plaintiff and the Severn Valley Gas Corporation by its terms and subject-matter even when modified as set out in section 17 (3) made it impossible that it should have effect. Although the agreement between the plaintiff and the Severn Valley Gas Corporation may

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have vested in the defendants, as it was not possible of performance even as modified under section 17 (3) the agreement became frustrated as from the vesting date.

By their defence the defendants, while denying that the plaintiff is entitled to any remuneration under or by virtue of his agreement with the Severn Valley Gas Corporation, admit that he is entitled to reasonable remuneration for the period from May 1, 1949, to March 31, 1951, and they admit that the reasonable remuneration for such period would be £3,958 5s. 1d., and after taking credit for £635 19s. 9d. already paid to the plaintiff admit that there is due and owing to the plaintiff the sum of £3,322 5s. 4d. In view of this admission, the plaintiff is entitled to judgment for this sum against the defendants.

This is enough to dispose of this case, but in view of the arguments addressed to me by counsel for both parties I propose to deal with the further question debated, although, of course, it can have no effect on the result which I have already indicated.

If I am wrong in the view I have taken of the construction of section 17, and the plaintiff is entitled to have his retaining fee calculated on the basis of the issued share and loan capital of the board, the question then arises as to what was the issued share and loan capital of the board on March 31, 1950, and March 31, 1951—if, indeed, there was any such capital. It is common ground that there was no issue of share capital by the area board. The plaintiff, however, contends that the amount of gas stock for which the ultimate responsibility for meeting the obligations in respect of such stock is allocated to the area board under a scheme under section 44 of the Gas Act, is capital loan of this area board.

I was referred to section 8 (5) of the Finance Act, 1899, as to what is a capital loan for the purposes of the Finance Acts, and "loan capital" there means (inter alia) any funded debt by whatever name known and any capital raised by any corporation, company or body of persons which is borrowed or has the character of borrowed money.

Section 52 of the Finance Act, 1946, exempts from the stamp duty imposed by section 8 of the Finance Act, 1899, documents connected with nationalization schemes and loan capital issued to raise money required to be paid as consideration for the transfer to the nationalized body of an undertaking. But for this exemption it would seem that money so raised would have attracted this duty as loan capital.

The scheme of the Gas Act, 1948, is to create a gas council as a body corporate and 12 area gas boards, each again being a body corporate. The gas council by section 43 is to issue stock to be known as British Gas Stock. It is empowered to issue such stock for the purpose of exercising its powers under section 42 and required to create and issue such stock for the purpose of satisfying any right to compensation which under the Act is expressly required to be satisfied by the issue of stock. By section 25 of the Act every holder of securities of any undertaker not being an

undertaker to which section 18 of the Act applies shall be entitled to be compensated by the issue to him by the gas council of British Gas Stock. The British Gas Council become responsible to the stockholder for the redemption of the stock and payment of the interest on it, and the stockholders are given no rights directly against the area gas boards. On the other hand, by section 17 (1) all property, rights, liabilities and obligations of the undertakers vest in such area board as the Minister may determine. Under section 44 (2), however, a scheme is to be settled by the gas council and the Minister to determine the shares in which the ultimate responsibility for meeting the obligations in respect of the issue of stock is to be borne and the scheme must provide for allocating to the area boards ultimate responsibility for any stock issued for the purpose of satisfying rights to compensation having regard to the extent to which the assets in respect of which the compensation is payable vest by virtue of the Act or are subsequently transferred to the respective boards.

By section 44 (3): "Each area board shall, at such times as "may be directed by the Gas Council, pay to the council—(*a*) "such sums as may be necessary to enable the council to make "any payments, or to refund to themselves any payments made, "in respect of interest on or the redemption of British Gas Stock, "including payments into a sinking fund, so far as the payments "are attributable to stock for which the area board are ultimately "responsible under this section; and (*b*) such contributions "towards the expenses incurred by the Gas Council in issuing "any British Gas Stock and in managing that stock as bear to "the total expenses so incurred the same proportion as the "amount of the stock in respect of which the area board are "ultimately responsible under this section bears to the total "amount of the stock. Any sums paid by an area board under "this subsection to enable the Gas Council to make payments in "respect of interest on British Gas Stock shall be deemed to be "annual payments, and any sums so paid to enable the Council "to make payments in respect of the redemption of such stock "shall be deemed to be capital payments."

Section 45 provides for a Treasury guarantee and the gas council are the body responsible for meeting any liability incurred by the Treasury in implementing the guarantee.

By section 46 a central guarantee fund is to be created and by subsection (1) of that section the gas council's solicitors shall maintain "a fund, which shall be known as the central "guarantee fund, for the following purposes—(*a*) in the event of "any area board or the Gas Council being unable temporarily to "discharge their obligations in respect of the payment of interest "on, or the redemption or repayment of, any British Gas Stock "or any temporary loan, or in respect of any payment by way "of compensation to a local authority, for enabling those pay-"ments to be made out of the fund; (*b*) for repaying to the

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"Treasury any payments made by them for the purposes of ful-
"filling any guarantee given by them under the last preceding
"section; and the moneys in the central guarantee fund shall
"be applied by the Gas Council for those purposes only."

No scheme was settled by the council and the minister under section 44 until July 31, 1952, but the council had made provisional allocations of stock for such purposes to the South Western Gas Board on March 31, 1950, of £11,376,595, and on March 31, 1951, of £12,714,188 to the South Western Gas Board in respect of compensation stock. There was no direct obligation of the area boards to the stockholders. The obligation imposed by the statute on the area boards is to be the ultimate responsibility of the gas council for the payment of interest on and the redemption of that gas stock. The payments are to be made under that obligation at such times as may be directed by the gas council, who are given complete control as to rate of interest and amounts of repayments made under the Act, namely, the Gas (Stock) Regulations, 1949 (S.I. 1949, No. 751).

The British Gas Stock issued by the gas council consisted of British Gas 3 per cent. Guaranteed 1990/95 and British Gas 3½ per cent. Guaranteed Stock 1969/71. This stock, as far as the gas council is concerned, was clearly a funded loan. The question I have to decide is whether the area board's ultimate responsibility to the gas council for meeting obligations of the stock, the responsibility for which was allocated to the area board, can properly be described as loan capital as being a funded debt or capital raised which is borrowed or has the character of borrowed money.

I have come to the conclusion, although I must say with considerable reluctance, on the facts of this case that the statutory debt owed by the area board to the gas council is a funded debt and, having regard to the provisions of section 44 (2) (*a*), the credit obtained has the character of borrowed money. Payments required to be made by the area board to the gas council to enable the council to make payments for the redemption of the gas stock are by section 44 (3) deemed to be capital payments. If the ultimate responsibility had been allocated by the gas council and the Minister under the scheme on March 31, 1950/51, that responsibility would be a funded debt and loan capital of the area board. The fact that only a provisional allocation had been made at those dates would not, in my view, prevent the credit thereby obtained being loan capital. Those entitled to such compensation by way of gas stock were entitled to such compensation at the vesting date or at the conversion date and the area board's obligation when the final allocation is made dates back to the vesting date.

In addition to issuing the gas stock required for compensation, the gas council under section 43 (1) (*a*) may create and issue any stock required for the purpose of exercising their powers under section 42. Section 42 reads: "(1) Each area board and the

"Gas Council may, with the consent of the Minister and with "the approval of the Treasury or in accordance with the terms "of any general authority issued by the Minister with the "approval of the Treasury, borrow temporarily, by way of over-"draft or otherwise, such sums as the board or council, as the "case may be, may require for meeting their obligations or "discharging their functions under this Act. (2) The Gas "Council may, with the consent of the Minister and the approval "of the Treasury, borrow money by the issue of British Gas "Stock, for all or any of the following purposes, that is to say— "(*a*) the redemption of any British Gas Stock; (*b*) the provision "of money for meeting any expenditure incurred by any area "board or by the Gas Council in connection with any works "the cost of which is properly chargeable to capital account; "(*c*) the provision of any working capital required by any area "board or by the Gas Council; (*d*) the provision of money "required for the payment of compensation by area boards "under this Act, except payments to local authorities in respect "of loans and advances; (*e*) any other purpose for which capital "moneys are properly applicable by any area board or the Gas "Council, including the repayment of any money temporarily "borrowed under the last preceding subsection for any of the "purposes mentioned in this subsection; and (*f*) any other "payment which any area board or the Gas Council are autho-"rised to make and which ought in the opinion of the Gas "Council to be spread over a term of years. (3) The aggregate "of the amounts outstanding in respect of the principal of any "stock issued by the Gas Council, otherwise than for the purpose "of paying compensation under Part II of this Act whether in "stock or in cash, and in respect of any temporary loans raised "by the Gas Council or any area board, shall not at any time "exceed the sum of two hundred and fifty million pounds: "Provided that nothing in this subsection shall prevent the Gas "Council from borrowing in excess of the said sum for the "purpose of redeeming any British Gas Stock which they are "required or entitled to redeem, or of repaying any money "temporarily borrowed under subsection (1) of this section. "(4) Save as aforesaid, neither an area board nor the Gas "Council shall borrow any money."

It is quite clear that the powers given by section 43 for the issue of gas stock for carrying out the gas council's powers under section 42 constitute borrowed money. It is not stock issued for the purpose of compensation but stock issued for the purpose of borrowing money from stockholders to be applied for the purposes set out in section 42.

In this case the gas council borrowed money on issued gas stock and the money was actually lent to the defendant gas board, and whatever view may be taken of the allocation of responsibility for compensation gas stock, it seems to me reasonably clear that stock issued for borrowing money and the loan

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of that money to the area board for what obviously are mostly capital purposes, in any event which called for a funded debt, must be treated as loan capital. According to the reports, the defendant board received £3,500,000 from the gas council under section 42 of the Act, and that, in my view, whatever may be said about the rights or wrongs of my decision with regard to the compensation stock, must clearly be loan capital. The ultimate result is that there will be judgment for the plaintiff for the admitted amount set out in the earlier part of my judgment.

Judgment for the plaintiff for the amount admitted by the defendants.

Solicitors: *Beaumont & Son; Slaughter & May.*

[COURT OF APPEAL.]

C. A.

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Jan. 18, 19.

Singleton, Jenkins and Hodson L.JJ.

* HARRISON *v.* METROPOLITAN-VICKERS ELECTRICAL CO. LD. SAME *v.* SAME.

[1952 H. No. 1682.]

Factory — Floor — Opening — Meaning of "floor"—Statutory duty to fence—Foundry with sand bed—Unfenced hole in sand—Whether "opening in floor"—Injury to workman through falling into hole —Liability of employer—Contributory negligence—Workman walks backwards into hole—Principles applicable—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 25 (3).

Statutory Duty—Contributory negligence.

The sand bed of a foundry on which casting operations are carried out is the "floor" of a factory within the meaning of section 25 (3) of the Factories Act, 1937, and consequently, if an excavation is made in the sand, it is the duty of the employer of men working on the sand bed to see that the opening is securely fenced.

Decision of Stable J. affirmed.

APPEAL by the defendants and cross-appeal by the plaintiff from Stable J., sitting at Manchester Assizes.

The plaintiff, John Alfred Deakin Harrison, was employed by the defendant company as a coremaker in a foundry carried on by the company at Trafford Park, Manchester, the premises in question being a factory within the meaning of the Factories Act, 1937. On November 27, 1951, the plaintiff, with another man, was carrying a ladle of molten metal for the purpose of pouring it into a mould. The ladle was slung from a shank 7 ft. 3 ins. long, and the men were walking backwards when, on coming to the edge of an iron gangway, the plaintiff fell into a pit which had been excavated in the sand bed of the foundry immediately adjoining the edge of the gangway and was injured. He brought an action for damages against the defendants, basing

his claim (1) on alleged negligence at common law, (2) for breach by the defendants of their statutory duty under section 25 (3)[1] of the Factories Act, in failing securely to fence the hole in the sand, on the ground that it was an opening in the floor within the meaning of section 25 (3), and (3) under section 26 (1) of the Act for failing to provide a safe means of access for the plaintiff to his work. The defendants denied negligence and that they had committed a breach of duty under section 26 (1). With regard to the plaintiff's second head of claim, they contended that the sand bed of the foundry was not a floor within the meaning of section 25 (3) and that consequently they were under no obligation to fence it. They also alleged that the plaintiff had been guilty of contributory negligence.

Stable J. held that there had been no negligence by the defendants at common law and no breach by them of their statutory duty under section 26 (1) of the Act. With regard to the plaintiff's second head of claim, he held that the sand bed of the foundry was a "floor" within section 25 (3) and that the defendants were consequently under a duty to fence it securely. As they had failed to do so, the plaintiff was entitled to damages under that head of claim, which he assessed at £112 2s. 8d. He was of opinion, however, that the plaintiff, by reason of his contributory negligence, was responsible for the accident to the extent of 50 per cent., and he therefore gave judgment in his favour for £56 1s. 4d.

The defendants appealed, and the plaintiff cross-appealed against the finding of contributory negligence.

N. J. Laski Q.C. and *Fenton Atkinson Q.C.* for the appellants.

R. Marven Everett Q.C. and *John Ritchie* for the respondent.

The following cases were cited in the argument: *Barrington* v. *Kent Rivers Catchment Board*[2]; *Hopwood* v. *Rolls Royce Ld.*[3]; *Hutchinson* v. *London and North Eastern Railway Company*[4]; *Unwin* v. *Hanson.*[5]

SINGLETON L.J. The defendants have a large factory at Trafford Park, Manchester, where they make castings of various kinds and sizes.

The plaintiff, John Alfred Deakin Harrison, was employed in the factory as a coremaker, and on November 27, 1951, he met with an accident when he was working for the defendants. He, and a man named Hatton, had to fill core moulds with molten metal. The molten metal was carried to the mould in a ladle

[1] Factories Act, 1937, s. 25 (3): "All openings in floors shall be "securely fenced, except in so far as "the nature of the work renders such "fencing impracticable."

[2] (1947) 64 T.L.R. 35; [1947] 2 All E.R. 782.

[3] (1947) 176 L.T. 514.

[4] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[5] [1891] 2 Q.B. 115; 7 T.L.R. 488.

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which was suspended on a double-handled shank, and one of the men was at each end of the shank. The time came when the contents of the ladle became too cool, or too stiff, for the operation of pouring to be continued successfully, and it was necessary for the men to return to the supply ladle. That meant that one of them had to walk backwards down a narrow way on to a 6-ft. wide steel-flagged gangway, which was at a right-angle to the course they had been taking. The one who walked backwards on this occasion was the plaintiff Harrison. The shank was 7 ft. 3 ins. in length, so that there was not much room for the turn towards the supply ladle across the gangway, and at the edge of it there was a pit, part of which formed the bed of another casting. There was a sheer drop from the gangway of at least 3 ft. 4 ins. As the plaintiff was backing he stepped a shade beyond the gangway and into this space; some of the metal went on his face and he received injuries. There was no warning of any kind, no guard, and the fact that the space was flush with the gangway deprived the plaintiff of the warning which he might have had if the space or the casting had been further from the gangway, as was usually the case.

The plaintiff brought this action claiming damages for negligence, and also for breach of statutory duty under the Factories Act, 1937. The important part of the case arises under section 25 (3) of the Act which provides: "All openings in floors shall "be securely fenced, except in so far as the nature of the work "renders such fencing impracticable."

The plaintiff's case is that the space down which he fell was an opening in the floor. The defendants' reply is that the space was not an opening in the floor in that the space was not in the floor. It is not disputed that it would have been practicable to fence the space; indeed, that was done after the accident. Thus we are face to face with the question as to what is a floor within the meaning of section 25 (3).

The defendants' factory at ground level was mostly sand. The photographs show castings and the like on portions of what appears to be the floor. In certain parts of the factory there are steel-flagged gangways which, according to the defendants' argument, constitute the floor for the purposes of the section. I find it difficult, if not impossible, to say that by constructing gangways, such as they did, the defendants took away the character of the ground level of the factory so as to make that which would normally be considered to be the floor something other than the floor. It is true to say that portions of the sand floor are used for castings, but the normal level of sand is the same as the level of the gangways. A floor may be of stone, or concrete, or wood, or steel, or earth, or sand, or it may be a combination of several substances. The making of a gangway does not mean that the remainder of the ground level ceases to be part of the floor.

Mr. Marven Everett drew our attention to the proviso to regulation 10 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. The regulation, which, as Jenkins L.J. pointed out, in (*b*) makes use of the word "floor," provides: "In "every room, or part thereof, in which *cleaning of castings* is "done— . . . (*b*) all accessible parts of the floor shall be properly "swept or otherwise cleaned at least once every day and for this "purpose the floor shall be maintained in a smooth and firm con-"dition so as to permit of such proper sweeping or cleaning." The proviso reads: "Provided that this regulation shall not apply "to—(i) *cleaning of castings* done upon the foundry floor at or "near the place where metal for the said castings is poured."

The foundry floor in the present case was mostly sand, and parts of the foundry floor were used from time to time for the making of castings, which meant interference with the floor. The floor at the ground level, though it was sand, was still the floor of the factory, and, in my view, it was a floor for the purposes of section 25 (3) of the Act.

The word "floor" was used during the evidence, and, furthermore, on a plan which was made for the defendants the place where the sand is is described as "floor level." I think the ordinary level of the factory, though it was of sand, constituted the floor of the factory; in the floor there was an opening down which the plaintiff stepped backwards and fell. In my view, the judge rightly held that that unfenced opening in the floor constituted a breach of section 25 (3), and that the defendants were responsible in damages.

There were two further heads of claim. One, based upon section 26 (1) of the Act: "There shall, so far as is reasonably "practicable, be provided and maintained safe means of access "to every place at which any person has at any time to work." Stable J. came to the conclusion that the plaintiff could not succeed under that subsection if there was safe means of access. That point has not been argued in this court, though Mr. Marven Everett said he desired to keep it open.

The other claim was that the defendants were negligent in that they had an open space so close to a gangway that a man going backwards, as the plaintiff was, might fall into it, and thus might suffer damage; and it was said that in having such a space the defendants were not taking reasonable care to see that their workmen were not exposed to unnecessary risk. Upon that claim Stable J. held that negligence was not proved. He said: "So far as the evidence goes, Harrison was an experienced "man and so was the one with him. They had both been "working in this factory for a matter of 12 years and each "agreed that during the whole of that time he had never known "a case in which one of these temporary pits had been fenced. "Mr. Beech, the Assistant Superintendent, with 30 years' "experience, told me that in the whole of his experience, neither "in this foundry nor in any other foundry, had he found it to be

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"the practice, or indeed had he found an example of fencing a "temporary pit. Mr. Gardner, the expert called on behalf of "the plaintiff, agreed with that, but he said in this particular "case, inasmuch as this particular pit was flush with this 6 feet "gangway, he thinks there was an additional risk which should "have been countered by putting up a fence. If this were a "matter of common law liability I should not myself think, and "I should not hold, in view of the overwhelming body of testi-"mony that in these foundries throughout the years it has "never occurred to anybody to fence a pit of this kind, that "there was any common law negligence whatever."

The witness Gardner had referred to the unusual proximity of this space to the gangway, and I gather from the evidence of Beech that there was a departure from the ordinary practice in this case. Normally, as he said, and as the plaintiff's witnesses agreed, temporary holes for castings are not fenced, though permanent holes are. Temporary holes are not, in the ordinary case, right up to the gangway; they are some 12 inches away. If there was a space of 12 inches between the gangway and the hole if a man was backing, when he got to the edge of the gangway and his heel came down upon sand he would know that there was danger. In this case there was no such gap and no temporary rail or anything of that kind.

The judge found that there was no negligence on behalf of the defendants, and in my judgment, this court ought to accept that finding. I am not sure that I should so readily have reached that conclusion if it be right to say that there was a departure from the ordinary practice in that the hole was much closer to the gangway than is normally found. I am not sure that that was present to the judge's mind, though he did refer to the evidence of Gardner.

One further matter has to be considered. There is a cross-appeal on behalf of the plaintiff that the judge ought not upon the evidence before him to have found that the plaintiff was guilty of negligence when he stepped backwards into the hole. Upon that question Stable J. said: "The next matter I have to consider is "the question of contributory negligence and I agree whole-"heartedly with the proposition that acts of omission, of inad-"vertence, of forgetfulness, absence of mind and lack of "concentration are constantly occurring, but to attribute to them "the rather grim description of contributory negligence is like "using an elephant rifle to shoot a rabbit. But this was far "beyond, in my view, a momentary inadvertence or carelessness. "This man, with his mate, was handling this pot of hot metal "and it obviously required the greatest possible care to see that "he did not stumble, or fall, or upset the thing and in the result "burn himself or somebody else, and to step backward without "looking where he was going over 6 feet of metal gangway "straight into a hole which had been there for days, which he "had seen over and over again, and which he knew perfectly "well was not fenced, is in my view the clearest possible example

"of what contributory negligence is as contrasted with momentary "carelessness, inadvertence and things like that, or fatigue, or "matters of that kind. I attribute the responsibility in the "proportion of 50–50."

Again, I am not clear that it was present to the judge's mind when he came to that conclusion that there had been a departure from normal practice, in that it was not usual that there should be a hole or a space immediately alongside the gangway, as there was in this case. I do not think that I should have found this man guilty of contributory negligence. I regard it, however, as being primarily a matter for the trial judge. It follows from what I have said that, in my judgment, the judge was right in holding that the plaintiff was entitled to succeed on the basis that there had been a breach by the defendants of the duty they owed to him under section 25 (3) of the Act, and it follows, too, that the cross-appeal ought to be dismissed.

JENKINS L.J. I agree. In my view there is no sufficient reason for holding that the so-called sand floor of the foundry in this case was not a floor within the meaning of section 25 (3) of the Factories Act, 1937. It is true that it was a floor made of sand as distinct from materials such as timber or cement, but, nevertheless, it seems to me that it was a floor, and a floor of such a kind that pits or openings could be made in it and refilled at will as the exigencies of the work demanded. I think, therefore, that the pit into which the plaintiff fell was an opening in a floor within the meaning of section 25 (3) of the Act. It is not disputed that it would have been perfectly practicable to protect this opening by means of a fence, and, accordingly, in my view Stable J. was right in holding that there was in this case a breach of the statutory duty imposed on the defendants.

As to the claim based on common law negligence, speaking for myself, I am not wholly satisfied that there were not materials here on which the judge might have held that a case of common law negligence had been made out. The pit into which the plaintiff fell, placed as it was, might, as it seems to me, have been regarded as an unusual hazard, and it might have been said that the test which the judge applied, and in effect found conclusive, namely that it was not the general practice in foundries to fence pits of this kind, did not necessarily preclude a finding of negligence, because so much depends upon the position and nature of the particular pit, and especially the position in relation to a gangway such as the 6-ft. way in the present case. But the judge, having considered the whole matter, came to the conclusion that the claim based on liability at common law had not been made out, and although, speaking for myself, I feel that I might, sitting as a judge of first instance, have formed a different view, I do not think it is for us to disturb the conclusion to which the trial judge came.

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In view of our decision on section 25 (3) of the Act, I do not propose to add anything to what my Lord has said on the claim under section 26 (1) as to safe means of access, which the judge rejected.

The point in the case on which I have felt most difficulty is the matter of contributory negligence. Mr. Marven Everett for the plaintiff urged that where, as here, a statutory duty is imposed for the benefit of workmen, and a workman is injured through a breach of that statutory duty, the court should be slow to nullify or counteract the benefit of the enactment by holding him guilty of contributory negligence. In a sense it is true to say that regulations such as these are made to protect workmen against themselves, against carelessness and inadvertence in the course of their work and other natural shortcomings which, if regarded as amounting to contributory negligence would greatly cut down the benefit to workmen of the statutory provisions.

Mr. Marven Everett referred us to *Hutchinson* v. *London and North Eastern Railway Company*,[1] where Goddard L.J. said[2]: "It is only too common to find in cases where the "plaintiff alleges that a defendant employer has been guilty of "breach of a statutory duty, that a plea of contributory negli-"gence has been set up. In such a case I always directed "myself to be exceedingly chary of finding contributory negli-"gence where the contributory negligence alleged was the very "thing which the statutory duty of the employer was designed "to prevent."

Mr. Everett also referred us to a passage in the judgment of Lord Greene M.R. in *Hopwood* v. *Rolls Royce Ld.*,[3] in which he said: "There remains only the question of contributory "negligence, and I can deal with that quite shortly. Con-"tributory negligence does not mean mere error of judgment, "nor does it mean that sort of, shall I say, degree of inattention "which a workman in a factory may in the ordinary course of "his work be expected to show in circumstances that are "familiar to him. All that the plaintiff here was guilty of, it "seems to me, was an error of judgment. He knew that the "blocks were there, and he thought, no doubt, that he was "avoiding them. In fact he made a slight mistake of an inch "or two caused by something the effect of which he was not "able to appreciate. He could not see the two cylinder blocks "himself as he said in evidence; he knew they were there, but "he could not see them. Walking backwards as he was, and "having his direction affected by the movement of his mate "swinging round the end of the two blocks, he could quite "naturally make a slight mistake and get too near to them. "That cannot, in my opinion, be regarded in any way as "contributory negligence on his part." That passage refers to the facts in *Hopwood* v. *Rolls Royce Ld.*,[3] which give it some

[1] [1942] 1 K.B. 481.
[2] Ibid. 488.
[3] (1947) 176 L.T. 514, 520.

resemblance to the present case. It might be said similarly that the plaintiff in the present case, who was walking backwards, knew that the pit was there, but, being unable to see it, made a slight mistake, got too near the pit, and fell into it.

Bearing in mind the principles stated in those two cases, speaking for myself, I very much doubt whether, if I had been trying the present case, I should have found the plaintiff guilty of contributory negligence. But it does not follow that it is right on appeal to disturb the judge's conclusion, which was the other way. It will be noted that he took into account the principles to which I have referred in the passage in his judgment where he said: ". . . I agree wholeheartedly with the proposition " that acts of omission, of inadvertence, of forgetfulness, absence " of mind and lack of concentration are constantly occurring, but " to attribute to them the rather grim description of contributory " negligence is like using an elephant rifle to shoot a rabbit. " But this was far beyond, in my view, a momentary inad- " vertence or carelessness. . . ."

Thus, Stable J., having the proper principles in mind and with all the facts before him, came to the conclusion that the plaintiff's conduct in the case before us did amount to contributory negligence. I think that conclusion is rather hard on the workman, and, as I have said, I very much doubt whether I should have arrived at it myself, but it was essentially a question for the judge, and he having formed the view he did, I do not think it would be right for us to disturb his decision. Accordingly, I agree with my Lord that both the appeal and the cross-appeal should be dismissed.

HODSON L.J. I think that this appeal fails for the reasons which have been already sufficiently given by my Lords. The only question which has caused, I think, any of us in this court any real difficulty is the question whether or not the cross-appeal ought to be allowed on the ground that there was not sufficient material upon which a finding of contributory negligence could be based.

I have come to the conclusion that there was material upon which the judge could so find in the passage which has just been read where he indicated that the facts which had made the greatest impression upon him were that the man concerned walked backwards into a hole which had been there for days—it is true only a few days—which he had seen over and over again, and which he knew perfectly well was not fenced. Mr. Marven Everett put his argument in the strongest way when, relying upon the observations of Goddard L.J. in *Hutchinson* v. *The London and North Eastern Railway Co.*[4]—a case in which a breach of statutory duty was involved—he said that if the statutory duty had been carried out in the present case, it would have prevented

[4] [1942] 1 K.B. 481.

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the accident for a reason which was made plain by the evidence of the plaintiff himself, because if this hole had had a fence, or even the slightest protection cutting it off from the gangway on which the man was walking, the least touch of that fence on the man's back would have warned him that there was something behind him. While recognizing the force of that argument, I still think that the judge was entitled to take the view that the plaintiff had known perfectly well for a material time that the hole was there, and to come to the conclusion that in those circumstances a proportion of blame for the accident must be attributed to him. I have nothing further to add. The appeal must be dismissed, and the cross-appeal also, with the usual consequences.

Appeal and cross-appeal dismissed.

Solicitors: *Church, Adams, Tatham & Co. for Cobbett, Wheeler & Cobbett, Manchester.*

P. B. D.

[CHANCERY DIVISION.]

1954
Jan. 29.
Wynn-Parry J.

* *In re* DEANS, DECD.
WESTMINSTER BANK LD. *v.* OFFICIAL SOLICITOR.

[1953 W. No. 207.]

Administration of Estates — No personal representative constituted — Vesting of estate in probate judge—Securities deposited by deceased to secure a debt—Application by creditor for order vesting securities in official solicitor—Whether probate judge a trustee—Trustee Act, 1925 (15 *Geo.* 5, *c.* 19), *s.* 51 (1)—*Administration of Estates Act,* 1925 (15 *Geo.* 5, *c.* 23), *s.* 9.
Trust and Trustee. Probate. Official Solicitor.

D. executed letters of guarantee and deposit in favour of the plaintiff bank, and deposited certain securities with them as a guarantee of the account of L. D. died in 1951, but no personal representative was constituted. In 1953, when the bank called on L. to make good his overdraft, he absconded.

The bank, who were unwilling themselves to take out letters of administration of D.'s estate, applied for a declaration that the deposited securities were vested in a trustee within the meaning of section 51 (1) (v) of the Trustee Act, 1925, and contended that they so vested in the probate judge by reason of section 9 of the Administration of Estates Act, 1925. They also asked for an order under section 51 (1) (v) of the Trustee Act that the right to transfer and to receive dividends from the deposited securities should vest in the official solicitor.

The purpose of the application was that transfers of the securities might be executed in favour of the bank, which would be binding on the persons responsible for their registration:—

Held, that the probate judge was not a trustee for the purposes of section 51 (1) (v) of the Trustee Act, 1925; and that property

vested in him by virtue of section 9 of the Administration of Estates Act, 1925, remained so vested until a grant of administration was made, so that there was no jurisdiction to make the order prayed.

ADJOURNED SUMMONS.

The facts are sufficiently set out in the judgment.

John Mills for the plaintiff bank.
W. F. Waite for the Official Solicitor.

No cases were cited in argument.

WYNN-PARRY J. This summons is of a distinctly novel character, and it comes before me in these circumstances: One William Deans executed a letter of guarantee and a letter of deposit, and deposited with the Westminster Bank certain shares and securities as one of a number of people who were guaranteeing the account of one Gilbert Loughlin. In December, 1948, he deposited 300 " B " shares of £1 each fully paid in Barclays Bank Ld. In April, 1949, he executed a further letter of guarantee and deposited with the bank £175 10s. 0d. of 3 per cent. guaranteed British Transport stock and £50 worth of 2½ per cent. Defence Bonds. He died on November 11, 1951, and no personal representative has been constituted to his estate. There is owing to the bank by Gilbert Loughlin (who has apparently found it discreet to take himself to Canada) a sum of nearly £2,500; so that it is clear that, on the realization by the bank of their securities, there must remain a deficit.

What the bank wishes to do—and, of course, one has sympathy with their view—is to realize these securities. It is perfectly clear that they can achieve that end by obtaining a grant in the Probate, Divorce and Admiralty Division of this court and then taking the necessary steps pursuant to that grant. They desire, however, to avoid taking that course because, as was said by their counsel, they do not wish to be involved in an administration action in this division if there is any shorter, less troublesome and less expensive, way of achieving that object.

In those circumstances, the ingenuity of those advising the bank has produced the present summons. That summons, which was originally addressed to the Treasury Solicitor as defendant, now has as defendant the Official Solicitor; and what is sought is an order appointing the Official Solicitor to represent the estate of William Deans, under Ord. 16, r. 46; but, of course, an order made pursuant to that Order would not of itself be sufficient, because it appears clearly on the face of r. 46 that an order made thereunder will only bind the estate of the deceased person, whereas in this case it will be necessary to bind other persons, such as the Bank of England and the Postmaster-General, if the object which the bank has in view is to be achieved.

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Deans, decd., *In re.*

Wynn-Parry J.

The summons originally asked, by way of relief, for a declaration that the securities to which I have referred are charged under the relevant documents in favour of the bank with the payment of all moneys owing by William Deans. It also asked for an account of what is due to the plaintiff bank under and by virtue of the deposits and letters of deposit and for its costs of the action, a sale of the shares and the stock and the defence bonds.

The point having been appreciated that an order under Ord. 16, r. 46, would not of itself be sufficient, two further paragraphs were added to the summons, praying "A declaration that the said "shares, the said stock and the said defence bonds are vested in "a trustee within the meaning of section 51 (1) (v) of the Trustee "Act, 1925," and "an order pursuant to section 51 (1) (v) of "the Trustee Act, 1925, that the right to transfer the said "shares, the said stock and the said defence bonds and to "receive any dividends or income now due or to accrue due "thereon do forthwith vest in the Official Solicitor."

In order to obtain, or to be entitled to obtain, a declaration that the shares, stock and defence bonds are vested in a trustee, reliance was placed on section 9 of the Administration of Estates Act, 1925, which provides: "Where a person dies "intestate, his real and personal estate, until administration "is granted in respect thereof, shall vest in the Probate Judge "in the same manner and to the same extent as formerly in the "case of personal estate it vested in the ordinary." It is urged upon me that, as the senior judge of the Probate Division can have no beneficial interest whatsoever in property which vests in him under that section, he must be regarded as a trustee thereof; and, not only that, he must be regarded as a trustee within the meaning of that word as used in section 51 of the Trustee Act, 1925. That section provides, so far as material: "(1) In any of the following cases, namely:— . . . (v) where "stock or a thing in action is vested in a trustee whether by way "of mortgage or otherwise and it appears to the court to be "expedient; the court may make an order vesting the right to "transfer or call for a transfer of stock, or to receive the divi-"dends or income thereof, or to sue for or recover the thing in "action, in any such person as the court may appoint: ".

In my view, the senior judge of the Probate Division cannot be said, by virtue of the language of section 9 of the Administration of Estates Act, 1925, to be a trustee within the meaning of that word for any of the purposes of the Trustee Act, 1925. He has no duties whatsoever to perform. No obligations fall upon him. It is a mere matter of necessary convenience and protection which has led to the introduction of section 9 in the Administration of Estates Act; and, although reference is made

to the ordinary, the position of the senior judge of the Probate Division appears to me to be different from the position of the ordinary, in that, whereas the ordinary had, at any rate in later times, thrown upon him the obligation to discharge debts before holding the balance to pious uses, no such obligation is thrown on the senior judge of the Probate Division. The whole operation of that section is that where the condition is fulfilled of a person dying intestate, his estate, real and personal, vests in the senior judge of the Probate Division, and that property remains vested in him until the second condition is fulfilled, namely, that administration is granted in respect of that property. That appears to me to be plain language and to provide the only method by which the senior judge of the Probate Division can be divested of the property which vests in him under the section.

For those reasons, it appears to me that I have no jurisdiction whatsoever to make the declaration and the order asked under paragraphs 6 and 7 of the summons. But I am not desirous of leaving the matter there. As I have said earlier, there is open to the bank a clear procedure, namely, that of obtaining a grant of administration in the Probate, Divorce and Admiralty Division of the court. Nothing stands in the way of their following that course. All they can urge in favour of the making of an order under Ord. 16, r. 46, assuming that I had jurisdiction to make such an order, is saving of trouble and costs. The Official Solicitor, through Mr. Waite, has made his position perfectly clear. That is, that although he fully recognizes that it is his duty on all proper occasions to help and not to hinder, he sees no reason why he should do the work of the bank where there is this clear course open to the bank. He tells me, through his counsel, that had I had jurisdiction to make the order, he would not have consented to that order unless I had held a strong view that he ought to consent, in which case he would have done so. I think it perhaps may be helpful if I say this, in case the matter should go further; that even if I were wrong on the first point as regards jurisdiction, I should not have regarded this a case in which I would have put any pressure whatsoever on the Official Solicitor to consent to an order being made under Ord. 16, r. 46.

In those circumstances, I make no order on the summons.

Solicitors: *Alfred Bright & Sons; Official Solicitor.*

F. R. D.

[CHANCERY DIVISION.]

1954
Feb. 2.

Harman J.

* *In re* POWLES, DECD.
LITTLE *v.* POWLES AND ANOTHER.

[1953 P. No. 3011.]

Will—Construction—Protected life interest—Trustee's power to "resort "to and spend any part of the capital . . . and apply the same for . . . [beneficiary's] maintenance and general benefit . . ."—Beneficiary's claim for entire capital rejected—Transfer of capital subject to trustee's discretion.

Trust and Trustee.

A testatrix provided that her trustees should set aside out of her residuary estate, inter alia, "investments sufficient to yield the "clear annual income of £375 upon trust to use the same for the "maintenance and general benefit of my son Francis during his "life" on a protective trust.

By clause 15 the testator directed: "My trustees may in their "uncontrolled discretion resort to and spend any part of the capital "of the annual sums hereinbefore bequeathed or appointed in trust "for my . . . son Francis and apply the same for his maintenance "and general benefit during his life or until the cesser of his "interest."

The son Francis claimed that he was entitled under clause 15 to have the whole of the capital of his trust fund transferred to him. On a summons to determine whether the trustees were entitled to transfer the whole of the capital to the son without regard to the use which he would make of it, or whether the application of the capital was limited to his maintenance or to a specific purpose which the trustees considered to be for his benefit:—

Held, that the trustees were not entitled to hand over the capital without inquiry as to the purpose for which the son required it; but that their discretion should not however be fettered, and they could pay capital of the fund to the son provided that they considered that such payment of it would be for his general benefit.

ADJOURNED SUMMONS.

Marianne Elizabeth Annie Powles, by her will dated March 8, 1929, provided that three funds should be set aside out of her residuary estate for her three sons, all of whom survived her, there being marked differences between the three funds.

Clause 13 contained directions: "(a) To set aside and "transfer to my . . . son John Copley Powles . . . invest-"ments which shall be sufficient to yield after all death "duties thereon shall have been paid the clear annual income "of one hundred pounds and I hereby bequeath the said invest-"ments to my said son absolutely. (b) To stand possessed of "investments which shall be sufficient to yield the clear annual "income of three hundred and seventy-five pounds upon trust "to use the same for the maintenance and general benefit of "my son Francis Brooksbank Powles during his life or until "he shall have committed or suffered any act default or "process of law whereby such income or any part thereof

"if belonging absolutely to him would become vested in "or payable to any other person or persons or after his "decease and upon the determination of this trust during his "lifetime the sum so invested shall fall into and form part of "my residuary trust fund and I declare it to be my wish that "the said sum shall be applied by my trustees as follows:—For "the board lodging and clothing of my said son three hundred "pounds and as an allowance to him seventy-five pounds per "annum. (c) To invest such sum as will yield an annual income "of three hundred pounds and to cause such sum to be paid . . . "to . . . my son Robert Cowley Powles during his life . . . and "from and after the decease of my said son such investments ". . . . shall be held upon such trusts as my said son shall by "his will or codicil appoint." The son had exercised this power.

The testatrix bequeathed her residuary estate subject to the above trust funds to her sons John and Robert in unequal shares.

By clause 15 of her will she directed: "My trustees may in "their uncontrolled discretion resort to and spend any part of "the capital of the annual sums hereinbefore bequeathed or "appointed in trust for my said son Francis Brooksbank Powles "and apply the same for his maintenance and general benefit "during his life or until the cesser of his interest."

The testatrix died on June 16, 1929. She was survived by her three sons, two of whom, John and Robert, were now dead. The whole estate had been distributed except the fund set aside under clause 13 (b) for the son Francis. He was now 70, and claimed that he was entitled under clause 15 to have the whole of the capital of his trust fund transferred to him.

The plaintiff, one of the present trustees of the will, took out this summons to ascertain whether, on the true construction of the will, the trustees were entitled to transfer the whole of the trust fund set aside under clause 13 (b) to the defendant Francis Brooksbank Powles for his own use and benefit absolutely without regard to the purpose for which it might be required, or whether the payment or application of the capital was limited to the maintenance of the defendant, or to some specific purpose which the trustees considered to be for his general benefit.

H. E. Francis for the plaintiff, a trustee of the will.
G. G. Robb for the defendant, Francis.
B. G. Burnett-Hall for persons interested in remainder

The case cited in argument is set out in the judgment.

HARMAN J. having stated the facts:—The difficulty here arises under clause 15 of the will, which provides: "My trustees "may in their uncontrolled discretion resort to and spend any "part of the capital of the annual sums hereinbefore bequeathed "or appointed in trust for my said son Francis and apply the "same for his maintenance and general benefit during his life

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POWLES, DECD., *In re.*

Harman J.

"or until the cesser of his interest." I assume for this purpose that the proper sum was set aside. The income from the fund has been paid to Francis, and the trustees in the exercise of their discretion have also paid him £10 a month, that being, in their view, an application or expenditure of the capital for his maintenance or general benefit; but I am not told for which of those purposes. He has now reached the age of 70, and wishes the trustees to hand the fund over to him so that he can do as he likes with it, without giving them any reason beyond the fact that he would be better off with £7,000 in his pocket than if the money remained in trust; and the trustees hesitate to act in that way. Mr. Burnett-Hall on behalf of those interested in remainder, not all of whom are present on the summons, has argued that it is not within the power of the trustees to hand over the fund, and that they can only pay the capital or resort to capital (which are the words used in the will) if its application will to their satisfaction be for the general benefit of the son Francis.

Mr. Burnett-Hall has drawn my attention to *In re Vestey's Settlement*[1] where the Court of Appeal held that income which trustees might at their discretion apply for the benefit of infants was well applied by handing the income over to the infants. This was a mere device to avoid surtax and I have held in those circumstances that the trustees had not applied the income at all because they had gone on to direct its accumulation on the ground that the infants did not need it. The Court of Appeal held nevertheless, that although the infants did not need it, payment of the income to them was an application of it, they held that there was no power to accumulate, and so in another way, defeated the device to avoid tax. But that case does not help me at all; there being there an entirely different and a very special power, and nothing which, in my view, illustrates any principle.

The testatrix was quite clear as to what she wanted paid to her son Francis and what she wanted handed over to him, that much is apparent from the rest of clause 13. Clause 15 is not the clause which is common in wills allowing capital to be handed over on the attainment of years of discretion; it is a carefully-guarded power. The trustees have a power to spend capital or to have resort to capital if they think that the application of it will be for the general benefit of Francis, remembering always that Francis has only a protected life interest, which if he anticipates his income he will forfeit. If, therefore, he created a charge the trustees, in my view, would have no power to pay capital to him because he would have forfeited under the previous words of the will.

The trustees cannot in the circumstances hand over the money without making any inquiry as to his objects or wishes for its

[1] [1951] Ch. 209; [1950] 2 All E.R. 891.

use. On the other hand, I am unwilling to fetter their discretion more than the words require. If they consider it to be for the general benefit of Francis to have this money, I think that they would be entitled to say "We think it better for him to have it "than that we should have it," and if they come to that conclusion who is to say to them "Nay"?—not I, certainly, because the testatrix has provided differently.

I propose therefore to declare that on the true construction of the will, the trustees may only resort to and spend or apply capital of the fund by paying it to the defendant Francis if they consider such expenditure or application will be for his general benefit. That gives scanty guidance, but it enables them to satisfy themselves not merely that he would like to have the money to jingle in his pocket, but that it will do him some good when he gets it.

Declaration accordingly.

Solicitors: *Rowe & Maw for Clutterbuck, Trevenen & Mawson,* Carlisle.

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

* PEOPLE'S REFRESHMENT HOUSE ASSOCIATION LD. *v.* JONES.

1954
Jan. 19, 20.

Lord Goddard C.J., Byrne and Parker JJ.

Catering wages — Minimum wage — Sum paid by worker for benefit — Licensed non-residential establishment—Manager—Two agreements — Service agreement under which manager entitled to statutory minimum wage—Catering agreement entitling him to run catering business and receive profits in consideration of weekly payment to employer—Whether deductions in respect of "benefits and advan-"tages received in connexion with employment" as manager — Catering Wages Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 24), *s.* 10 (3).

Section 10 (3) of the Catering Wages Act, 1943, provides that "Where any benefits or advantages are provided in connexion with "any employment by the employer . . . then, whether or not the "benefits or advantages are authorized to be reckoned as payment "of wages in lieu of payment in cash, any sum paid by the worker "in respect of those benefits or advantages shall be deemed for the "purposes of this Act to have been deducted by the employer from "his remuneration."

The manager of a licensed non-residential establishment was entitled by a written service agreement made with his employers to a salary in accordance with the provisions of the Catering Wages Act, 1943, and the Wages Regulation (Licensed Non-residential Establishment) (Managers and Club Stewards) Order, 1952. By a separate agreement made on the same day the manager was entitled to carry on a catering business at the establishment and to receive the profits in consideration of his paying the employers £3 a week out of the profits of the business. That agreement was expressed to be subsidiary to the service agreement, to be read with

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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it and to terminate with it. At the end of the manager's employment he received as his final month's net remuneration a sum which, if the £3 weekly paid by him to his employers under the catering agreement were deducted therefrom, reduced his salary below the statutory minimum:—

Held, that the catering agreement conferred benefits or advantages on the manager in connexion with his employment as manager; that the two agreements were not separate and independent agreements, but one agreement contained in two documents which must be read together; that by reason of the wording of section 10 (3) the weekly payments made by the manager to the employers must be deducted from his remuneration; and that, accordingly, the employers had failed to pay him the statutory minimum wage.

Case stated by Southampton justices sitting at Romsey.

On May 29, 1953, an information was preferred by the respondent, Freda Ellen Jones, a wages inspector employed by the Ministry of Labour and National Service, against the appellants, the People's Refreshment House Association Ld., that the Association unlawfully failed to pay to one Leonard Thomas Anderson remuneration not less than the statutory remuneration, clear of all deductions, contrary to section 9 (2) of the Catering Wages Act, 1943, and the Wages Regulation (Licensed Non-residential Establishment (Managers and Club Stewards) Order, 1952, made thereunder.

At the hearing of the information the justices found the following facts: Leonard Thomas Anderson was at all material times employed by the appellants as manager (category A) at the Horns Inn, Nursling, Southampton, which was a licensed non-residential establishment within the meaning of the Order. Anderson's wife was required by the appellants to assist in the work of the establishment and both he and his wife were provided with accommodation as defined in paragraph 26 of the Order, but not with full board. In respect of their employments, Anderson and his wife were workers to whom the schedule to the Order applied. Anderson had first been employed by the appellants at the Horns Inn as manager since April, 1946. On April 17, 1952, two agreements in writing were entered into: the first, referred to as the "agreement for service," was between the appellants and Anderson and his wife; and the second, referred to as the "catering agreement," was between the appellants and Anderson. Clauses 5 and 7 of the second agreement provided that it was subsidiary to the service agreement and was to be read with it and should terminate with it.

By clause 14 of the agreement for service the appellants settled with Anderson monthly in arrear, crediting him with his salary and other moneys due to him, the sum so credited in respect of his salary being in accordance with the scales laid down by the Act and Order. He was also entitled to one-half of the rent received from lodgers and 3d. per dozen on aerated waters sold, plus £1 15s. a week towards help. By clause 23 provision was made for Mrs. Anderson's wages in accordance with the Act

and the Order, and if no part of the Act or Order provided for her wages, they were to be 30s. a week, payable to her by Anderson on behalf of the appellants.

By clause 4 of the catering agreement, in consideration of the appellants allowing Anderson to carry on a catering business at the Horns Inn and to receive and retain for himself the profits arising from such business (but not profits arising from the sale of mineral waters or packed goods) and in consideration of the appellants paying for the lighting and heating, providing the utensils and the use of the dining rooms, Anderson agreed to pay to the appellants the sum of £3 a week out of his profits from the catering business. According to the usual course of business between the parties, Anderson paid the sum of £3 a week by paying to the appellants a sum of £13 in respect of each month. He paid this sum at the same time as he paid the takings for the first week of the next following month.

Anderson's employment was terminated in December, 1952. The appellants sent him £46 0s. 8d. representing wages for himself and his wife and expenses for the month of November, and of that total sum £29 13s. 6d. represented the wages of himself and his wife after deductions for insurance and income tax. Before such deductions were made the minimum sum payable to him under the Act and Order was £24 7s. 6d. and the minimum sum payable to his wife under the Act and Order was £6 10s. Anderson paid to the appellants in accordance with the catering agreement the sum of £13 for the month of November in respect of the catering business, and if this sum could properly be set off against his remuneration, his remuneration would be reduced to £21 1s. 5d., thus being below the statutory minimum. Neither when making this payment nor at any other time did Anderson inform the appellants that it was not paid out of the profits of the catering business, nor did he inform them what were the profits thereof. On May 24, 1952, the respondent furnished the appellants with a statement setting out what she alleged to be the details of the remuneration due to Anderson, and received by him during November, 1952, and the statement showed that, if the sum of £13 had to be debited to Anderson in order to arrive at his wages for the purposes of the Act and Order, there was a deficiency of £3 6s. 1d., save as to any deductions properly to be made in respect of national insurance and income tax.

It was contended by the appellants (a) that the respondent's statement was incorrect in that the charge of £13 made under the catering agreement was incorrectly included in the calculation of "remuneration" because it was not a deduction from remuneration but a separate payment to be paid out of the profits of the catering business and was in fact paid separately and on a different date from the remuneration; (b) that the two

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agreements should not be read together but were separate agreements; and (c) that Anderson had received the remuneration due to him under the Act and Order in respect of November, 1952.

For the respondent it was contended (a) that the object of the Act was to ensure that the net remuneration received by a worker from his employer was not less than the statutory minimum remuneration; (b) that in determining the remuneration paid to a worker one must have regard to the arrangement between the employer and worker as a whole and to its final effect; (c) that any system of payment which finally resulted in a worker receiving as wages a net sum less than that fixed by the appropriate Wages Regulation Order was a contravention of the Act; (d) that the arrangement between the employer and the worker in this case, though dual in form, was single in substance; and (e) that the sum of £13 a month which was in fact paid by Anderson and accepted by the appellants in respect of the catering agreement was, in the circumstances of this case, a sum which should be deducted in arriving at the net remuneration paid by the appellants in respect of Anderson's employment at the Horns Inn.

The justices were of the opinion that the two agreements should be read together; that the sum of £13 paid for November, 1952, in respect of the catering business should be deducted in arriving at the remuneration received by Anderson from the appellants; and that therefore Anderson had not received the remuneration due to him under the Act and Order. Accordingly, they convicted the appellants.

F. W. Beney Q.C. and *C. J. Doughty* for the appellants.
S. B. Cooke for the respondent.

The following cases were cited in argument: *Long Eaton Co-operative Society Ld.* v. *Smith* [1]; *Harding* v. *Price.* [2]

Lord Goddard C.J. stated the facts, read the relevant clauses of the two agreements and continued: The clause which is said to amount, in effect, to a breach of the Act provides that: "In "consideration of the Association allowing the caterer to carry "on the said catering business and receive and retain for himself the profits arising from such business (but not profits "arising from the sale of mineral waters or packed goods) and "in consideration of the Association paying for the lighting and "heating, providing the utensils and the use of the room or "rooms specified in clause 2 hereof the caterer agrees to pay "the Association the weekly sum of £3 for the said catering "business out of his profits therefrom. This agreement shall be "read with the principal agreement but is subsidiary thereto "and nothing in this agreement shall qualify or prejudice the

[1] [1949] 2 K.B. 144; [1949] 1 All E.R. 633.

[2] [1948] 1 K.B. 695; 64 T.L.R. 111; [1948] 1 All E.R. 283.

"provisions of clause 11 of the principal agreement," clause 11 of the principal agreement being the one under which the manager is obliged to keep proper books and accounts. It is then provided that "if for any reason the principal agreement becomes "determined this agreement shall immediately become and be "determined save only for the validity of acts done and obliga-"tions acquired during its currency."

At the end of his employment the manager sent the Association a cheque for £13 for November, although he said that he had not made £3 a week profit. He was only bound to pay £3 a week under the agreement if he made a profit. If he chose to pay them that sum, even though he had not made any profits, it would be very difficult to see, if it were otherwise permitted by the Act, that the Association would commit an offence, but that is not the point which we have to decide.

The point arises under section 10 (3) of the Catering Wages Act, 1943, which provides: "Where any benefits or advantages "are provided, in connexion with any employment, by the "employer or by some other person under arrangements with "the employer, then, whether or not the benefits or advantages "are authorised to be reckoned as payment of wages in lieu of "payment in cash, any sum paid by the worker in respect of "those benefits or advantages shall be deemed for the purposes "of this Act to have been deducted by the employer from his "remuneration."

One of the objects of the Act is to ensure that the payments shall be in cash; it is very similar to the provisions of the Truck Acts, and deductions may not be made from a man's remuneration except in so far as the Order may provide.

Our attention has been called to a provision that if board is provided a certain sum may be deducted in respect of that board, and I have no doubt that this subsection was put in by Parliament to prevent evasion. In this particular case, I do not think that there has been an attempt to evade the Act. It was provided that the manager should be paid a minimum wage and he was paid a minimum wage—in fact, he was generally paid rather more than the minimum wage; but it is said that what has happened here is caught by the words of the subsection; and if it is, we are bound to give effect to it.

In my judgment, it is impossible to say that this catering agreement did not confer on the manager a benefit or advantage. It gave him the benefit of carrying on a catering business and of retaining the profits less £3 a week. I cannot see that that benefit or advantage was not provided in connexion with the employment; it clearly was. The agreement under which he was appointed catering manager was not only made on the same day as the agreement which appointed him manager, but the principal agreement, that is to say, the agreement appointing him manager, is referred to in the catering agreement, where it is provided that the catering agreement is to be read with the

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Lord Goddard C.J.

principal agreement, although it is said to be subsidiary thereto. Under the catering agreement he is to pay £3 a week to his employer, not under any circumstances, but provided that he makes profits; and he did pay £3 a week.

The words of section 10 (3) are: "... any sum paid by the "worker in respect of those benefits or advantages"—and the £3 was clearly for a benefit conferred on him for being a caterer —"shall be deemed for the purposes of this Act to have been "deducted by the employer from his remuneration." In this particular case this section, which was no doubt put in to prevent evasion, works a hardship on the employer, although there has been no evasion of the Act at all. Indeed, it was conceded by Mr. Cooke, and conceded rightly in my view—although I am not deciding this point since the Minister might take some different view and might consider it hereafter—that if this agreement had been differently worded to produce the same result, that is to say, if it had provided that the manager was to pay over all the profits of the catering business to his employers who were then to return the profits to him less £3, that would not be caught by the Act. If that is so, it seems a very unfortunate situation and one which possibly the Minister might think fit to remedy by altering the wages schedule. We are not criticizing the act of the Ministry because it is their duty to see that this Act is obeyed; neither are we criticizing the provisions of subsection (3) because it is very often necessary to include such a provision to prevent evasion; but in this particular case it seems that the manager was not only receiving his minimum wage in cash, but receiving more than his minimum wage. By reason of the wording of this section, however, the transaction is caught by the concluding words.

The test in such cases apparently would be whether or not the agreement such as the catering agreement was a separate and independent agreement, or whether the two documents can be looked at as entirely separate contracts. That was the view taken by the Court of Appeal in *Long Eaton Co-operative Society* v. *Smith*,[1] which was a case concerning agricultural wages, and where the words of the relevant Act were not so strong as they are in the Catering Wages Act, 1943. In that case an agricultural worker was engaged at a minimum wage, and was paid the right wage, but he also asked to be accepted by his employers as the tenant of a cottage which was not a tied farmhouse cottage in the ordinary sense, but a cottage quite independent of the farm. He agreed to pay £1 a week. The Court of Appeal held that that payment could not be looked upon as a deduction from his wages because they regarded the two contracts as entirely separate, there being a relationship of landlord and tenant so far as the cottage was concerned and a relationship of employer and workman so far as the employment was concerned.

[1] [1949] 2 K.B. 144; [1949] 1 All E.R. 633.

I cannot take that view of these two agreements. In my opinion they are really one and the same agreement although contained in two different documents which must be read together. Although it may be possible to have an independent caterer in a refreshment house of this type carrying on an independent business, I am clearly of opinion that in this case the manager was carrying on the business qua manager. He was the manager and as the manager he was given the benefit of providing food and taking the profits less £3 a week, but, by reason of the words of section 10 (3) the fact that he paid the £3 a week must, in my opinion, be treated as a deduction from his minimum wage.

In those circumstances, the magistrates came to a right decision, and this appeal fails.

Byrne J. I agree.

Parker J. I agree. The short point is whether the undoubted benefit with which the manager was provided by the employers was in connexion with his employment. It seems to me that whether in any particular case a benefit is or is not provided in connexion with the employment or forms part of an entirely separate bargain must be a question of fact.

In this case one of the contentions raised before the magistrates by the respondent was that, in determining the remuneration paid to a worker, one must have regard to the arrangement between the employer and the worker as a whole and to its final effect. It seems to me perfectly clear from the findings of the magistrates that they came to the conclusion that the two agreements were not separate bargains but part and parcel of one single transaction. Accordingly, that being a finding on a question of fact, it cannot be challenged unless it is shown that they have misdirected themselves in law or that there was no evidence on which they could so find. So far from that being the case, when one looks at these agreements and sees that the second catering agreement was made subsidiary to the principal agreement, when one sees that the employers were not content for this man to remain as caterer once he ceased to be manager, and when one appreciates that the offer of becoming caterer was really an inducement to this man to become manager, it seems to me quite impossible to say that the benefit provided was not in connexion with his employment.

Appeal dismissed.

Solicitors: *Faithfull, Owen, Wright & Armstrong; Solicitor, Ministry of Labour and National Service.*

[COURT OF APPEAL.]

C. A.

1954
Jan. 12, 13, 25.

Somervell and Birkett L.JJ.; Vaisey J.

*NORRIS *v.* W. MOSS & SONS LD.

[1952 N. 306.]

Building—Safety regulations—Scaffold—Upright not vertical—Remedial work by plaintiff—Injured by own negligence—Causation—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 10 (1) (*a*).

Causation.

The plaintiff, an employee of the defendants, had, together with another workman, been ordered by the foreman to ascend the tubular scaffolding already erected at a building for the purpose of adding another lift or platform. On reaching the top lift already erected the plaintiff noticed that one of the uprights was not vertical but was inclining away from the building, in breach of regulation 10 (1) (*a*) of the Building (Safety, Health and Welfare) Regulations, 1948.[1] He thought it his duty, as a competent scaffolder, to remedy the defect, but, as was found by the trial judge, he did so in a way which caused the putlogs that attached the scaffold to the wall to be drawn out and the platform on which he was standing collapsed, the plaintiff falling and suffering injury:—

Held, that the plaintiff's injury was caused solely by his own negligence and not by the defendants' breach of regulation 10 (1) (*a*).

Decision in *Sexton* v. *Scaffolding (Great Britain) Ld.* [1953] 1 Q.B. 153; [1952] 2 All E.R. 1085 considered.

Decision of Stable J. affirmed.

APPEAL from Stable J., sitting at Manchester Assizes.

The plaintiff was a scaffolder in the employ of the defendants, a firm of building contractors, who were engaged in erecting a new building and for that purpose had erected two lifts of tubular scaffolding, reaching a height of approximately 20 feet. On the day in question the defendants' foreman ordered the plaintiff and another workman to ascend the scaffold and add another lift of 5 feet. On reaching the top of the existing scaffolding the plaintiff noticed that the existing scaffolding did not comply with regulation 10, in that one of the uprights was not vertical but was inclining away from the building. The plaintiff, a competent scaffolder, considered it his duty (rightly, as the trial judge found) to remedy the breach, but proceeded to do so in such manner that the putlogs were pulled out from the wall of the building and the platform on which he was standing collapsed and he sustained injury. The plaintiff claimed damages from the defendants, alleging common law negligence and also a breach of regulation 10 of the Building (Safety, Health and Welfare) Regulations, 1948.[1]

Stable J. dismissed the action. He described the method used by the plaintiff to remedy the defect in the scaffolding as

[1] Building (Safety, Health and Welfare) Regulations, reg. 10 (1): "Standards or uprights of scaffolds "should be—(*a*) Where practicable "vertical or slightly inclined towards "the building."

fantastically wrong, and held that the plaintiff's injuries were solely caused by his own negligence.

The plaintiff appealed.

Fenton Atkinson Q.C. and *L. J. Antelme* for the plaintiff.
R. S. Nicklin for the defendants.

Cur. adv. vult.

SOMERVELL L.J. This is an appeal from a decision of Stable J. in an action in which the plaintiff claimed damages against his employers for personal injuries. He alleged a breach of the defendants' duty at common law, and also a breach under the Building (Safety, Health and Welfare) Regulations, 1948. The case concerns scaffolding. The defendants were erecting a new building and put up their own scaffolding. There are a number of regulations concerning scaffolding and this was of the type which had to be rigidly connected with the building. There were vertical and cross pieces and the pieces affixed to the building were known as putlogs. The regulation relied on, or mainly relied on, is regulation 10 (1) (*a*), which provides that the standards or uprights of scaffolds shall be practically vertical or slightly inclined towards the building. [His Lordship stated the facts and continued:] There was on the judge's finding no difficulty about putting the scaffolding right and if the correct procedure had been followed there was no danger to anyone concerned.

The judge set out the proper procedure and continued: "Instead of that, before this safety strut was inserted, for some "inexplicable reason he unfastened the couplings of the first plat-"form, on which he was standing, and proceeded to try to pull "this strut back into the vertical without having unfastened the "couplings at the base and middle. The result was that as he "pulled it towards him inevitably there was created a sort of "bend in this stand and when the pull was released it shot back "dragging the putlogs out of the support of the brick wall, and "thus causing the platform to collapse and the plaintiff to fall." The judge describes this method as fantastically wrong.

When the trial judge was considering the issue at common law he referred to the fact that the foreman had noticed this upright on the previous day and had done nothing about it. He held that the foreman should have had the standard attended to before sending people up to raise the lift. "But this omission," he said, "on the part of the foreman, had nothing to do with this "accident, but it so happened that the plaintiff observed the "position of the standard and was proceeding to do that very "thing, though in the wrong way, which he would have been "doing had the foreman done his duty and directed him to do it." The judge was finding, and I agree, that the cause of the accident was the method by which the plaintiff set about this work and not the failure of the foreman to take steps.

The claim was based on an alleged breach of regulations, and I have recited the most important. The defendants' primary

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defence was based on causation. It was submitted that the departure from the vertical of the standard was not the cause of the accident for the purpose of liability: it was merely the occasion of the work which the plaintiff took upon himself to do. During the course of the hearing below reference was made to the decision of this court in *Sexton* v. *Scaffolding (Great Britain) Ld.*[1] In that case an accident had happened while some scaffolding was being dismantled and this court held that the regulation relied on did not apply to the work of dismantling at the time when the accident occurred. The principle is easily illustrated. Regulation 9 provides that all scaffolds shall be kept secure or placed in position so as to prevent accidental displacement so far as is practicable. An occupier clearly could not be convicted of a criminal offence on the ground that the scaffold or part of it had not been so secured if he was in process of erecting it and doing at the proper time that which the regulation provides is to be done. As Hodson L.J. put it, certain of the regulations are only applicable to a scaffold in use and cannot be applied to the process when it is being put up so as to comply with the regulations, or to dismantling. The judge thought that that case covered the present circumstances.

I have come to the conclusion that the claim fails on the point of causation. On the judge's findings of fact it seems to me plain that the sole cause of the accident was the method which the plaintiff unfortunately adopted in carrying out the work. With regard to the principle of *Sexton's* case,[2] it seems to be clear that it could and would apply in some cases to the process of keeping the scaffolding in accordance with the regulations in between erection and dismantling. I will assume—and this may be the case here—that scaffolding, properly erected, requires attention as a result of the weather or inevitable wear and tear in order to bring it back into a state in which it accords with the regulations. As soon as the defect appears men are no longer allowed to use it as a scaffold and a proper repairing squad is sent up to repair it. I cannot think that it could be said that a criminal offence had been committed.

I feel, however, some difficulty about the present case, and I therefore wish to make no concluded observations on the application of the principle in *Sexton's* case[2] to the circumstances here. If that had been the only point, I think that the fact that the foreman had noticed the defect and done nothing and knowing of the defect had sent the plaintiff up on a job on which he would have had to use this piece of scaffolding as a scaffold, might have been relied on, if I may put it in this way, as ousting the application of the principle in *Sexton's* case.[2] It was suggested that one sentence of Stable J.'s judgment indicated that apart from his application of *Sexton's* case,[2] he would have held the

[1] [1953] 1 Q.B. 153; [1952] 2 All E.R. 1085.

[2] [1953] 1 Q.B. 153.

defendants liable to some extent, with a substantial contribution from the plaintiff due to his negligence. There is a sentence that supports that suggestion. On the other hand, having regard to what the judge said about the common law liability, I think that he would probably have come to the same conclusion as I have on the question of causation, if he had felt it necessary to decide the point with reference to the alleged breach of regulations.

I would therefore dismiss the appeal.

BIRKETT L.J. The plaintiff seeks to reverse the decision of Stable J., given in favour of the defendants in the plaintiff's action claiming damages for personal injuries suffered by him in the course of his employment by the defendants on August 15, 1950. [His Lordship stated the facts and continued:]

By regulation 10 (1) of the Building (Safety, Health and Welfare) Regulations, 1948, it is provided that "standards or "uprights of scaffolds shall be (*a*) where practicable, vertical or "slightly inclined towards the building." It is clear, therefore, that on August 15 there was a breach of the regulations on the part of the defendants. Indeed, it is also clear on the evidence that the foreman when making his weekly inspection had noticed that the standard was out of the vertical; but taking the view that it did not affect the safety of the scaffold in any way he did nothing about it; and it was with this knowledge that he instructed the plaintiff to add the extra platform or "lift" at the higher level. When the plaintiff reached the existing platform he too noticed that the standard was out of the vertical. He therefore decided for himself that he would correct the fault before going on to erect the higher platform. The judge found that this was a perfectly proper thing to do, and that he was quite competent to do it.

There was a perfectly safe way to carry out this work which the judge has described; but what the plaintiff did was described by the judge as "quite inexplicable, and nobody has given a "really satisfactory explanation, and indeed, he himself was "quite unable to provide an answer or an acceptable explanation "of the way he went to work." After describing the proper method of doing the work the judge said: "Instead of that, "before this safety strut was inserted, for some inexplicable "reason he unfastened the couplings of the first platform on "which he was standing, and proceeded to try to pull the strut "back into the vertical without having unfastened the couplings "at the base and middle. The result was, as he pulled it "towards him that inevitably there was created a sort of bend "in this standard, and when the pull was released it shot back "dragging the putlogs out of the support of the brick wall and "thus causing the platform to collapse and the plaintiff to fall ". . . that method of carrying out the operation was fantastically "wrong. Everybody agreed on that point. . . ."

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In this state of affairs the judge had to decide whether the defendants were liable to the plaintiff, either at common law or because of some breach of their statutory duty. He decided that there was no liability at common law because the foreman's omission to tell the plaintiff of what he had discovered a few days before August 15 had no bearing on the accident, and the plaintiff had discovered the same thing for himself. If the plaintiff had not discovered it and gone on to erect the higher platform, and an accident had occurred because of the leaning standard, then it would appear that the judge would have found the defendants to blame both at common law and because of breach of statutory duty. But the plaintiff, having discovered the fault for himself, was in fact engaged in repairing the fault, though in an improper way, when the accident occurred; and the silence of the foreman had nothing to do with the accident at all.

With regard to the alleged breach of statutory duty, the judge, on the authority of *Sexton* v. *Scaffolding (Great Britain) Ld.*,[3] decided that regulation 10, relied on by the plaintiff, did not apply; and he therefore dismissed the plaintiff's claim. He added: "I think in any event there was substantial negligence "on the part of the plaintiff in the way he set about this "particular job." It seems to me that this appeal can be decided if a clear answer can be given to the question: what was the cause of this accident? The evidence points unmistakably to the cause of the accident being the improper manner in which the plaintiff endeavoured to straighten the leaning standard. Had he performed that work in the natural and proper manner there would have been no accident at all.

If that is right, can it be said that the leaning standard, which constituted a breach of statutory duty, contributed in any way to the plaintiff's injury and damage? It is obvious, of course, that if the standard had not been out of place the plaintiff would never have attempted to set it right, and in that sense the leaning standard was concerned with the accident. But I cannot think that the leaning standard was in any sense or in any degree the cause of the accident; it was the act of the plaintiff, and that alone, which brought about the unfortunate injury. If it is to be said that there was here a breach of statutory duty (as there was) and because of its existence it must be regarded as a contributory cause, in the sense that without it the plaintiff would never have attempted to put it right, and would never have been injured, though had he acted prudently and properly there would have been no accident at all, then the liability of the defendants would be purely nominal in my opinion; but in my view the sole cause of this accident was the negligence of the plaintiff and the breach of statutory duty made no contribution. In these circumstances it is not necessary to discuss the question whether regulation 10 of the

[3] [1953] 1 Q.B. 153.

Building Regulations applies, although on the reasoning which governed *Sexton's* case [4] I should incline to say that it did not.

VAISEY J. I am of the same opinion. It is sometimes difficult to decide whether an antecedent act or event is the cause, or one of the causes, of a subsequent event; or whether, on the other hand, it is merely one of the surrounding circumstances in which, or part of the background in front of which, the subsequent event has taken place. Here it seems to me that the accident to the plaintiff was due entirely to his own negligence in doing a piece of work, well within his competence, in a manner which the judge described as "fantastically wrong." True it is that it was upon the leaning standard that the work in question had to be carried out, but the fact that the standard was in that condition cannot in my judgment be treated as being in any reasonable sense a cause of the accident. It is not, I think, admissible to construct chains of causation in a case such as this where a single cause, simple, obvious and amply sufficient to account for what happened is to be found in the inexcusably careless behaviour of the workman himself. The argument in the old fable in which the loss of a kingdom is traced back to an originating and ultimate cause in the loss of a single nail from a horse's shoe does not commend itself to me as adaptable to this case. I concur in the reasoning of my Lords following that of Stable J. and I agree that this appeal fails, and should be dismissed.

Appeal dismissed.

Solicitors: *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester; Theodore Goddard & Co. for Buckley, Pidgeon & Co., Liverpool.*

A. W. G.

[4] [1953] 1 Q.B. 153.

[QUEEN'S BENCH DIVISION.]

* FISHER v. BARNETT & POMEROY (BAKERS) LD.

1954
Jan. 20.

Lord Goddard C.J., Byrne and Parker JJ.

Food and Drugs—Act or default of third person—Practice—Sale of food unfit for human consumption—Proceedings against manufacturer—Effect of Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *s.* 9 (2).

Section 9 (2) of the Food and Drugs Act, 1938, is purely procedural and does not create a substantive offence separate and distinct from that created by section 9 (1) (*a*). Accordingly, where manufacturers are prosecuted under section 83 (3) in respect of an offence against section 9 due to their act or default, the prosecutor cannot be put to his election whether he should proceed under subsection (1) (*a*) or subsection (2).

[Reported by Miss C. J. ELLIS, Barrister-at-Law.]

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CASE STATED by the chief metropolitan magistrate sitting at Bow Street.

The prosecutor, Stanley George Fisher, a sanitary inspector for the metropolitan borough of Holborn, preferred an information against the defendants under section 83 (3) of the Food and Drugs Act, 1938,[1] stating that Leigh Bakeries Ld. on June 24, 1953, sold to Eastern Carpets Ld., a roll which was intended for, but unfit for human consumption in that the roll contained part of a cigarette contrary to section 9, and that he was reasonably satisfied that the offence was due to the act or default of the defendants and that Leigh Bakeries Ld. could establish a defence under section 83 (1).

At the hearing before the magistrate, before the defendants were called upon to plead to the charge, it was contended on their behalf that the proceedings were brought under section 9, which contained two subsections, under either of which the proceedings could have been brought, and that as the course taken by the defendants might differ according to which subsection was being used, the prosecutor should elect whether he was proceeding under subsection (1) (*a*) or subsection (2). On behalf of the prosecutor it was contended that the prosecution was brought under section 83 (3) but that section 9 (1) (*a*) had to be relied upon as that was the one which created the offence.

The magistrate, being of the opinion that the prosecutor should elect and that his contention should be taken as an election to proceed under subsection (1) (*a*), heard the information and found the following facts: the defendants sold to Leigh Bakeries Ld. a bread roll, with others, which was unfit for human consumption in that it contained the end of a smoked cigarette. Leigh Bakeries Ld. sold the roll, with others, to Eastern Carpets Ld. Eastern Carpets Ld. had the roll in their possession for the purpose of preparation for sale at their canteen, but when they discovered that it was unfit for human consumption on completion of the preparation, they withdrew it from

[1] Food and Drugs Act, 1938, s. 9: "(1) A person who—(*a*) sells, or "offers or exposes for sale, or has in "his possession for the purpose of "sale or of preparation for sale; . . . "any food intended for, but unfit for, "human consumption shall, subject "to the provisions of this section, be "guilty of an offence. (2) Where "food in respect of which an offence "under paragraph (*a*) of the pre-"ceding subsection has been com-"mitted was sold to the offender by "some other person, that person also "shall, subject to the provisions of "this section, be guilty of an "offence."

S. 83 (3): "Where it appears to "the authority concerned that an "offence has been committed in "respect of which proceedings might "be taken under this Act against "some person and the authority are "reasonably satisfied that the offence "of which complaint is made was "due to an act or default of some "other person and that the first-"mentioned person could establish a "defence under subsection (1) of this "section, they may cause proceedings "to be taken against that other "person without first causing pro-"ceedings to be taken against the "first-mentioned person. In any "such proceedings the defendant may "be charged with and, on proof that "the contravention was due to his "act or default, be convicted of, the "offence with which the first-men-"tioned person might have been "charged."

sale. At all material times up to its withdrawal from sale the roll was intended for human consumption by an ultimate purchaser. At the end of the prosecutor's case it was submitted on behalf of the defendants that there was no case to answer. It was contended that the word "sells" in section 9 (1) (*a*) had to be interpreted to mean "sells by retail" or at least "makes a "sale other than the sale contemplated by section 9 (2)," since there was a presumption that Parliament enacted nothing in vain, and if a sale of the type described in section 9 (2) were an offence under section 9 (1) (*a*), then section 9 (2) would be otiose and unnecessary. Inasmuch as Eastern Carpets Ld. had the roll in their possession for the purpose of preparation for sale, and inasmuch as the relevant Food and Drugs authority had made no adjudication under section 83 (3) in respect of Eastern Carpets Ld., it must be taken for the purposes of the present proceedings that Eastern Carpets Ld. had committed an offence against section 9 (1) (*a*) in respect of the roll. In the premises the offence (if any), committed by Leigh Bakeries Ld., with which offence the defendants were charged by virtue of section 83 (3), was an offence against section 9 (2) and hence outside the provisions of section 9 (1) (*a*). The defendants were gravely prejudiced by being charged under section 9 (1) (*a*) and not under section 9 (2), in that they were deprived of putting forward a defence under section 9 (3), that defence not being available to persons charged with offences under section 9 (1) (*a*).

The magistrate dismissed the information, being of the opinion that in the premises, the prosecution was misconceived in that contrary to the intention of the Act, the proceedings were brought under section 9 (1) (*a*) instead of section 9 (2).

The prosecutor appealed.

Paul Wrightson for the prosecutor.
Brian J. P. Galpin for the defendants.

The following cases were cited in argument: *Lindley* v. *Horner & Co. Ld.*[2]; *Reg.* v. *Industrial Disputes Tribunal, ex p. Technaloy*[3]; *Newman* v. *Jones.*[4]

LORD GODDARD C.J. referred to the facts and continued: The sanitary inspector had to decide against whom to take proceedings in respect of the offence committed, and he took proceedings against the bakers who manufactured the roll. He did that under section 83 (3) of the Food and Drugs Act, which is generally called the third party section and which provides that where the appropriate authority is satisfied that the person who actually sold the bread would have a good defence under

[2] (1950) 66 T.L.R. (Pt. 1) 296; [1950] 1 All E.R. 234.
[3] [1953] 1 W.L.R. 1418; [1953] 2 All E.R. 1338.
[4] (1886) 17 Q.B.D. 132; 2 T.L.R. 600.

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the section—a defence, for instance, that he had been supplied with the goods by somebody else and had passed them on as supplied to him, and that he had not been guilty of any negligence or interference with the article—then the person who supplied the bread in the first instance is liable. As this was a cigarette end, it must have got into the roll in the course of manufacture. He therefore decided that he would prosecute the bakers.

Section 83 is the section which really matters in this case—and I think that the mistake which has been made is that much too much attention was paid to section 9 (1) (*a*). [His Lordship read section 83 (3) and continued:] This court has said on more than one occasion that in the case of a manufacturer or wholesaler, the mere fact that he sold the goods may be an act or default; it generally is. The offence which had been committed here by someone was selling bread which was unfit for consumption, and that is an offence under section 9 (1) (*a*). Therefore, having established that that is the offence, if the local authority are satisfied that some person other than the actual seller is in fact responsible for the condition of the goods, they can proceed against that person, as they did in this case. The only question, therefore, was whether the bread sold was unfit for human consumption and whether, in those circumstances, the defendants as the manufacturers were liable. That is exactly what the information charges.

At the hearing an application was made to the magistrate to put the prosecutor to his election whether he would proceed under section 9 (1) (*a*) or under subsection (2), and it was said that he ought to proceed under subsection (2) because if he did not he would deprive the defendants of a defence.

The prosecutor quite rightly, first of all, took the objection that he was not bound to elect, and I do not think that he was. I do not think that there was any question of election. The summons charged selling; that was the offence. Section 9 (2) is concerned with an entirely different matter. It is a procedural section. [His Lordship read section 9 (2) and continued:] That subsection simply means that where A is prosecuted for the offence of selling unfit food and that offence has been proved against him, the person who supplied that food to A may also be prosecuted, and all that it is necessary to show is that he supplied the food in respect of which A has been convicted. It is true that he is given a defence or may be given a defence if he can prove that the food when he sold it to A was in perfectly good order. Take, for instance, fish or game. The person who supplies fish to the fishmonger may have supplied it when it was in good order, but if it is not sold by the fishmonger until it has gone bad, then, of course, the person who supplied it would not be guilty; but that is not this case. I think that where the matter has gone wrong is that undue attention was paid to section 9 (2)—which has nothing to do with this case—and subsection (3), whereas all that mattered here was section 9 (1)

(*a*) and section 83 (3). The magistrate held that no offence had been committed. I think that the case must go back to him with an intimation that the information was a perfectly good information, that the offence was proved by the prosecution under the combined sections, and that it is therefore for him to proceed to hear any evidence the respondents wish to bring forward or any submissions they wish to make; and the appellant must have the costs of this argument.

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BYRNE J. I agree.

PARKER J. I agree.

Appeal allowed.

Solicitors: *F. S. Chapple; Lethbridges.*

[COURT OF APPEAL.]

* HARTLEY *v.* MAYOH & CO. AND ANOTHER.

C. A.

1954 *Jan.* 14, 15.

Singleton, Jenkins and Hodson L.JJ.

[1951 H. No. 2884.]

Invitor and Invitee—Dangerous premises—Causation—Injury caused by concurrent causes—Factory—Fire—Failure to turn off main switch —Other switch turned off—Wires transposed unknown to occupier —Fireman electrocuted—Whether occupier liable—Relevance of statutory duty regarding switches.

Factory — Persons benefitted by regulations — "Person employed" — Fireman electrocuted in factory premises while fighting fire — Mains switch not conforming to regulations—Firemen not "persons "employed"—No right of action—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 60 (*as amended by Factories Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 55), *s.* 12)—*Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts,* 1901 *and* 1907 (*S.R. & O.* 1908, *No.* 1312).

Factory—Electricity—Switch. Factory—Common law duty—Relevance of regulations. Fire Brigade. Causation. Regulations . . . 1907.

The Factories Act, 1937, s. 60, as amended by the Factories Act, 1948, s. 12, gives the Secretary of State power to make regulations where he is satisfied that the nature of the work or plant in factories is "of such a nature as to cause risk of bodily injury "to persons employed. . . ."

Fire brigade officers summoned to a fire in factory premises asked the factory manager to direct them to the main electric switch in order to cut off all current to the premises. This, unknown to the manager, consisted of two small tumbler switches, which both he and the firemen ignored; but he directed them to other master switches which were switched off, and which would have effectively cut off all current to that part of the premises where the fire was, had not two wires been transposed at a point in the wiring system, that transposition being the responsibility of the area electricity

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authority. Accordingly the current remained in the wires throughout the circuit so long as the main switch was on. A fire officer was electrocuted in the fire.

In an action by his widow, Barry J. held the electricity authority liable as to 90 per cent. of the damages. He held the occupiers of the factory liable for the remaining 20 per cent. (1) as invitors at common law and (2) for breach of regulation 9 (relating to main switches) of the electricity regulations of 1908. On appeal by the occupiers:—

Held, first (affirming Barry J.) that that regulation showed that it was the duty of the occupier of a factory to know his main switch; that the manager ought to have known that the two tumbler switches constituted the main switch and the danger to firemen if all current was not cut off; that that constituted an unusual danger on the premises against which the occupiers as invitors ought to have protected or warned the firemen, as invitees; that though the manager neither knew nor ought to have known that the wires were transposed, his original negligence in relation to the main switch persisted to cause the fireman's death; and that the occupiers were accordingly liable at common law.

Held, secondly (reversing Barry J.) that, though the placing of the tumbler switches constituted a breach of the regulations, the deceased did not belong to the class of "persons employed" for whose benefit the regulations were enacted, and, therefore, the plaintiff could not maintain a civil action successfully against the occupiers for breach of statutory duty.

Appeal from Barry J.

On September 24, 1950, a Sunday morning, the Salford Fire Brigade was summoned to a fire which had broken out in the upper portion of the small factory premises of Mayoh & Co., pickle manufacturers, the first defendants. On arrival at the scene, Divisional Officer Reginald Dingle Hartley and sub-officer Bigland, following the invariable rule for members of fire brigades, went to locate the main electric switches in order to cut off the electric supply to the premises, and so avoid the risk of firemen in wet clothes being electrocuted. Bigland was directed to the main switchboard by the factory manager, Holland. The fire officer switched off two ironclad and obvious master switches on the left of the board, but paid no attention and was not directed to two small tumbler switches on the right of the board which were unconnected by any form of link-bar, but which were in fact the main switches for the whole premises. The fire officers next ensured that a master switch, which controlled the whole lighting circuit to that part of the factory where the fire was, was at the "off" position, and dealt similarly with two individual switches for that part of the building, so that in the normal course, there should have been no electric current in that part of the premises, even though the main switch had not been turned off.

Several of the firemen having received minor shocks, Bigland asked the manager whether there were any other switches, and the manager assured him that there were not, but went back to the switchboard with him to ascertain that the ironclad switches,

which he believed to be the main switches, were off. Meanwhile Divisional Officer Hartley had entered a blazing room, and shortly afterwards was found, lying in the fire with an electric wire in his hand; he died almost at once.

His widow brought an action under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, against the first defendants as occupiers, and the second defendants, the North-Western Electricity Board, as the electricity authority, claiming damages for negligence at common law and breaches of statutory duty under the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907 (S.R. & O. 1908 No. 1312, as amended by S.R. & O. 1944, No. 739), and the Electricity Supply Regulations, 1937, regulation 25 (*a*).

Barry J. found that the death was due to two causes, in the absence of either one of which the deceased would not have met his death: (1) that the electricity supply had not been cut off because no one had realized that the two tumbler switches controlled the circuit; he found, however, that the wires in the upper part of the building should have been "dead" as they should have been disconnected by the other switches which were all at the "off" position, but for the second cause of the accident which was (2) that certain connexions between the two tumbler switches and the electricity meter and the neutral phase wire on the switchboard—connexions for which the electricity authority was wholly responsible—had at some time unknown been transposed, with the result that the neutral wire remained "live" throughout the circuit. The judge found that the accident could not have happened if the tumbler switches had been in the "off" position, nor could it have happened if the current had not been flowing through the neutral wire.

Barry J. held that the occupiers of premises of this kind ought to have been aware of the way in which the main supply to the lighting and power circuits could be switched off, and that they were in breach of their duty at common law to warn the fire officer, an invitee, of that which constituted an unusual danger on their premises; alternatively, they should have rendered their premises free of that unusual danger by fitting a link-bar between the tumbler switches or fixing a notice nearby indicating that they were the main switches. The judge also held that the occupiers were in breach of the statutory regulations, in particular regulation 9, holding that, once an act or omission caused danger to "persons employed" on the premises, the right to protection given by the Factories Act, 1937, s. 60,[1] as amended by the Factories Act, 1948, s. 12,[1] extended to other persons lawfully on the premises.

[1] Factories Act, 1937, s. 60: "(1) "Where the Secretary of State is "satisfied that any manufacture, "machinery, plant, process, or de-"scription of manual labour, used in "factories is of such a nature as to

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He held that the second defendants were also liable both at common law and under the Electricity Supply Regulations, 1937, regulation 25 (*a*), and gave judgment for the plaintiff for £10,049, apportioning the damages as to 10 per cent. against the first defendants and as to 90 per cent. against the second defendants. The occupiers appealed against that apportionment.

Neville J. Laski Q.C. and *J. W. Da Cunha* for the occupiers.

H. I. Nelson Q.C. and *C. M. W. Elliott* for the Electricity Board.

D. J. Brabin Q.C. and *Philip Curtis* for the plaintiff.

The following cases were cited in the argument: *Yorkshire Dale Steamship Co.* v. *Minister of War Transport* [2]; *Davies* v. *Swan Motor Co. (Swansea) Ld.* [3]; *Stimpson* v. *Standard Telephones and Cables Ld.* [4]; *Groves* v. *Wimborne (Lord)* [5]; *Monk* v. *Warbey* [6]; *Glasgow Corporation* v. *Muir.* [7]

SINGLETON L.J. stated the facts, and continued: The second defendants, the North-Western Electricity Board, have not appealed against the judgment which was given against them, and that is not surprising, for it is found by the judge that they were responsible for the transposition of the wires. The judge said: "I am, however, forced to the conclusion that, on a strong balance "of probability, the original crossing of the two leads from the "tumbler switches to the board's apparatus was the fault of "someone, some unknown employee of the board. This fault "was committed on some previous occasion which it is wholly "impossible to identify"; and he gave other reasons for the conclusion which he reached.

When any work of importance was done to the electricity system in this factory a representative of the board, or of their predecessors, carried out a test; and if there had been a proper test, this defect, which must have been of long standing, must have been found. The tumbler switches indeed constituted what ought to have been regarded as the main switch. A main switch ought to have an iron bar across it, so that it would be recognized as a main switch; but when one has merely two tumbler switches with the appearance these two had it is unlikely that they would

"cause risk of bodily injury to per-"sons employed in connexion there-"with, or any class of those persons, "he may, subject to the provisions of "this Act, make such special regu-"lations as appear to him to be "reasonably practicable and to meet "the necessity of the case."

Factories Act, 1948, s. 12: "(1) "In subsection (1) of section 60 "of the principal Act after the word "'plant' there shall be inserted the "words 'equipment, appliance' and "for the words 'persons employed in "'connexion therewith' there shall "be substituted the words 'the per-"'sons employed'; . . ."

[2] [1942] A.C. 691; 58 T.L.R. 263; [1942] 2 All E.R. 6.

[3] [1949] 2 K.B. 291; 65 T.L.R. 278; [1949] 1 All E.R. 620.

[4] [1940] 1 K.B. 342; 56 T.L.R. 90; [1939] 4 All E.R. 225.

[5] [1898] 2 Q.B. 402; 14 T.L.R. 493.

[6] [1935] 1 K.B. 75; 51 T.L.R. 77.

[7] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.

be recognized by anyone, and certainly not by a fire brigade officer coming to the factory, as a main switch. From what I have said it is clear that an appeal on the part of the Electricity Board could have had no hope of success. The main responsibility, if not the whole of the responsibility, for this accident lies on the board or on its predecessors. There had been work done which should have been followed by a test some time in the late 30's, I think, again in 1946, and again in 1950. Witnesses from the board said that the system of having a main switch of this kind was obsolete, and that their practice was to point that out to occupiers. They had not pointed out anything of that nature to the occupiers of this factory, which is a matter for great regret.

Mr. Laski, on behalf of the first defendants, submitted to this court that the whole of the responsibility arising from the death of Hartley rested on the board, and that no negligence was proved against his clients, the occupiers of the premises, nor was there any breach of statutory duty by them. In any event, he said, if there was a breach of statutory duty, the officer who was killed was not a person for whose benefit the regulations were made, and an action for breach of statutory duty would not lie on the part of his widow.

The regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, are preserved for present purposes by section 159 of the Factories Act, 1937. The power to make regulations now is given by section 60 of the Act of 1937: "(1) Where the Secretary of State is satisfied that any "manufacture, machinery, plant, process, or description of "manual labour, used in factories is of such a nature as to cause "risk of bodily injury to persons employed in connexion there-"with, or any class of those persons, he may, subject to the "provisions of this Act, make such special regulations as appear "to him to be reasonably practicable and to meet the necessity "of the case."

It is to be observed that the power to make the regulations is given when the Minister is satisfied that the work is of such a nature as to cause risk of bodily injury to "persons employed." Those words embrace the amendment made by section 12 of the Factories Act, 1948, prior to which time the power to make the regulations was given if the Minister was satisfied that the manufacture, etc., was of such a nature as to cause risk of bodily injury to persons employed "in connexion therewith."

I do not think that Hartley, who met with his death on this occasion, was a person for whose benefit the regulations could be made, or were made, and I do not think that an action lies for breach of statutory duty in this case.

A somewhat similar position arose in 1898 in *Groves* v. *Wimborne* (*Lord*),[1] and in each of the judgments in that case

[1] [1898] 2 Q.B. 402.

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the question was discussed as to whether the Factories Act, or a particular section of it, was passed in the interests of the public at large or of a particular class of persons. That appears from the judgment of A. L. Smith L.J.[2] and that of Rigby L.J.[3] and from that of Vaughan Williams L.J.[4] In my view Hartley was not one of the class of persons for whose benefit the regulations were made in that he was not a person employed. For that reason I do not think that any action for breach of statutory duty lies against the occupiers.

The regulation on which reliance was placed is regulation 9 of the regulations of 1908 which provides: "Where one of the "conductors of a system is connected to earth, no single-pole "switch, other than a link for testing purposes or a switch "for use in controlling a generator, shall be placed in such "conductor or any branch thereof."

It is agreed for the purpose of this appeal that the tumbler switches, as they were placed and as they were at that time, constituted a breach on the part of the occupiers of regulation 9. Though that breach does not, in my view, give the right to an action for damages for breach of statutory duty, I feel that regard must be had to it from another point of view. The occupier of a factory is in a different position from the occupier of a private house or flat. He is charged with certain duties under the Factories Acts, and under the regulations which are made under those Acts in so far as they affect factories. Regulation 9 put a duty in regard to a single-pole switch on the occupier of a factory. Thus it is clear that the occupier of a factory must know something about his switches; it seems to me that he ought to know where the main switch is. That is a matter for consideration when one has to deal with the claim made for damages for negligence at common law. It was said on behalf of the plaintiff against the first defendants: "You, Mayohs, are occupiers of a factory, the "premises on which the man Hartley went, and thus the ordinary "law with regard to invitor and invitee applies, and Hartley being "an invitee, using reasonable care on his part for his own safety, "was entitled to expect that you, the occupiers, should on your "part use reasonable care to prevent damage from unusual danger "of which you knew, or ought to have known"; and it was added that no warning was given of any unusual danger.

The unusual danger of which the occupiers knew, or ought to have known, was that their main switch, which consisted of two tumbler switches, was not indicated in the normal way. Holland, their manager, did not know that that was the main switch. The judge pointed out that if he knew that those switches did not serve any lighting points in the building, he was at least put on inquiry to see what they were. He had been there almost 20 years at the time of this fire; he did not know where the main switch in the building was, and when on the day of the fire the fire brigade

[2] Ibid. 407.
[3] Ibid. 413, 414.
[4] Ibid. 415, 416.

officers came on duty to the factory the manager, though he showed them the switches of which he knew, did not show them this main switch. For my part, I do not think that he can be heard to say that he was not negligent in that respect, for his duty as manager of the factory was to know where the main switch was.

Mr. Laski submitted that that did not matter; the real cause of this accident was the transposing of the two wires in connexion with the tumbler switches. That, said he, was what brought current into the neighbourhood of the fire and caused the death of Hartley; to which it was replied: Yes, but if the main switch had been indicated as a main switch, or if the fireman had been told it was the main switch, this accident would never have happened.

Barry J. said that he accepted the evidence of the many witnesses who told him that any fireman would assume that two unconnected tumbler switches controlled some lighting points, but not the main supply. There was no negligence, in other words, on the part of any officer of the fire brigade.

In dealing with the duty owed by an invitor to an invitee the judge said: "Stated at its very lowest, the duty of an occupier "of premises to his invitee is to use proper care to ensure that "his premises are free from any unusual danger, or, alterna- "tively, to give due warning of any unusual danger of which "he knows, or ought to know. With this standard in mind "I am quite satisfied that the first defendants failed to fulfil "their common law duties towards the deceased. It is, how- "ever, right to say this—I acquit them of any conscious default. "I am also far from satisfied that they ought to have known "that the polarity of the lighting system had been reversed by "the crossing of the leads between the tumbler switches and the "meter and neutral phase. On the other hand, I consider that "the occupiers of premises of this kind ought to have been "aware of the way in which the mains supply to the lighting "and power circuits could be switched off. I am fortified in this "view by the manager's evidence. He told me that he knew "that the two tumbler switches did not control any local light- "ing points. This should, I think, have put him on inquiry "as to their true function. Neither he nor anyone else in the "employment of the first defendants warned the deceased of "the unusual danger which existed in these premises for firemen "or other persons who might come into contact with the electric "wires, this unusual danger being, of course, the fact that the "lighting supply was controlled by a switch which was "not apparently a mains switch and that electric current could "circulate through the electric circuit when the only two "switches which appeared to be mains switches were turned to "the 'off' position. Put in another way, the first defendants "ought, I think, to have realized that the absence of any link- "bar between the two tumbler switches constituted an unusual

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"danger to persons in the situation of the deceased, against "which such persons clearly ought to have been warned. If "no warning was to be given, the first defendants should have "fulfilled their alternative duty; that is to say, they should "have rendered their premises safe and eliminated this unusual "danger by the very simple means of fitting a link-bar between "the two tumbler switches or fixing some label or notice in the "neighbourhood of the switches indicating that they controlled "the main lighting supply to the building." That is the way the judge put the case on the plaintiff's claim against the first defendants for negligence.

I was very impressed by the argument of Mr. Laski on this part of the case. It is extraordinarily hard on the occupiers, who may well have thought that they were entitled to rely on the visits from time to time of officers of the board, that they should be found guilty of negligence by reason of the fact that they had not pointed out the unusual danger which would have been avoided if the regulations had been carried out. The real danger was introduced by the transposing of the wires. I feel for myself that Barry J. might have reached a conclusion that, as the main responsibility was on the board, he might well have said that the whole fault was on them, as Mr. Laski submits.

[His Lordship considered the evidence and continued:]

I approach the matter in this way: Suppose that time had run in favour of the second defendants as a public authority before an action was brought, and the only defendants had been Mayoh & Co., and it had been proved that their manager did not know where the main switch was, but indicated to the fire brigade other switches as being the main switches: is it clear that an action against the occupiers in those circumstances would have failed? I do not think that it is. It would have been for the judge to make up his mind on the evidence whether negligence was proved or not. The judge arrived at the conclusion that he could not exonerate Mayoh & Co. entirely.

Mr. Laski reminded this court that this is a re-hearing, and that if we reach the conclusion that the judge was wrong we ought so to say. I am not satisfied that he was wrong in deciding that the occupiers of the premises were responsible to some extent. I have already said that I do not agree with the judge's finding that an action for damages for breach of statutory duty would lie in this case, but on the other part of the claim I feel that the appeal of Mayoh & Co. must be dismissed.

Jenkins L.J. I have found considerable difficulty in this case, but on the whole I have come to the conclusion that the judge's decision to the effect that the defendants, Mayoh & Co., are liable at common law to the plaintiff in respect of the accident to her husband ought not to be disturbed. I think that the defendant firm, in the person of their manager on the spot, ought to have known that the two tumbler switches in fact

constituted the main switch for the lighting circuit in this building. The manager ought to have known that in his capacity as the manager of this factory, particularly in view of the statutory obligation to their own workpeople owed under the Electricity Regulations. Further, the manager, as representing the defendant firm, ought to have known that this was not a normal or modern type of main switch, and that the men of the fire brigade would be likely to overlook the fact that it was a main switch, and to consider that by turning off the two power circuit main switches adjacent to the switchboard they had turned off the whole of the electric supply to this factory. Further, I think that the manager must be taken to have known that it would be highly dangerous for the firemen to proceed to deal with the fire unless all current was cut off from the building so as to prevent the risk to them of injury by electric shocks. In these circumstances, it seems to me that the manager ought to have known that the firemen here were exposed to an unusual danger consisting of the risk that, owing to the unusual and obsolete character of the main switch relating to the lighting circuit, they might seek to deal with the fire on the mistaken assumption that by turning off the two power circuit main switches they had effectively made the whole of the electrical system in the factory dead. That being so, under the ordinary law of invitor and invitee it was the duty of the defendant firm through their manager to protect the firemen from damage arising from this unusual danger, or to warn them of it. In actual fact he did neither of these things, and the result was that the current in the lighting circuit was not cut off at the main switch. So far, it seems to me, it would be reasonably plain that the judge was justified in holding the defendant firm liable. It is, however, still necessary to consider the effect on that conclusion of the circumstance that the master switch controlling all the lights in the upper part of the building (which was the seat of the fire) was turned off, so that if all the wiring in connexion with this system had been in proper order no current would have reached the upper storey by reason of the omission to turn off the two tumbler switches which constituted the main switch for the lighting circuit.

Mr. Laski has forcefully argued that inasmuch as this master switch would have effectively rendered dead the electric wires in the immediate vicinity of the fire if the wiring had been in order, it cannot be said that the manager's omission to see that the firemen understood which were the main switches caused, or contributed to, the death of Hartley to any extent. The true cause, he said, was the reversing of the phase wire and the neutral wire at the switchboard, which prevented the master switch from effectively cutting off the current.

It will be remembered that the judge in effect found it impossible to hold that the defendant firm or the manager knew, or ought to have known, of this reversing of the wires, and,

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accordingly, on Mr. Laski's argument, the true cause of the fatal accident to Hartley was an unusual danger of which it could not be said that the manager or the defendant firm knew, or ought to have known. I certainly would not differ from that finding. Nevertheless, in my view, the defendant firm cannot escape liability on account of the fact that the master switch was shut off.

I think that feature of the case should be looked at in this way: For the reasons I have endeavoured to state, there was negligence on the part of the defendant firm in the person of the manager, and that negligence had resulted in an omission to shut off the main switch of the lighting circuit. If the wires had not been crossed at the switchboard the circumstance that the master switch was shut off would have averted the consequences of that negligence, but inasmuch as the wires were crossed, or reversed, although that was not a circumstance of which the manager either knew, or ought to have known, nevertheless the result was that the consequences of the original negligence did operate; and accordingly, although, as I have said, I regard this as a difficult case and I think that it is very near the line, I am on the whole of opinion that the judge's conclusion on this aspect of it ought not to be disturbed.

I agree that the existence of the statutory obligation under regulation 9 of the Electricity Regulations of 1908 which provides: "Where one of the conductors of a system is connected to earth, "no single-pole switch, other than a link for testing purposes or "a switch for use in controlling a generator, shall be placed in "such conductor or any branch thereof" affords strong support for the view that one must conclude that the manager, and through him the defendant firm, ought to have known of the probability that the two tumbler switches would not be recognized as a main switch, inasmuch as it was the duty of the defendant firm to link those two switches by means of a bar or other device in order to satisfy the provisions of regulation 9. On the other hand, I agree with my Lord that Hartley was not a person belonging to the class of "persons employed" for whose benefit these regulations were enacted, and, accordingly, I agree that the plaintiff could not successfully maintain a civil claim based on breach of that statutory duty.

I have only to add that, in my view, the case would be clearer against the defendant firm if it was plain on the evidence that the report of Bigland or other members of the fire brigade that they were still receiving electric shocks after the main switches had supposedly been turned off had been made, and that the manager's assurance that all the main switches were turned off had been given, before the moment when Hartley met his death; but the evidence as to the order of events is not sufficiently definite to make it possible for me to form my conclusion on that. Even so, for the other reasons I have endeavoured to state, I think that the judge's judgment on the matter of common

law liability should stand. Accordingly I agree that this appeal fails and should be dismissed.

HODSON L.J. I agree with both the judgments which have been delivered, and have very little to add. It is abundantly clear that the substantial cause of this accident was the negligence of the second defendants, who have been found 90 per cent. to blame. Mr. Laski has put his argument on behalf of the first defendants forcefully and shortly, basing himself on the language of Lord Wright in *Yorkshire Dale Steamship Company Ld.* v. *Minister of War Transport* [5]: "This choice of the real or efficient "cause from out of the whole complex of the facts must be made "by applying commonsense standards. Causation is to be under-"stood as the man in the street, and not as either the scientist "or the metaphysician, would understand it."

Mr. Laski said, looking at this matter from the commonsense point of view without endeavouring to be unduly scientific or metaphysical, that the cause of this accident was the fact that the wires from the main switch to the meter were transposed, so that the main switch not being in the "off" position, the electricity was running wild in the building along the neutral wires which should have been dead.

That is a very strong argument, but the judge has found that there was a subsidiary and less important cause of this accident, which was that the first defendants, the occupiers of the factory where the fire occurred and where the man met his death, were in breach of their common law duty, because if the main switch, which they ought to have known was a main switch, had been in the "off" position the accident would not have happened. That is sufficient to establish a causal connexion between the negligence and the accident. It is true that the manager had switched off another switch between the main switch and the premises where the man met his death, and two subsidiary switches, three in all, which would, if the wiring system had been in order, have prevented the accident. As Jenkins L.J. has pointed out, the wiring system not being in order, in my view it is open to the court to come to the conclusion that the consequences of the original negligence persisted, and it is not right to exclude from consideration the deficient knowledge of the first defendants of the inefficiency of their switch, and its situation.

I think that the way in which Lord Wright put it, that this is a matter for the man in the street and is not a matter of scientific investigation, leads one to the conclusion that on the question of causation this court should be slow to interfere with the conclusion of the trial judge. Mr. Laski said quite rightly that although the court should be slow to act, nevertheless it is open to the court to do so. I accept that, but difficult as this

[5] [1942] A.C. 691, 706.

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case is, I feel myself unable to say with any certainty—indeed I feel the reverse—that one can exclude from consideration in dealing with the position at common law the fact that the first defendants were in breach of the electricity regulations.

On the regulation itself, on which the plaintiff relied, I agree that it is not open to the plaintiff to found her cause of action upon that. Regulation 9 is in general terms and does not exclude the plaintiff from the class of persons who may bring an action; it leaves that wide; but the regulation is made under what is now section 60 of the Factories Act, 1937, which gives power to the Minister, on being satisfied that any manufacture, or machinery, or other matter, in a factory is of such a nature as to cause the risk of bodily injury to the persons employed, to make such regulations as appear to him to be reasonable and practicable, and to meet the necessity of the case. That involves this, that regulations can only be made within the limits of the powers conferred by section 60, and section 60 contains the words "persons "employed," which were substituted for the words "persons "employed in connexion therewith" in the earlier legislation. These words do not, in my opinion, extend the ambit of the Act far enough to include a fireman who comes on the premises to fight a fire, whether called by the occupier or anyone else.

I respectfully disagree with the judge's construction of the words "persons employed" as being wide enough to cover such a person, and as I have already made clear, I do not regard the regulations as being open to separate construction apart from the section of the Act under which they are made. I agree, therefore, that the appeal fails.

Appeal dismissed.

Solicitors: *Hewitt, Woollacott & Chown, for Shaw, Smith & Co., Manchester; L. Bingham & Co., for James Chapman & Co., Manchester; Bower, Cotton & Bower, for George Davies, Manchester.*

M. M. H.

[COURT OF APPEAL.]

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Jan. 14.
Evershed M.R., Denning and Romer L.JJ.

* WAKEHAM *v.* WAKEHAM.

Infant—Custody—Divorce Court—Removal by wife from jurisdiction—Decree against wife on ground of desertion—Right of husband to custody to enable him to bring proceedings in foreign court—Care and control.

Conflict of Laws.

In October, 1949, a wife deserted her husband taking with her the two children of the marriage, P. then two years of age and B. then about twelve months old. Shortly afterwards she promised her

husband not to remove the children from the jurisdiction without informing him. The wife subsequently returned P. to the husband, but retained B. In December, 1950, the wife, without informing her husband and in breach of her promise, went to South Africa taking B. with her. She did not return to this country. On October 7, 1953, the husband obtained a decree nisi dissolving the marriage on the ground of the wife's desertion, and by that order the custody of both children was given to him. The wife applied to have the order as to custody varied. Collingwood J. varied the original order, giving the custody of B. to the wife on the ground that it would not be reasonable to order so young a boy, who had always been with his mother, to be returned to his father. The husband appealed:—

Held that, in the circumstances, it was not to B.'s advantage that the husband should be deprived of the legal custody and thus be under a disadvantage should he see fit to make an application to a South African court; and that the original order would be restored, but without prejudice to any question of care and control which should be left to be determined by the court of South Africa on any such application.

Decision of Collingwood J. reversed.

APPEAL from Collingwood J.

Ronald Walter Wakeham and Alexandra Catherine Wakeham were married in the Union of South Africa in 1943 where the husband was then serving in the Royal Air Force. The wife had been born in England, but had lived in South Africa from early childhood and all her family and friends were there. After the war the husband and wife returned to England where the two children of the marriage were born, the elder, Peter, being born in February, 1947, and the younger, Brian, in October, 1948.

In October, 1949, when Brian was a year old, the wife went to Broadstairs to stay with her mother and grandmother, who were then in England, ostensibly for a short holiday. The correspondence which passed at that time did not indicate any determination on her part never to return to the husband. The husband and wife were in fact apart from the period of the Broadstairs holiday.

In January, 1950, the wife, through her solicitors, asked the husband whether he would object if she went back to South Africa taking the two children of the marriage with her. The husband said plainly that he would object, and shortly afterwards the wife in writing promised the husband that she would not make any attempt to take the children away without first informing him and obtaining an order of the court. In May, 1950, the elder boy, Peter, was returned by the wife to the husband, but Brian, who was then only about 18 months old, remained with the wife. In December, 1950, the wife, without informing the husband, left for South Africa taking Brian with her. She gave instructions to her solicitors, contrary to their advice, that no information of what was on foot was to be given to the husband. After Brian was removed to South Africa the husband did little, if anything, to inform himself as to the welfare, or even the whereabouts, of Brian.

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On October 7, 1953, the husband was granted a decree nisi of divorce on the ground of his wife's desertion. At the same time an order was made giving the custody of Peter and Brian to the husband. The wife was not represented at the hearing of the petition, but she had intended to ask the court that the custody of Brian should be given to her. Her advisers expected that the question would be adjourned into chambers. Subsequently, she took out a summons, which came before Collingwood J., asking that custody should be given to her. On December 10, 1953, he varied the order made on the petition and, so far as it related to the custody of Brian, gave his custody to the wife until further order, with leave to keep him out of the jurisdiction for an indefinite time. He made this order on the ground that it would not be right to order Brian to be taken away from his mother, who had brought him up, and returned to a father whom he probably would not recognize. The husband appealed.

R. D. Ranking for the husband.
D. J. C. Ackner for the wife.

Evershed M.R. stated the facts and continued: A point that struck me as a little unusual was the fact that, the wife in asking for a variation of the earlier order, made no offer to the effect that, if the court accepted her application, she would obey any further order about the child that the court might make. Indeed, the proceedings before Collingwood J. and the present appeal—although relating to Brian, and therefore the arguments have naturally been punctuated by assertions on both sides that the only concern of the two parties is his welfare—seem to me to be in the nature of manoeuvres by the husband and wife to gain tactical advantages. The result of Collingwood J.'s order is admittedly that the husband will be put at a substantial disadvantage if he ever should see fit to go to South Africa and ask for Brian to be returned to him.

Mr. Ackner contends that it is right that he should be at such a disadvantage, at any rate, if the court is satisfied, as Collingwood J. was, that for the moment it is in the best interests of Brian that he should remain in South Africa with his mother. It is indeed clear that the judge's mind was directed exclusively to the question whether it was better that Brian should remain, at any rate for the present, with the wife, or whether he should be transported back to England? The judge on that matter, after considering the somewhat serious conduct of the wife, and the fact that she was a deserter, and after considering also the father's apparent lack of serious concern about Brian during the past two years of his life, thought that the argument clearly was all in favour of Brian remaining where he is; that a young boy always with his mother, who would perhaps not even know his father, and not know his elder

brother, ought not, decently and kindly, to be sent back to England.

But Mr. Ranking has made it clear that he is not asking this court now to express any view as to whether Brian now or at some future date ought to come back to England, and I confess that any view that we expressed would be largely futile, because it would be quite incapable of being made effective, unless the court in South Africa should take a similar view.

I feel the great force of Collingwood J.'s opinion that for the moment, at any rate, Brian is better where he is. Only one matter is not mentioned by him, which seems to me to be not without substance, and that is that Brian (who is, after all, English by birth) has an elder brother, and a matter which at some time will have to be considered is whether it is not right that he should be brought up to be aware of that fact, and to have the advantages of brotherhood as well as fatherhood made available to him. But more upon that topic I do not propose to say, for I have come to the conclusion that whatever be, now or hereafter, the right answer to the problem of the care and control of Brian, I am not satisfied that it was right to vary the order made when the decree nisi was granted and to give the legal custody to the wife, on the ground (for so it must be taken) that she, in fact, had possession of Brian, and took him out of England, has retained possession of him and has brought him up well.

I do not think, in the circumstances of this case, that it is right, or to Brian's advantage, that the husband should be put technically in that disadvantageous position, and therefore, with all respect to the judge, the proper course is to let the original order in this respect stand, namely: to let the husband have the legal custody of Brian, but to make it clear by express statement in the order that the order as to custody is without prejudice to any question as regards the care and control of Brian. If the husband chooses to make an application to the South African court, the matter will no doubt be considered by that court upon its merits; but the husband will not at any rate start with the unfair disadvantage of having an order of an English court giving the wife the legal custody of Brian. Therefore, I should allow this appeal, and restore, with the qualification that I have mentioned, the order originally made as regards the custody of Brian in the decree nisi.

DENNING L.J. Cases often arise in the Divorce Court where a guilty wife deserts her husband and takes the children with her, but the father has no means of bringing them up himself. In such a situation, the usual order is that the father, the innocent party, is given the custody of the child or children, but the care and control is left to the mother. That order is entirely realistic. By giving the father the custody, it recognizes that he, the innocent party, is at least entitled to a voice in the bringing up

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of the child or children, and is entitled to the consideration of the court when any question arises as to what is to be done for the child.

Of course, the paramount consideration for the court is the welfare of the child. But that is not the only consideration. The father's views are also entitled to consideration, and that is why the order for custody should be given to him, although for practical reasons, and solely for practical reasons, the mother may have the care and control.

I think the judge erred in this case, because there can be no doubt, on the facts before us, that the husband was the innocent party, and the wife took a child of two years of age out of the country in breach of an undertaking which she had deliberately given, and, indeed, contrary to the advice of her then solicitor, who told her that she ought not to do it without communicating with the husband.

I am clearly of opinion that the custody ought to be given to the husband, without prejudice, as my Lord has said, to any question of care and control, which no doubt will be dealt with by the courts in South Africa. I agree that the appeal should be allowed accordingly.

Romer L.J. I also agree. It was suggested that if we interfered, as we are asked to do by the husband, with the order of Collingwood J., we should, in effect, be overruling the discretion which was vested in him, and which he exercised; but that is not so. The point that we are deciding today is quite different from the point to which Collingwood J. was addressing his mind when he said: "I cannot see any argument at all which would justify "me in saying that this little boy in his own interest should be "taken away from his mother and brought back to England," and he gave effect to that view without hesitation and said that he would not make the order. We are not being asked to make that order, but to put the husband into a position in which he can approach, on terms of equality with his former wife, the South African courts if any question in regard to the welfare or control of the boy Brian comes up for determination. As the matter stands at the moment, in my view, the wife, having the legal custody as well as the physical control of Brian, the husband would be gravely prejudiced if, in the face of that order, he made an application to the South African courts, which he might well make on some matter affecting Brian; and the only thing that we are doing today is to remove that disadvantage and to put him on equal terms with the wife in any application that may be made.

Mr. Ackner said that if we made the order which my Lord has indicated it would, in fact, be giving the husband an advantage over his wife, but I do not take that view. The words which are going to be put into the order, which my Lord has mentioned, "without prejudice to any question of care or

control," will, and are intended to, leave the matter open, and will no doubt receive that interpretation in the South African courts. I accordingly agree that the appeal should be allowed.

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Appeal allowed, custody of the child, Brian, granted to the husband without prejudice to any question as regards care and control.

Solicitors: *Lewis, Holman & Lawrence; Braund & Hill for Walmsley & Barnes, Broadstairs.*

B. A. B.

[QUEEN'S BENCH DIVISION.]

* LONDON COUNTY COUNCIL *v.* TANN.

1954
Jan. 28.

Lord Goddard C.J., Byrne and Parker JJ.

Metropolis — Building — "Structure" — "Building or structure . . . "beyond the general line of buildings"—Erection of car shelter in forecourt of house—Tubular steel framework covered with canvas —Shelter fixed to gateposts in forecourt wall—Whether a "structure"—London Building Act, 1930 (21 *&* 22 *Geo.* 5, *c.* 158), *s.* 22.
Building. Statute—Construction—Meaning of word—View of man in Stoke Newington omnibus. Ejusdem generis rule.

By the London Building Act, 1930, s. 22 (1): "No building or "structure shall without the consent in writing of the Council be "erected . . . (*a*) beyond the general line of buildings . . ."

The defendant, without the consent of the London County Council, erected a car shelter, consisting of a tubular steel framework covered with a specially made canvas cover, in the forecourt of her house. The shelter was fixed to two wooden gateposts in the forecourt wall and had sliding canvas curtains at the entrance:—

Held, that, looking at it from the point of view of a man of the world and having regard to its purpose, the car shelter, which had been erected in order to provide the defendant's house with the garage which it had not otherwise got, was a "structure" within the meaning of section 22 of the London Building Act, 1930.

Per Lord Goddard C.J.: The term "structure" should not be construed ejusdem generis with the term "building" because there is no genus and because the Act is meant to include something wider than "building."

Per Parker J.: "Structure" in section 22 means a structure in the nature of a building, but in deciding whether something is constructed in the nature of a building it is proper to look at the intention with which it was constructed. The car shelter was a structure in the nature of a garage and it could not be said that it was not a structure merely because it was made of canvas.

Tests laid down by Lindley L.J. in *Lavy* v. *London County Council* [1895] 2 Q.B. 577, 582; 11 T.L.R. 525 and Vaughan Williams J. in *London County Council* v. *Pearce* [1892] 2 Q.B. 109, 112; 8 T.L.R. 531 applied.

CASE STATED by the North London stipendiary magistrate.

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London County Council v. Tann.

An information was preferred by the London County Council against the defendant for that she, within the six months immediately preceding the laying of the information, in the County of London and within the Metropolitan Police District, did unlawfully erect a structure (car shelter) in contravention of the provisions of section 22 of the London Building Act, 1930,[1] beyond the general line of buildings on the northern side of Paget Road, Stoke Newington, without the consent in writing of the council, whereby she became liable to a penalty under section 148 (2) (iii) of the London Building Acts (Amendment) Act, 1939, and to have an order made against her to demolish the structure.

The following facts were proved or admitted before the magistrate: Paget Road was a street within the meaning of section 22 of the London Building Act, 1930. Within six months prior to the laying of the information the defendant put a car shelter in the forecourt or garden of a dwelling-house on the north side of Paget Road, the car shelter having been erected or brought forward in front of the general line of buildings without the consent in writing of the council.

The car shelter in question consisted of a tubular steel framework, fixed together by pipe screw angles and joints, covered with a specially made canvas covering fastened to the framework by canvas tapes and small tie ropes. The shelter had sliding canvas curtains at its entrance from Paget Road, and was fixed to two wooden gateposts in the forecourt wall of the house by means of four metal fittings screwed to the gateposts. The width between the gateposts was seven feet and the overall width of the car shelter framework was seven feet nine inches. It had remained in situ since its erection and its purpose was to provide shelter for a car. The Stoke Newington Borough Council, at the defendant's expense, had made a vehicular crossing of the footway from the carriageway to the gateway in the forecourt wall.

On behalf of the council it was contended that the car shelter was a building or structure within the meaning of section 22 of the London Building Act, 1930, and that the defendant was accordingly liable to a penalty and an order to demolish pursuant to section 30.

On behalf of the defendant it was contended that the car shelter was not a structure or building within the meaning of section 22.

The magistrate was of the opinion that the term "structure," as used in section 22, must be construed ejusdem generis with

[1] London Building Act, 1930, s. 22 (1): "No building or structure shall "without the consent in writing of "the Council be erected . . . (notwithstanding that there are gardens "or vacant spaces between the line "of buildings and the highway)—(a) "beyond the general line of buildings "..."

S. 30: "Where any person has "erected . . . any building or structure in contravention of this part of "this Act . . . the court . . . may in "addition to imposing any penalty "make an order . . . directing the "... person to demolish the building "or structure. . . ."

the term "building"; that a structure to be within the mischief of the section must be something in the nature of a building; and that, applying those principles, the car shelter was not a structure within the meaning of section 22 but was something in the nature of a tent which in no way defeated or adversely affected the general objects of the Act, as specified in the preamble. He was confirmed in his opinion that a structure must be construed ejusdem generis with a building or a wall by the definition of structure in section 60 of the London Building Acts (Amendment) Act, 1939,[2] purporting to widen the ordinary meaning of structure for the purpose of that part of that Act. Accordingly, he dismissed the information.

The council appealed.

Percy Lamb Q.C. and *William Scrivens* for the council.
Charles Lawson for the defendant.

The following cases were referred to in argument: *Lavy* v. *London County Council*[3]; *London County Council* v. *Illuminated Advertisements Co.*[4]; *London County Council* v. *Hancock and James*[5]; *London County Council* v. *Pearce*,[6] and *South Wales Aluminium Co. Ld.* v. *Neath Assessment Area Assessment Committee*.[7]

Lord Goddard C.J. The defendant has a house in Paget Road, Stoke Newington, with a little garden in front of it, but, as she had no garage, she put up what I had better call a thing which is made of tubing, not very big tubing—somebody suggested in the course of the case that it was about the size of gas piping—and, having made a skeleton frame of that material, covered it with canvas. It is fastened by screws to the gateposts of the house, and it forms a convenient little garage.

[His Lordship referred to the facts found by the magistrate and continued:] The borough council altered the pavement for her to enable her to drive her car in and out, but of course that is a different local authority. One local authority seems to have encouraged her to put up this little erection, but the superior local authority alleges that she must take it down. I agree that it is not a very satisfactory position, but that is what has happened.

The magistrate found that this was not a structure and, if it were a mere question of fact, we should of course be bound by his decision, but it seems to me that he has not asked himself

[2] London Building Acts (Amendment) Act, 1939, s. 60 (*a*): "the "expression 'structure' includes any "building or wall or other structure "and anything affixed to or projecting "from any building or wall or other "structure."

[3] [1895] 2 Q.B. 577; 11 T.L.R. 525.

[4] [1904] 2 K.B. 886; 20 T.L.R. 527.

[5] [1907] 2 K.B. 45; 23 T.L.R. 417.

[6] [1892] 2 Q.B. 109; 8 T.L.R. 531.

[7] [1943] 2 All E.R. 587.

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Lord Goddard C.J.

the proper questions. I think that the magistrate was wrong in saying that he must construe the term "structure" as ejusdem generis with the term "building." To start with there is no genus, but it is quite obvious that the Act is meant to include something wider than a building. If one had simply to construe the word "structure" ejusdem generis with the word "building" and say that structure meant a building, there would have been no necessity for the legislature to use both words. The real question is, leaving out "building" altogether: Is this a structure?

It seems to me that one of the convenient tests is that laid down by Lindley L.J., whose judgment on any subject is always helpful. In *Lavy* v. *London County Council*[1] he said: "We "must look at this case, and not at the effect of other cases. In "this case we must ask ourselves, as men of the world, whether "such a new wall"—he was dealing with a wall—"as this is "not a building, structure, or erection within the mischief of "section 75." I do not pretend that I know what the mischief is in these matters, but if I ask myself whether this is a structure, I confess I think that question only capable of one answer: that it is a structure. I am not saying that if it was a mere temporary thing which was put up, as a tent might be in the summer time, that that would be a structure; but the object of this thing was to provide the defendant's house with that which it does not at present possess, namely, a garage. She would certainly not be able to get permission to build a garage consisting of ordinary building material there, and the shelter was put there not as a thing to be put up one week and moved the next, but for the purpose of being permanently there.

Vaughan Williams J. said in *London County Council* v. *Pearce*[2]: "I do not mean to say that a man is to be allowed to "evade the Act of Parliament by building on wheels what he "intends to be a wooden structure, and then saying it is not "within the Act because it is on wheels. In all cases we must "be guided by what I may call the intentions of the structure, "and must inquire with what intention it was made." Applying that test, it seems to me obvious that this structure, whatever you like to call it, was put there for the purpose of permanently housing a car at a house where there was no other garage. I think, therefore, that it must be looked at as, I was almost going to say, a home-made garage, though I do not suppose it was made by the lady herself, or as a thing put there in place of a garage. I think, therefore, that we must hold that the magistrate did not direct himself properly in this matter. Had he asked himself, as a man of the world, as an ordinary citizen—the man on the Stoke Newington bus—whether it was a structure. I think that he must have come to the conclusion that this was a structure; and, therefore, this appeal must be allowed.

[1] [1895] 2 Q.B. 577, 582.

[2] [1892] 2 Q.B. 109, 112; 8 T.L.R. 531.

BYRNE J. I agree.

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PARKER J. I agree. Speaking for myself, I am prepared to accept the view that "structure" in this context means a structure in the nature of a building. That was the phrase used by Lord Alverstone C.J. in *London County Council* v. *Illuminated Advertisement Co. Ld.*[3] The same meaning was put upon that word, though in connexion with a different Act, by Atkinson J. in *South Wales Aluminium Co. Ld.* v. *Neath Assessment Area Assessment Committee.*[4]

It seems to me that in deciding whether the structure is something constructed in the nature of a building it is perfectly proper to look at the intention, as in the passage my Lord has referred to in *London County Council* v. *Pearce,*[5] where Vaughan Williams J.[6] expressly so states. Looking at the matter in that light and adopting the test laid down by Lindley L.J. in *Lavy* v. *London County Council,*[7] the question posed is this: as men of the world can we say that this thing, to use a neutral expression, is a structure constructed in the nature of a building? It is quite clear that it was intended to be a garage, and, looking at it in that way, and asking oneself the question: Is this a structure in the nature of a garage? the answer is clearly, yes. It seems to me that the magistrate misdirected himself first of all in seeking to apply the ejusdem generis rule and then in treating "structure" as in the nature of a building in the sense that if it was made of canvas it could not be a building because it was in the nature of a tent. It seems to me that the statement of facts admits of only one conclusion, that this was a structure within the meaning of the Act.

Appeal allowed.

Solicitors: *J. G. Barr, Solicitor, London County Council; Thornton, Lynne & Lawson.*

J. F. L.

[3] [1904] 2 K.B. 886, 892.
[4] [1943] 2 All E.R. 587, 592.
[5] [1892] 2 Q.B. 109.
[6] Ibid. 112.
[7] [1895] 2 Q.B. 577, 582.

[QUEEN'S BENCH DIVISION.]

* STEPHENSON v. JOHNSON.

1954
Jan. 28.

Lord Goddard C.J., Byrne and Parker JJ.

Wages — Wages Council — Information — Sufficiency—Failure to pay "statutory minimum remuneration . . . contrary to section 11 *of the "Wages Councils Act,* 1945*"—Complexity of Order laying down statutory minimum remuneration—Insufficient information as to nature of charge—Wages Councils Act,* 1945 (8 *&* 9 *Geo.* 6, *c.* 17),

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s. 11 — *Milk Distributive Wages Council (England and Wales) Wages Regulation Order,* 1952 (*S.I.* 1952, *No.* 986), *Sch.* — *Magistrates' Courts Rules,* 1952 (*S.I.* 1952, *No.* 2190), *r.* 77. *Justices—Information.*

Section 11 (2) of the Wages Councils Act, 1945, makes it an offence to pay to a worker remuneration less than the statutory minimum remuneration. The statutory minimum remuneration for a worker in the milk distributive trade is laid down in the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952; and the schedule to the order provides for minimum time rates calculated on a weekly basis and varying in amount according to the age and category of worker, and the hourly rate is to be ascertained by dividing the minimum time rate by the number of hours in the week.

An information was preferred against the defendant, who was engaged in milk distributive business and employed a workman for four and a half hours on a Sunday to wash bottles at her dairy, alleging that she did "unlawfully fail to pay remuneration "not less than the statutory minimum remuneration . . . contrary "to section 11 of the Wages Councils Act, 1945." On appeal against conviction by the defendant who had taken the point before the justices that the information was insufficient:—

Held, that where there was a schedule of such complication, an information which merely told a defendant that he was going to be charged with not paying the statutory remuneration to a particular worker did not give him reasonable information as to the nature of the charge; that it should have contained a reference to the particular paragraph of the schedule which it was alleged laid down the appropriate rate of remuneration for the worker concerned, and a statement of the amount actually paid and that which should have been paid; that it would have been advisable if it had also contained an allegation as to the nature of the worker's employment and his age; and that as the defendant had not been given sufficient information about the alleged offence, the information was bad.

Case stated by Northampton justices.

The following were among the facts proved or admitted before the justices:

The defendant, Mrs. Elsie Stephenson, carried on the business of a dairy in the course of which she was concerned in the retail sale of milk. On Sunday, December 21, 1952, the defendant employed at her dairy one, George Harry Tarry, as a washer of milk bottles, work incidental to her business of selling milk by retail, from 9 a.m. to 1.30 p.m. paying him for his work on that day the sum of 16s. 6d. George Harry Tarry was in the full-time employment of the Northampton Corporation for whom he normally worked on weekdays, and, when there was work for him to do, on Sundays. On other Sundays, when he wished, he went to the defendant's dairy and asked the foreman for work, but he was not bound to attend at the dairy on Sundays nor was the defendant bound to employ him. There was no agreement as to the rate at which he was to be paid but he was satisfied with the lump sum of 16s. 6d. which he received on each Sunday that he did work at the dairy.

A wages inspector under the Wages Council Act, 1945, preferred an information against the defendant for that she "being "an employer of workers to whom the Milk Distributive Wages "Council (England and Wales) Wages Regulation Order, 1952, "made under the Wages Council Act, 1945, applies, did on "December 21, 1952, at Anderston's Dairy . . . unlawfully fail "to pay remuneration not less than the statutory minimum "remuneration to George Harry Tarry one of the said workers, "contrary to section 11 [1] of the Wages Councils Act, 1945, and "the said Order made thereunder."

In answer to the defendant's request for the formulation of allegations as to what sum should have been paid and was alleged to have been the statutory minimum remuneration, and what sum was alleged to have been paid below the statutory minimum remuneration, the prosecutor referred her to paragraph 6 (2) of the Schedule to the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952.

On behalf of the defendant it was contended, inter alia, that the information was insufficient.

On behalf of the prosecutor it was contended, inter alia, that the information was sufficient as it gave reasonable information as to the nature of the charge.

The justices considered that the information was sufficient, and they refused to order the prosecutor to give any further particulars. They found that the worker should have been paid 18s. 11d., and convicted the defendant.

The defendant appealed.

John Hobson for the defendant.

S. B. R. Cooke for the prosecutor.

[1] Wages Councils Act, 1945, s. 10: "(4) Where the Minister receives any "wages regulation proposals, he shall "make an order (. . . a 'wages regu-"'lation order') giving effect to the "proposals. . . . (8) Remuneration ". . . fixed by a wages regulation "order is hereafter in this Act "referred to as 'statutory minimum "'remuneration.'"

S. 11: "(2) If an employer fails "to pay to a worker to whom a wages "regulation order applies remunera-"tion not less than the statutory "minimum remuneration . . . he "shall be liable on summary convic-"tion to a fine. . . ."

The Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952 [made under s. 10 of the Wages Councils Act, 1945], 2 (1): "Effect is hereby given "to the . . . wages regulation pro-"posals set out in the Schedule here-"to." Schedule, Pt. III, para. 6: "Subject to the provisions of para-"graph 7 . . . the following minimum "remuneration is payable to any "worker for overtime:—. . . (2) In "the case of a seven-day worker or of "any other worker to whom sub-"paragraph (1) . . . does not apply "(*b*) on a Sunday . . . (i) for any "time worked not exceeding 6 hours: "Time-and-a-quarter for 6 hours." Part V, para. 11 (*h*): "Time-and-"a-quarter . . . mean(s) . . . one "and a quarter times . . . the hourly "general minimum time rate. . . ." Para. 1: "(2) . . . the expression "'hourly general minimum time "'rate' means the general minimum "time rate applicable to the worker "under . . . Part II of this Schedule "divided by the number of hours in "the week."

Paragraph 3 in Part II of the Schedule lays down the general minimum time rates calculated on a weekly basis and varying in amount according to the age and category of worker.

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The following cases were referred to in argument: *Robertson* v. *Rosenberg* [2] and *Hill* v. *Begg*.[3]

Lord Goddard C.J. The first point taken by Mr. Hobson in this court and before the justices was that the information was defective in that it did not give reasonable information or sufficient particulars for the defendant to know what case she had to meet. In the opinion of the court, that is a good point, and this information does not give reasonable information of the nature of the charge.

Rule 77 of the Magistrates' Courts Rules, which replaces with no material difference the corresponding enactment in section 32 of the Criminal Justice Act, 1925, in force at the time the information was laid, provides: "Every information, summons, warrant or other document laid, issued or made for the purposes of, or in connexion with, any proceedings before a magistrates' court for an offence shall be sufficient if it describes the specific offence with which the accused is charged, or of which he is convicted, in ordinary language avoiding as far as possible the use of technical terms and without necessarily stating all the elements of the offence, and gives such particulars as may be necessary for giving reasonable information of the nature of the charge."

As is well known, the Criminal Justice Act of 1925 was designed so that informations before magistrates' courts should be substantially in the same concise form as indictments have been since the Indictments Act, 1915. Before that Act came into force indictments were very long, very prolix and very often had to contain a great number of averments which were not necessary for the purpose of knowing what the case was about. Now, an indictment simply contains, first of all, the statement of offence—for example, obtaining money by false pretences or burglary—put quite shortly, contrary to section so-and-so of such-and-such an Act; and the particulars inform the defendant of the nature and particulars of the offence and what he is actually charged with.

In this case we have had to consider, first, a section of an Act which at first appeared to the court somewhat difficult to understand, but which Mr. Cooke's argument has made clear. We have also had to consider the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952. The order itself is very short, but it is the schedule that matters. There is one schedule with several parts, several paragraphs and several definitions, and to find out what the employee has to be paid it is first necessary to find out what is his age, then the actual nature of his employment, then whether he is a seven-day worker or a six-day worker, as well as many other things.

[2] [1951] W.N. 97; [1951] 1 T.L.R. 417; 115 J.P. 128.

[3] [1908] 2 K.B. 802; 24 T.L.R. 711.

The prosecutor proved to the satisfaction of the justices that the employee should have been paid 18s. 11d. per week, whereas in fact he was only paid 16s 11d.; but it is most important that a defendant when summoned before a criminal court should know exactly what he is being charged with. When there is a schedule of this complication, it does seems to me that merely to inform a defendant that he is going to be charged with not paying the statutory minimum remuneration to some particular person is by no means giving him reasonable information as to the nature of the charge. As I pointed out in the course of the argument, many things have to be taken into account in order to find out what is the minimum remuneration. The employer in this case would no doubt know what she did pay to this man. It may be that by sitting down with the assistance of her solicitor or accountant or somebody else, she could work out what it is said that she should have paid, but one can very well understand the case in which an employer might say: "You are "saying that I did not pay this man enough. I say that I did. "Why do you say that I did not? What am I going to be "charged with when I get to the court? Why is it said that I "did not pay enough?" Supposing an information were to be laid in respect of say, a pasteuriser, and instead of being a pasteuriser, the man in fact was a roundsman at the material time, it might be that a different part of the schedule would apply and that a different sum, therefore, should have been paid.

In *Robertson* v. *Rosenberg*[1] this court emphasized the necessity in these cases of summary jurisdiction of letting defendants know exactly with what they were charged. Especially considering that rule 77 provides that "If the offence charged "is one created by or under any Act, the description of the "offence shall contain a reference to the section of the Act, or, "as the case may be, the rule, order, regulation, by-law or other "instrument creating the offence," it seems to me to be quite elementary that the information should contain, first of all, a reference to the particular section of the schedule or the order which it is alleged has been infringed. This information does not refer to any section or any rule, order or regulation, and yet when the defendant comes to court the order is produced and all these different paragraphs of the schedule have to be considered in order to find out exactly what remuneration it is said that the man should have been paid.

I think that informations such as this should contain, besides a reference to the particular paragraph of the schedule, information with regard to the particular nature of the man's employment. I am not sure that they ought not also to contain a statement of his age because the amount that he is entitled to receive depends on his age. At any rate, I am quite satisfied that in this case the defendant was not given sufficient information. The information was, therefore, bad, and the justices should

[1] [1951] W.N. 97; [1951] 1 T.L.R. 417; 115 J.P. 128.

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not have entertained it. In my opinion they were wrong in a matter of law, and this appeal succeeds.

BYRNE J. I agree that this information was defective. It should at the least have contained a reference to paragraph 6 (2) of the schedule to the Milk Distributive Wages Council (England and Wales) Wages Regulation Order, 1952, and it should also have contained a statement to the effect that the man in question was paid 16s. 6d. per week instead of 18s. 11d. for the work which he did. I agree that this appeal should be allowed.

PARKER J. I agree.

Appeal allowed.

Solicitors: *Sharpe, Pritchard & Co. for Becke, Green & Stops, Northampton; Solicitor, Ministry of Labour and National Service.*

J. F. L.

[PRIVY COUNCIL.]

J. C.†

1954
Feb. 2.

*KESARMAL S/O LETCHMAN DAS AND ANOTHER . . . . . APPELLANTS;

AND

N. K. V. VALLIAPPA CHETTIAR S/O NAGAPPA CHETTIAR . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL, SUPREME COURT OF THE FEDERATION OF MALAYA.

Malaya—Land—Claim to set aside transfer—Occupation period—Duress—Knowledge of duress in transferee to be established—Titles to Land (Occupation Period) Ordinance, No. 39 *of* 1949, *s.* 27 (1) (5) *—Land Code of the Federated Malay States (F.M.S. c.* 138), *ss.* 2, 42.

Duress—Transfer of land in Malaya—Transferee's knowledge of duress to be established. "Indefeasible"—Title to land—"Not indefeasible"—Does not mean void.

Before a transferor of land which is subject to the provisions of the Land Code of the Federated Malay States can claim to have the instrument of transfer, which has led to the registration of a proprietor under the Code, set aside on the ground that its execution had been obtained by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949, of Malaya, it must be established, in addition to the fact that the instrument of transfer was procured by duress, that the transferee had knowledge of the duress.

The words "the title of a proprietor . . . shall not be indefeasible" in section 27 of the Ordinance of 1949 and in section

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† *Present*: LORD TUCKER, LORD KEITH OF AVONHOLM, and MR. L. M. D. DE SILVA.

42 (ii) of the Land Code of the Federated Malay States (c. 138) mean only that the title of a proprietor is liable to be defeated.

Judgment of the Court of Appeal, Supreme Court of the Federation of Malaya, affirmed.

APPEAL (No. 26 of 1952) from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (March 21, 1952) affirming a judgment of the High Court of Kuala Lumpur (May 22, 1951) by which the present respondent was held to be entitled to have set aside an instrument of transfer of land executed by him on July 20, 1943, in favour of the appellants on the ground that it had been obtained by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949.

The following introductory statement is taken from the judgment of the Judicial Committee: The courts in Malaya arrived at concurrent findings on the facts. It was found that the respondent had made a series of loans to one Tungku Musa Edin, referred to in the judgments as "the Klana," who was the eldest son of Sultan Suleiman of Selangor. For various reasons a younger brother was appointed heir-apparent to the throne and succeeded to it on the death of Sultan Suleiman in 1937. When the Japanese occupied the country in 1942 they deposed him and installed the Klana as Sultan. Prior to the Japanese occupation the Klana had on more than one occasion in 1941 borrowed money from the respondent and furnished him with security. He did that by the indirect method of transferring to the respondent certain land (with the buildings thereon) and obtaining at the same time an option to repurchase it for the amount repayable on the loan. That series of transactions came to an end on November 5, 1941, on which day, in consideration of the payment of a final amount of $5,000, the Klana, by a document ("P 3"), surrendered his right to repurchase the property. The respondent thereupon became the absolute owner of the property and the Klana ceased to be his debtor. After he had been installed as Sultan in 1942 by the Japanese the Klana made a series of attempts to recover the property, which were resisted by the respondent. Finally, on July 9, 1943, the respondent was summoned to the Klana's residence. The Klana was there with two Japanese officers. The appellants were also in the building. The Klana told the respondent that he (the respondent) must sign forthwith an agreement to transfer the property to the appellants. On the respondent showing some hesitation one of the Japanese officers told the respondent that he must obey the Sultan's orders. The respondent then signed the agreement. Eleven days later it was implemented by, among other things, the signing of the transfer impugned in this case.

In the suit out of which this appeal arises the respondent alleged that the execution of the transfer was procured by duress and he sought to have it set aside.

J. C.

1954

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The trial judge (Taylor J.) and, on appeal, the Court of Appeal (Murray-Aynsley C.J., Charles Abbott and Wilson JJ.) found that duress was established and held that the respondent was entitled to have the transfer set aside.

The transferees appealed.

The material part of subsection (1) and subsection (5) of section 27 of the Ordinance of 1949, which were the only relevant subsections, were to the following effect:—

"27. (1) Notwithstanding the provisions of subsection (1) of "section 42 of the Land Code or the corresponding provisions "in the Land Enactment of any Malay State, the title of a "proprietor, chargee or lessee . . . under any instrument "executed during the occupation period shall not be indefeasible "if the execution of such instrument was procured by coercion or "duress: Provided that nothing in this subsection shall affect "the title of a subsequent proprietor, chargee, lessee or assignee "who has taken bona fide and for valuable consideration from "such first named proprietor, chargee, lessee or assignee or from "any person claiming bona fide through or under him."

"(5) Duress, for the purposes of any action brought to set "aside an instrument or the registration of an instrument "executed or effected during the occupation period on the ground "of duress, includes—(*a*) any force or injury applied or caused, "or threat of force or injury offered, by an official of, or person "on behalf of, the Occupying Power; and (*b*) a threat (other "than one ordinarily and lawfully made in the exercise of a legal "right or remedy) made by a party to the transaction to inform "an official of the Occupying Power of the refusal of the person "concerned to execute an instrument or effect a registration, "which caused the person concerned to execute an instrument "or effect a registration."

1953. Nov. 25, 26, 30; Dec. 1. *Kenneth Diplock Q.C.* and *Rodger Winn* for the appellants.

Sir Frank Soskice Q.C., *Dingle Foot*, and *Biden Ashbrooke* for the respondent.

1954. Feb. 2. The judgment of their Lordships was delivered by Mr. L. M. D. DE SILVA, who stated the facts and statutory provisions set out above and continued: For the purposes of this judgment it is necessary to consider three questions, two of fact and one of law, which were decided by the courts in Malaya. The two questions of fact are:—1. Was the execution of the instrument of transfer of July 20, 1943, by the respondent in favour of the appellants procured by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949? 2. If so, were the appellants at the time when they took the transfer aware that its execution had been procured by duress? The question of law is:—3. If the second of the above questions be answered in the negative, is the respondent

nevertheless entitled to have the instrument set aside if its execution had been obtained by duress?

For the purposes of the observations which they wish to make, their Lordships do not think it necessary to state the facts found [as set out above] in greater detail. Upon the first question the courts below arrived at the conclusion that the execution of the deed of July 20, 1943, had been procured by duress. In the argument before their Lordships it was not disputed that this conclusion is inevitable if the concurrent findings are allowed to stand.

The principles which guide the Board in dealing with concurrent findings on the facts have been set out in a judgment of the Board delivered by Lord Thankerton in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1] and need not be repeated here. The Board declines to review the evidence for a third time unless there are special circumstances the nature of which are discussed in the case referred to. Counsel for the appellants sought to overcome this difficulty in relation to the question whether the execution of the deed had been procured by duress by asking their Lordships to take into consideration certain material which had not been adduced in evidence before the trial judge. The application was refused in the course of the argument. A similar application had been refused by the Court of Appeal, and their Lordships would, in any event, have been reluctant to disturb the order made by the Court of Appeal in the exercise of its discretion. It is stated by the trial judge that at the trial "it was accepted that his (the respondent's) accounts "are genuine, contemporary and well kept." The object of the evidence sought to be adduced was, according to counsel, to attack certain entries in the respondent's books of account which the trial judge had regarded as supporting his oral evidence that a sum of $5,000 had been paid in November, 1941, on the document P.3, referred to above, by the respondent to the Klana as consideration for the surrender by the Klana of his right to purchase the property.

The exceptional circumstances in which a party seeking to adduce fresh evidence at the hearing of an appeal is allowed to do so are well known. It is an essential condition that the evidence was not available at the trial and that reasonable diligence would not have made it available. It appears from the "Case for the appellants" (paragraph 14) that the material which is stated to be damaging to the respondent was discovered when the appellants' counsel in Malaya "after the conclusion "of the trial and shortly before the hearing of the appeal" examined one of the respondent's books "more thoroughly" than he had done before. Counsel for the appellants at the hearing before their Lordships was constrained to admit that there had been nothing which had prevented, or even impeded,

[1] [1946] A.C. 508; 62 T.L.R. 549.

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an examination before the trial of the respondent's books on identically the same lines as that which is stated to have been made after the trial. Consequently the condition referred to had not been satisfied and the application was refused.

There was no other ground upon which the concurrent finding that the execution of the transfer of July 20, 1943, had been procured by duress, was or could have been attacked, and the finding must therefore stand.

The second question of fact which has to be considered is whether the appellants were aware at the time when they became the transferees on the transfer of July 20, 1943, that it had been procured by duress. On this question also there is a concurrent finding of the courts below answering it in the affirmative. It was submitted that there was no evidence on which this finding could be sustained and, further, that certain statements made by the trial judge in the course of arriving at it were contrary to the evidence given on behalf of the respondent.

Their Lordships are of the opinion that the facts which they have stated above and others deposed to by the respondent and his witnesses would, if accepted, furnish ample material from which the inference could be drawn that the appellants had knowledge of the exercise of duress. At the end of a passage in his judgment which begins "The next issue is whether the "defendants were aware of the duress," the trial judge arrives at the conclusion "on the evidence as a whole, I find that the "defendants personally knew of the duress." As there is evidence from which this conclusion can arise the main point of the appellants' submission fails.

Certain other statements in the passage referred to above have been the subject of criticism on the ground that they were contrary to the evidence. This criticism rests upon an interpretation, which is possible but not inevitable, of certain words in the evidence of one of the respondent's witnesses. Their Lordships do not feel disposed to deal with this criticism in detail because they are of the opinion that the contentions of the appellants on this subsidiary point, if accepted, would not be of weight sufficient to induce them to disturb the finding of the courts below.

It was not disputed that if both duress and knowledge of it by the appellants were established the respondent was entitled to succeed. It follows that upon what has been said so far the appeal should be dismissed.

The third question referred to above, namely, whether knowledge of duress on the part of the appellants was a necessary ingredient of the respondent's case, was argued fully before their Lordships. As it is one of importance in the application of the Titles to Land (Occupation Period) Ordinance of 1949 their Lordships have thought it would be useful to express an opinion upon it, although upon the view of the facts they have taken it does not arise.

The parties to this case are agreed that the land which is the subject-matter of this case is subject to the provisions of the Land Code of the Federated Malay States (F.M.S., chapter 138). Section 2 of the Code defines " proprietor " thus: " ' Proprietor ' " means the individual person, incorporated company or body " corporate for the time being registered as the owner of land " comprised in a grant or certificate of title or entry in the " mukim register or as the lessee of State land."

The Code embodies a system of registration of title. It provides for the registration as proprietor, after compliance with certain formalities, of a transferee of land from an existing proprietor. By reason of the events set out above the respondent became the duly registered proprietor of the land some time prior to the Japanese occupation. As the result of the impugned deed of July 20, 1943, the appellants became the registered proprietors. The first four subsections of section 42 of the Code are to the following effect:—" Section 42 (i) The title of a proprietor, " chargee or lessee shall be indefeasible except as in this section " provided. (ii) In the case of fraud or misrepresentation to which " he is proved to be a party the title of such proprietor, chargee " or lessee shall not be indefeasible. (iii) If the registration of any " proprietor, chargee or lessee has been obtained by forgery or " by means of an insufficient or void instrument such registration " shall be void. (iv) Nothing in subsections (ii) or (iii) shall affect " the title of a proprietor, chargee or lessee who has taken bona " fide for valuable consideration from any proprietor, chargee " or lessee whose registration as such was procured by any such " means or by means of any such instrument as aforesaid or of " any person claiming bona fide through or under him."

It is not necessary to refer to the remaining subsections for the purposes of this case. It will be seen that the ultimate effect of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949, was to add to subsection (ii) of section 42 of the Land Code yet another set of circumstances on proof of which the " title of " a proprietor, chargee or lessee shall not be indefeasible."

The appellants and respondent were agreed that to set aside an instrument of transfer on the ground of duress it would be necessary to establish two elements: (i) duress and (ii) knowledge of duress on the part of the transferee except in special cases provided for otherwise by statute. It was argued that section 27 made such statutory provision and that proof of duress as defined in the section, operating in the circumstances stated in it, was sufficient to destroy the title of a transferee registered as proprietor even if he had had no knowledge of that duress. This argument involved as an essential part the view that the words " shall not be indefeasible " meant " shall be void." Their Lordships do not think that the words " shall not be indefeas- " ible " could in any case bear that meaning. Moreover, the words " shall not be indefeasible " occur both in subsection (1) of section 27 and in subsection (ii) of section 42 and have to be

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accorded the same meaning in both places. Subsection (iii) of section 42 says that in certain circumstances the registration of a proprietor "shall be void," and it would be most unusual if the totally different words "shall not be indefeasible" were used in subsection (ii) to mean identically the same thing as "shall "be void." Their Lordships are of the opinion that the words "the title of a proprietor . . . shall not be indefeasible" mean that the title of a proprietor is liable to be defeated. Once duress within the meaning of the section is established the barrier against attack placed by subsection (i) of section 42, which declares that in all but the excepted cases the title of a person registered as proprietor "shall be indefeasible," is lifted. His title is then vulnerable but has not been defeated. The Ordinance does not say how it can be defeated and consequently, to ascertain the way in which this can be done, recourse must be had to the ordinary law. Under that law knowledge on the part of the transferee is a necessary ingredient. Their Lordships are therefore of opinion that knowledge of duress on the part of the transferee must be established before a transferor can claim to be entitled to have an instrument of transfer which has led to the registration of a proprietor under the Land Code set aside on the ground of duress.

An argument was addressed to their Lordships based on the existence of the words "to which he is proved to be a party" in subsection (ii) of section 42, which deals with fraud and misrepresentation. The implications which have been suggested as arising from the presence of these words are not strong enough to persuade their Lordships that the words "shall not be "indefeasible" referred to earlier do mean "shall be void" or that they mean anything more than has been observed by their Lordships.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors: *Lawrance, Messer & Co.; Barrow, Rogers & Nevill.*

C. C.

[QUEEN'S BENCH DIVISION.]

* EAD *v.* HOME SECRETARY.

1954
Jan. 25.

Lord Goddard C.J., Byrne and Parker JJ.

Police — Pensions — Police constable — Disablement — Application for pension—Decision by medical referee—Not the result of service—Appeal—Quarter sessions—Jurisdiction—Right of appeal limited by regulations—Police Pensions Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 24), *s.* 5 (1) (3)—*Police Pensions Regulations,* 1949 (*S.I. No.* 1241), *rr.* 43, 44, 45.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

The right of appeal to quarter sessions under section 5 (1) of the Police Pensions Act, 1948, from a refusal by the police authority to grant a pension is not a general one but is limited by the Police Pension Regulations, 1949, to an appeal on the ground that the medical referee had inadequate or inaccurate evidence on which to come to his conclusion.

MOTION.

The appellant, John Raymond Ead, a constable in the metropolitan police force, contracted a tubercular infection of the spine some time after having injured his back while acting in the course of his duty. He applied for a pension under the Police Regulations, 1949,[1] made under the Police Pensions Act, 1948, but his application was refused. He appealed to the

[1] Police Pensions Act, 1948, s. 5: "(1) If any person . . . is aggrieved by—(*a*) the refusal of the police authority to admit a claim to receive as of right a pension, . . . under the regulations made under this Act; . . . he may appeal to a court of quarter sessions and that court, after enquiring into the case, may make such order in the matter as appears to the court to be just: Provided that—. . . (*b*) regulations made under this Act may provide, in relation to questions arising out of those regulations, for the reference of any such matter as is specified in the regulations, either by the police authority or by the court, to a medical practitioner, whose decision thereon shall, subject to such rights of appeal as may be provided by the regulations to such tribunal as may be constituted thereunder, be final on the matter so referred. . . .

"(3) An appeal shall lie on a point of law from any decision of a court of quarter sessions under this section to the High Court in accordance with rules of court and the decision of the High Court shall be final."

Police Pensions Regulations, 1949, reg. 43: "(1) Subject as hereinafter provided, the question whether a person is entitled to any and, if so, what awards under these Regulations shall be determined in the first instance by the police authority.

"(2) Where the police authority are considering whether a person is disabled they shall refer for decision to a duly qualified medical practitioner selected by them the following questions:—. . . (*c*) Whether the disablement is the result of an injury received in the execution of duty, and (*d*) the degree of the person's disablement, . . .

"(4) The certificate of the selected medical practitioner on the questions referred to him under the preceding provisions of this Regulation shall, subject to the provisions of Regulations 44 and 45, be final."

Reg. 44: "(1) Where a person has been informed of the determination of the police authority on any question which involves the reference of questions under Regulation 43 to a selected medical practitioner, he shall, if . . . he applies to the police authority for a copy of the certificate of the selected medical practitioner, be supplied with such a copy. (2) If the person concerned is dissatisfied with the decision of the selected medical practitioner as set out in his certificate, he may . . . give notice to the police authority that he appeals against the said decision, and the police authority shall notify the Secretary of State . . . who shall appoint an independent person or persons (hereafter in these Regulations referred to as the 'medical referee') to decide the appeal. (3) . . . the decision of the medical referee shall, subject to the provisions of Regulation 45, be final."

Reg. 45: "(1) A court hearing an appeal under s. 5 of the Act . . . may, if they consider that the evidence before the medical authority who has given the final decision was inaccurate or inadequate, refer the decision of that authority to him for reconsideration in the light of such facts as the court . . . may direct, and the medical authority shall accordingly reconsider his decision and, if necessary, issue a fresh certificate which, subject to any further reconsideration under this paragraph, shall be final."

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Secretary of State who, in accordance with regulation 44, appointed a medical referee, referring to him for decision the question whether the appellant's disablement was the result of an injury received in the course of duty. The medical referee came to the conclusion that the appellant's disablement was not the result of his service. From that decision the appellant appealed to quarter sessions under section 5 (1) of the Act. At the hearing he admitted that the ground of appeal was not that the evidence before the medical referee had been inadequate or inaccurate but that it was an appeal against the decision itself. The respondent took a preliminary objection of law to the court hearing any evidence, submitting that on a true construction of the Act and regulations it was not open to the court to review the decision of the medical referee since regulation 45 (1) limited their jurisdiction to considering whether the evidence before the medical referee had been inaccurate or inadequate. After hearing argument the court ruled that their jurisdiction was so limited, refused to hear evidence and dismissed the appeal. The appellant appealed to the court under section 5 (3) of the Act.

R. D. L. Du Cann for the appellant.
Mervyn Griffith-Jones for the respondent.

Lord Goddard C.J. Parker J. will deliver the judgment of the court.

Parker J. This case comes before the court under section 5 (3) of the Police Pensions Act, 1948, which provides that: "An appeal shall lie on a point of law from any decision of a court of quarter sessions under this section to the High Court in accordance with rules of court and the decision of the High Court shall be final."

It is unnecessary to go into the merits of the case. Quite shortly, the appellant had been refused a pension after having been invalided out of the police service, and the matter went through the various stages provided for in the Police Pensions Regulations, 1949, which are the relevant regulations for this purpose.

[His Lordship read regulations 43, 44, and 45, stated the facts relevant to this appeal, and continued:]

Mr. Du Cann has put forward an able argument on behalf of the appellant. He contended that by section 5 of the Police Pensions Act, 1948, a person in the position of the appellant has a general right of appeal from the refusal of the police authority to grant a pension, and that it must be remembered that the police authority has to be guided by, or to act on, the medical certificates. Accordingly he argues that the right of appeal is perfectly general except in so far as it has been expressly cut down by regulations. He agrees that there is power to cut down that right of appeal by regulations because of section 5

(1) (*b*). [His Lordship read the subsection and continued:] Mr. Du Cann says, however, that if one looks at regulation 45 it is clear that a general right of appeal has not been cut down and that regulation 45 merely states what the tribunal, which is quarter sessions, may do with such an appeal.

In my view, the answer to that argument is that section 5 of the Act gives no general right of appeal as such, in the sense that it exists except in so far as it is taken away by the regulations. Section 5 itself provides that in the regulations certain matters of medicine shall be decided by the medical practitioner or the medical referee, and it states in terms that the regulations may provide that the certificate of the medical practitioner shall be final subject to any rights of appeal that the regulation may give. Examination of the regulations shows that the certificate or the decision of the medical referee is final and that there is no right of appeal except in so far as regulation 45 provides it. I am satisfied that the only appeal provided by regulation 45 is one by an appellant who alleges that the medical referee had inadequate or inaccurate evidence from which to come to his conclusion, and not an appeal against the conclusion itself. In these circumstances, I would dismiss the appeal.

LORD GODDARD C.J. I agree.

BYRNE J. I agree.

Appeal dismissed.

Solicitors: *Ludlow, Head & Walter; Treasury Solicitor.*

[LIVERPOOL ASSIZES.]

* PUGH *v.* MANCHESTER DRY DOCKS CO. LD.

1953
Nov. 10, 11, 12.

Donovan J.

[1952 P. No. 2250.]

Factory—Dangerous machinery—Fencing—Duty to fence even though rendering machinery unusable—Grindstone—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 14 (1).

The plaintiff, who was employed as a blacksmith's striker at the defendants' factory, was engaged in taking the 'rag' end off a box spanner by holding it against the revolving wheel of a grinding machine when his finger came into contact with the wheel and he sustained injuries. There was a tool rest fitted to the grinding machine, but the plaintiff at the time he sustained the accident was holding the spanner against a part of the grinding wheel where there was no rest. The grinding machine had a guard of the type usually provided for such machines, i.e., a three-quarter fence which completely encased the grinding wheel save

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

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for a small exposed portion, without which the grinding machine would have been unusable:—

Held, that the defendants' duty was to fence securely the grinding wheel in accordance with section 14 (1) of the Factories Act, 1937 [1] and they had failed to discharge that duty; that the fact that, in the absence of regulations modifying the requirements of section 14 (1), compliance with that subsection rendered the machine unusable did not absolve the defendants from their duty to fence; and, therefore, the whole blame for the accident must be attributed to the defendants.

Davies v. *Thomas Owen & Co. Ld.* [1919] 2 K.B. 39 applied.

Per curiam. It is said that if the effect of section 14 is virtually to prohibit the use of grinders like these, it is very odd to find the Secretary of State legislating [2] on the basis that they are usable. I agree that it is, but I am bound by the authorities.

Action.

The plaintiff, Alfred Pugh, was employed as a blacksmith's striker at the defendant company's premises in Ellesmere Port. The duty of grinding articles had not been specifically allotted to him, but by custom extending over some 30 years it had come to be recognized as part of his work.

On June 29, 1951, the plaintiff was at work on a grinding machine which was fitted with a tool rest running across the front of the grinding wheel and at right angles along the right-hand side of the wheel. The grinding wheel which was 14 ins. in diameter was substantially encased by a fabricated steel guard which left exposed only the front of the grinding wheel. This opening in the guard was 4 ins. in width and $8\frac{3}{4}$ ins. in height measured from the tool rest. The plaintiff was engaged in taking the rag end off a box spanner and was working on the left-hand side of the machine where there was no tool rest when the spanner, which he was holding against the grinding wheel, slipped and his left index finger came into contact with the grinding wheel. As a result the plaintiff suffered a traumatic amputation through the middle phalanx of the left index finger.

The plaintiff brought this action against the defendant company claiming damages for breach of statutory duty and at common law.

Andrew Rankin for the plaintiff.

H. I. Nelson Q.C. and *R. H. Forrest Q.C.* for the defendants.

[1] Factories Act, 1937, s. 14: "(1) "Every dangerous part of any "machinery, . . . shall be securely "fenced unless it is in such a posi-"tion or of such construction as to be "as safe to every person employed "or working on the premises as it "would be if securely fenced:
"Provided that, in so far as the "safety of a dangerous part of any "machinery cannot by reason of the "nature of the operation be secured "by means of a fixed guard, the re-"quirements of this subsection shall "be deemed to have been complied "with if a device is provided which "automatically prevents the opera-"tor from coming into contact with "that part."

[2] Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (S.R. & O. 1925, No. 904) as amended by the Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950 (S.I. 1950, No. 688).

In addition to the cases referred to in the judgment, the following cases were cited in argument: *Nicholls* v. *Austin (F.) (Leyton) Ld.*[3]; *Benn* v. *Kamm & Co. Ld.*[4]; *Mackay* v. *Ailsa Shipbuilding Co. Ld.*[5]; *Franklin* v. *Gramophone Co. Ld.*[6]; *Lewis* v. *Denyé.*[7]

Cur. adv. vult.

November 12. DONOVAN J. delivered a considered judgment in which, after reviewing the evidence, he found that the defendants had failed to rebut the prima facie case that the plaintiff was acting in the course of his employment, and continued: The next question is whether there was a breach of section 14 of the Factories Act, 1937, on the part of the defendants. The grinding machine was obviously machinery. Equally obviously, to my mind, the grinding wheel, revolving at over 1,000 revolutions per minute, was a dangerous part of that machinery. To adopt the words of Lord du Parcq in *Walker* v. *Bletchley Flettons Ld.*,[1] it was a possible cause of injury to anyone acting in a way a human being might be reasonably expected to act in circumstances which might reasonably be expected to occur.

Here the plaintiff was grinding the spanner towards the left of the face of the grinding stone, and it appears that this was frequently done by persons from the blacksmith's shop. That being so, the tool being ground would not be supported by the metal rest, and the downward pull of the fast revolving stone might well be expected to carry the tool with it and cause some part of the hand of the operator to come into contact with the moving stone. That is what happened here.

On that view, the machine had to be securely fenced. That means that some barrier had to be erected which would prevent any employee from making contact with the dangerous part of the machine, *i.e.*, the wheel: see *Carroll* v. *Andrew Barclay & Sons Ld.*, *per* Lord Porter.[2] In the present case the machine clearly was not so fenced. To comply with section 14, I think that it is true that the fence would have to be such that the grinding machine would become quite unusable except for quite a few minor jobs. But that does not absolve the defendants from their duty to fence: see *Davies* v. *Owen (Thomas) & Co. Ld.*[3] and *Miller* v. *Wm. Boothman & Sons Ld.*[4] In the latter case there were regulations made by the Secretary of State which the Court of Appeal held modified the requirements of section 14 of the Factories Act, 1937, as regards the machine there in question because they specified what the fencing should be. Here,

[3] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92; [1945] K.B. 50; [1944] 2 All E.R. 485.

[4] [1952] 2 Q.B. 127; [1952] 1 T.L.R. 873; [1952] 1 All E.R. 833.

[5] 1945 S.C. 414.

[6] [1948] 1 K.B. 542; 64 T.L.R. 186; [1948] 1 All E.R. 353.

[7] [1939] 1 K.B. 540; 55 T.L.R. 391; [1939] 1 All E.R. 310.

[1] [1937] 1 All E.R. 170, 175.

[2] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[3] [1919] 2 K.B. 39.

[4] [1944] K.B. 337; 60 T.L.R. 218; [1944] 1 All E.R. 333.

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Donovan J.

there are no comparable regulations. There are the Grinding of Metals (Miscellaneous Industries) (Amendment) Special Regulations, 1950 (S.I. 1950, No. 688), and these assume that grinding machines will be usable, but they contain no provisions as to fencing.

It is said that if the effect of section 14 is virtually to prohibit the use of grinders like these, it is very odd to find the Secretary of State legislating on the basis that they are usable. I agree that it is, but I am bound by the authorities I have mentioned, and no comparable escape from the impasse is provided for me such as the Court of Appeal found in the Woodworking Regulations under review in *Miller* v. *Wm. Boothman & Sons Ld.*[5] As the authorities stand, the deadlock can be resolved, in my opinion, only by the House of Lords or by Parliament.

I arrive, therefore, at the conclusion that there was a breach of section 14 and that the injury to the plaintiff was one of the consequences.

[His Lordship then considered the position at common law; found that the stone of the grinding wheel was unduly worn; that the tool rest, which should have come up to a distance of 1/16th inch from the stone, was adjusted as fully forward as possible but, nevertheless, left a gap of 5/8th inch; and continued:] It is clear that the plaintiff was working on the left-hand side of the machine as one faced it, where there was no rest. To do this is to court the danger that the object being ground will be carried downwards by the stone, which may then come in contact wtih the hand. This the plaintiff knew, but he was in a hurry and, as workmen who are in a hurry sometimes will, he took a risk. While, therefore, I think the stone was so worn as to be unsafe, I could not on the facts attribute the accident to this negligence.

I decide in favour of the plaintiff on the ground that the defendants were in breach of their statutory duty. If the machine had been securely fenced, the plaintiff would not have been doing any grinding on it at all for the reason, as I have stated, that he could not. I think, therefore, that I must attribute the whole blame for the accident to the defendants.

I assess the general damages at £300 and therefore give judgment for the plaintiff for a total sum of £369 11s., which includes the agreed special damage.

Judgment for the plaintiff.

Solicitors: *John Whittle, Robinson & Bailey, Manchester; Laces & Co., Liverpool.*

[5] Ibid.

[CHANCERY DIVISION.]

* *In re* A DEBTOR: *Ex parte* THE DEBTOR *v.* SCOTT AND THE OFFICIAL RECEIVER.

1954
Jan. 25.

Harman and Danckwerts JJ.

[No. 20 of 1953.]

Bankruptcy—Bankruptcy notice—Sum specified to be due excessive—Damages awarded to creditor in High Court action—Damages reduced on appeal—Effect on bankruptcy proceedings—Set-off of costs—Validity of bankruptcy notice—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 2 (ii), 5.

In July, 1953, a petition in bankruptcy was presented by a creditor based on the sum of £200 damages awarded to her (together with costs) in an action in the Queen's Bench Division, in which judgment had been given on March 17, 1953. A bankruptcy notice had been issued on April 16, based on the damages alone.

The hearing of the petition was, on October 21, 1953, adjourned pending the hearing of an appeal in the action. On October 22, 1953, the Court of Appeal reduced the damages to £25 and allowed the debtor to set off one half of his costs in the Court of Appeal against the judgment against him in the court below.

On November 27, 1953, the petition was restored and a receiving order was made against the debtor.

On appeal by the debtor to the Divisional Court in Bankruptcy, on the grounds that the reduction by the Court of Appeal of the sum of £200 to £25 left a figure which was not a correct figure for bankruptcy proceedings, and that the registrar in the county court had wrongly proceeded with the hearing of the petition, as he did not know at what figure the costs awarded to the debtor which had not then been taxed, ranked:—

Held, that, taking into consideration (i) that at the date of the hearing of the petition there remained a debt sufficient to support a bankruptcy notice; (ii) that the debtor's cross-claim on costs was not in existence until the date of the order of the Court of Appeal; (iii) that by section 2 (ii) of the Act a bankruptcy notice is not invalidated by stating an excessive sum; and (iv) that after taxation of the costs there would clearly be a substantial sum owing by the debtor, it was just and equitable that the receiving order should be affirmed.

APPEAL from Brentford County Court.

On March 17, 1953, the plaintiff (Mrs. Suzane Scott), in an action in the Queen's Bench Division, obtained judgment against the debtor for £200 and costs. On April 16, 1953, a bankruptcy notice based on that sum of £200 (the costs not having then been taxed) was issued against and subsequently served on the debtor.

The debtor opposed the bankruptcy notice and the registrar dismissed his opposition. On June 17, 1953, the debtor appealed to the Divisional Court against the registrar's decision and his appeal was dismissed.

On July 28, 1953, a petition in bankruptcy was filed in the Brentford County Court for a receiving order against the debtor. The petition was presented by the creditor and stated that the

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A Debtor, *In re. Ex parte* The Debtor *v.* Scott.

debtor was indebted to her under the judgment in the Queen's Bench action in the sum of £426 9s. 9d., being £200 in respect of damages awarded by the court in the action and £226 9s. 9d. in respect of the taxed costs of the action. This petition came on for hearing on October 21, 1953, when the hearing was adjourned pending an appeal by the debtor from the decision in the Queen's Bench action. That appeal was heard by the Court of Appeal on October 22, 1953, and was allowed to the extent that the damages awarded were reduced to £25, the order as to costs being undisturbed, save that the debtor was allowed to set off one-half of his costs in the Court of Appeal.

On November 27, 1953, the petition was restored and a receiving order in bankruptcy was made against the debtor by the registrar of the Brentford County Court.

On December 18, 1953, notice of appeal against the receiving order was given by the debtor, in which he put forward as grounds of appeal that in the events which had happened no available act of bankruptcy had been proved; and that when the petition (which was for £426 9s. 9d.) was before the registrar at the Brentford County Court, he proceeded with it before the appellant's costs in the Court of Appeal had been taxed.

On January 25, 1954, the appeal came on for hearing before the Divisional Court in Bankruptcy.

The facts are more fully stated in the course of the judgment.

Muir Hunter for the appellant.
Ian Fife for the respondent.

It was stated in argument that there was no authority. The following textbook was referred to in argument: Williams on Bankruptcy, 16th ed., pp. 34, 193.

Harman J. This case, like other cases brought before us concerning this particular debtor, raises one or two novelties. The petition is based on a judgment for £200 pronounced by Lynskey J. on March 17, 1953, in an action in the Queen's Bench Division brought against the debtor by the petitioner. In the ordinary way that judgment carried the plaintiff's costs of the action to be taxed. The judge was willing to grant a stay only on the terms that £200, the whole of the damages, were paid into court. The debtor was either unwilling or unable to do that. The result was that execution could be levied on the debtor, and on April 16 a bankruptcy notice was issued against him for £200, the costs not then having been taxed and therefore not being available for the bankruptcy notice.

The debtor gave notice of appeal on April 27, 1953, against the Queen's Bench decision and evaded service of the bankruptcy notice, with the result that an order for substituted service was made by the registrar at Brentford on May 6. At the same time, the bankruptcy notice was extended to June 16.

The bankruptcy notice having been served by post, the debtor filed an affidavit in opposition to it. That was eventually heard on June 8, when the registrar adjourned the hearing. Why he did so is a little obscure; he restored the matter for hearing on June 22; and reheard it on June 26, when he dismissed the debtor's opposition. There was an appeal against that to the Divisional Court on July 17, which was dismissed early in October. So the validity of the bankruptcy notice at that time is now beyond cavil.

The costs in the Queen's Bench action were taxed at £226. The allocatur for those was issued on July 16 and was in the manner customary in the Queen's Bench Division added at the end of the order, there being no taxing master's certificate.

On July 28 this petition was put on the file for the debt of £200 plus costs £226, making in all £426. It came on for hearing on October 21 when it was adjourned pending the hearing of the Queen's Bench appeal, which, in fact, was heard the next day when the appeal was allowed and the order of Lynskey J. was varied by reducing the judgment for damages from £200 to £25. The costs in the Queen's Bench action were left standing, but the appellant was given half his costs in the Court of Appeal and the right to set them off against what he owed on the judgment below.

The petitioner's solicitors then wrote a letter to the registrar applying to have the petition restored and arguing their case behind the respondent's back. That is not a practice which ought to be encouraged.

However that may be, the petition was further heard on November 27, when a receiving order was made. Although the facts do not clearly appear either from the petition or from the affidavit sworn to verify it, it does not seem that there was any miscarriage of justice, either from that hearing or from the fact that this undesirable letter had been written. The registrar seems to have been in possession of the right facts. He simply took the view that, as the costs to be taxed in favour of the debtor when taxed would admittedly not reduce the total debt of the petitioner below £50, there was a good petitioning creditor's debt and a receiving order ought to be made. Accordingly, he made a receiving order, and it is against that that this appeal is brought.

The first ground of appeal is this. Under section 5 of the Bankruptcy Act, 1914, the court is bound to require proof of the act of bankruptcy, and it is said here that it could not be satisfied in that respect because, as things had turned out, there was no proof of an act of bankruptcy. This appears bizarre, having regard to the facts above stated, but the argument goes in this way. The act of bankruptcy alleged was a debt of £200. The Court of Appeal reduced that to £25. £25 would be a good enough debt to avail as an act of bankruptcy. But it is further

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A Debtor, *In re. Ex parte* The Debtor *v.* Scott.

Harman J.

said that the debtor has the right to set off against the debt, that is the £25, his right to costs which may amount to £60 or so, and, therefore, having regard to the effect of the order of the Court of Appeal, there was no debt available as an act of bankruptcy, and, therefore, the condition of the statute was not complied with and the court cannot make an order.

Secondly, it is said that, if one serves a bankruptcy notice on a man for a large sum which he cannot pay, and one follows it up by a petition admitting that the sum is very much smaller, an injustice has been committed; inasmuch as, though he could not pay the larger amount, he might have paid the smaller one, and, therefore, the court, in the exercise of the discretion conferred by section 5, should come to the conclusion that there is "other sufficient cause" why no order ought to be made.

In my judgment, neither of those points ought to prevail. I do not wish to canvass the larger contention of the respondent, which amounted to this, that if a sufficient act of bankruptcy was available at the time when the notice expired, it mattered not that there was no debt at all by the time the petition came on. That is a matter which can be decided when it comes necessarily into controversy. I am not bound to deal with anything so difficult today.

It seems to me that the true view is that there remained at the hearing of the petition a debt for £25, enough to support the bankruptcy notice. The right to set off the costs in the Court of Appeal in fact is not a present right, because those costs have not been quantified by taxation. Apart from that, it seems to me that the cross-claim created by the order of the Court of Appeal was never in existence before the date when the Court of Appeal made its order. It is not as if that were a matter which dated back, as does in some senses the variation in the damages claimed. So that, in my judgment, the bankruptcy notice remained a good bankruptcy notice, notwithstanding that it had been given for a larger sum than the £25, which turned out to be the true debt.

Section 2 of the Act provides: "A bankruptcy notice . . . "(ii) shall not be invalidated by reason only that the sum specified "in the notice as the amount due exceeds the amount actually "due," unless certain other conditions are satisfied which do not arise here. I do not see that any such injustice was done by the form of the bankruptcy notice as would induce us to say that in the exercise of our discretion we ought to refuse the petition. The substance of the matter is that this debtor owes the creditor the costs and £25, subject to a counterclaim which clearly will leave a very substantial balance in favour of the creditor. In those circumstances, neither justice nor equity demands that the usual consequences should not be visited on the debtor.

The appeal should be dismissed.

Danckwerts J. I agree and I will add my reasons in a very few words. When on November 27, 1953, the petition came before the registrar for further hearing, it seems to me that the view which he took was an entirely sensible one on the information which was given to him as regards the cross-claim. It appears plain that, taking the cross-claim or set off of the debtor at his highest figure of £100, at least £150 remained owing by the debtor to the petitioning creditor. It seems to me that either the debtor was in a position to pay that sum, or, if he was not in a position or was unwilling to do so, justice demanded that a receiving order should be made.

The answer which is given seems to me to be an entirely technical one, and, if that answer be a technical one, it appears to me that the debtor cannot very well complain if it is defeated on technical grounds.

It is true that the judgment of Lynskey J. for £200 damages was reduced by the Court of Appeal to the sum of £25, and therefore the bankruptcy notice. when it was issued, was demanding a sum which ultimately turned out to be larger that the proper sum. Presuming therefore that it is to be treated as stating too large a sum, and that Lynskey J.'s judgment must be treated as if it ought to have been from the beginning one for £25, it seems to me that that amount was a valid subject for a bankruptcy notice. As to the argument that it would be wiped out by the amount of costs which were recoverable by the debtor under the order of the Court of Appeal, I agree that, at the date of the bankruptcy notice, that right of the debtor could not possibly be operative. It was a claim which did not and could not arise until the Court of Appeal dealt with the matter on October 22, 1953. Therefore, there was at the date of the bankruptcy notice, if not a valid debt for £200, at any rate a valid debt enforceable by a bankruptcy notice for £25. In those circumstances, it seems to me that the notice is validated by the second proviso to the provisions of section 2 of the Bankruptcy Act, 1914. Consequently, there was a perfectly valid bankruptcy notice on which a petition could effectively be founded, and it seems to me, therefore, that the receiving order was properly made.

Appeal dismissed.

Solicitors: *Shelton, Cobb & Co.; Piesse and Sons.*

J. L. D.

[COURT OF APPEAL.]

C. A.

1954
Jan. 26.

Evershed M.R., Denning and Romer L.JJ.

*ISAACS *v.* TITUS.

[Plaint No. J. 1316.]

Landlord and Tenant—Rent restriction—Shared accommodation—Shared use of kitchen—One tenant vacating premises—Right of other tenant to remain in occupation—Landlord and Tenant (Rent Control) Act, 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 8.

Court of Appeal—Notice of appeal—Failure of respondent to appear—Desirability of delaying drawing up of order.

The defendant was the tenant of part of a dwelling-house within the protection of the Rent Restriction Acts with a right to share the use of the kitchen with another tenant. The defendant's fellow-tenant gave up possession and the landlord claimed possession of the part of the premises let to the defendant, alleging that, by reason of the other tenant having left, the landlord and no one else had a right to share the use of the kitchen with the defendant:—

Held, that the fact that one tenant had left did not result in the landlord becoming entitled to share the use of the kitchen with the defendant. The defendant was entitled to the protection of section 8 of the Landlord and Tenant (Rent Control) Act, 1949, and the landlord was not entitled to possession.

Lockwood v. *Lowe* [1954] 2 W.L.R. 296 followed.

APPEAL from Judge Archer sitting at Brighton County Court.

The plaintiff, Alfred John Isaacs, in these proceedings claimed as landlord to recover possession from the defendant, Bridgid Teresa Titus of the rooms in No. 12 Norfolk Square, Brighton, which had been let to her.

The particulars of claim alleged by para. 1 that the defendant was the tenant of the front room and kitchen on the first floor of the landlord's property, No. 12 Norfolk Square. Paragraph 2 was as follows: "By the terms of the tenancy the defendant "shares the kitchen with the tenant or occupier of the other room "or rooms situate on the first floor." Paragraph 3 added by amendment: "The tenant with whom the defendant has hereto-"fore shared the said kitchen has vacated the premises and the "right of sharing the said kitchen has accordingly reverted to "the" landlord. The tenant in her defence relied on the Rent Restriction Acts.

No evidence was called, the solicitors, who appeared for the two parties, being apparently agreed about the facts. In the short note of his judgment, the judge said: "This is a very "doubtful point, but in the events which have happened the "landlord and no one else at present has any right to share "the kitchen with the defendant, and so I feel constrained to "hold that section 8 of the Act of 1949 does not protect the "tenant."

The tenant appealed contending that, notwithstanding the fact that the other tenant had left, she remained within the protection of section 8 of the Landlord and Tenant (Rent Control)

Act, 1949,* and further that the decision of the Court of Appeal in *Lockwood* v. *Lowe* † was conclusive in her favour.

Peter Elman for the tenant.
The landlord did not appear.

EVERSHED M.R. after stating the facts and reading section 8 of the Landlord and Tenant (Rent Control) Act, 1949, continued: The effect of section 8 of the Act of 1949 was to alter the law as it had previously been laid down, which, in effect, provided that where there was a sharing of accommodation of the kind indicated—whether the sharing was with the landlord or anyone else—then there was no letting as a separate dwelling, and so no protection for the tenant.

Apart from one point, to which I will come back, it appears to me that had the judge had the advantage of having cited to him the decision of this court, delivered on March 31, 1953, in *Lockwood* v. *Lowe*,[1] he would not have felt constrained to hold, as he did, that the tenant had lost the protection of the Act. In that case, as in this, there had originally been a letting to two persons of separate accommodation, each having the right to share with the other an essential part of the habitation of each, namely, the kitchen and scullery and bathroom. In that case, as in the present, one of the two had gone and left his part of the premises vacant. The majority of the court (Denning and Morris L.JJ.), in deciding the case in favour of the tenant, came to the conclusion that the terms of the original letting, on the facts as found by the county court judge, remained as they had previously been notwithstanding the departure of one of the two original tenants—that is to say, they were of opinion that the right of the relevant tenant, Lowe, was, as it always had been, a right to the exclusive occupation of certain of the accommodation, plus a right to share with the other tenant Bartholomew, and with no one else.

* Landlord and Tenant (Rent Control) Act, 1949, s. 8: "(1) Where "—(*a*) a tenant has the exclusive "occupation of any accommodation "(in this section referred to as 'the "'separate accommodation'), (*b*) the "terms as between the tenant and "his landlord on which he holds the "separate accommodation include the "use of other accommodation (in this "section referred to as 'the shared "'accommodation') in common with "another person or other persons, "not being or including the landlord, "and (*c*) by reason only of the circumstances mentioned in paragraph "(*b*) of this subsection, the separate "accommodation would not apart "from this section be a dwelling-"house to which the principal Acts "apply, the separate accommodation "shall be deemed to be a dwelling-"house to which those Acts apply, "and the following provisions of this "section shall have effect. . . .

(6) While the tenant is in possession of the separate accommodation "by virtue either of the contract of "tenancy or of the provisions of the "principal Acts, any term or condition of the contract of tenancy terminating or modifying, or providing "for the termination or modification "of, his right to the use of any of "the shared accommodation which is "living accommodation shall be of no "effect: . . ."

Subsection (8) gives to the court a right, on the application of the landlord, to modify the sharing provision.

† [1954] 2 W.L.R. 296.

[1] [1954] 2 W.L.R. 296.

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Romer L.J., who was the third member of the court, based his conclusion rather upon this: that since Bartholomew had gone, the practical effect was that Lowe had an exclusive right, on the facts as found, not only to the original accommodation, but also to that which he had formerly had to share with Bartholomew. But all three judges indicated that, unless there was some modification by mutual consent or alteration of the contract, or the making of a new contract, it could not be said that because one of the two tenants had gone, therefore the landlord had, so to speak, automatically stepped into the shoes of the old tenant, so as to produce the result, as a matter of law, that the tenant who formerly had the right to share with another tenant was now in the position of having a right to share with the landlord.

I come back then to the one point to which my brother Romer drew attention in this case, namely this: According to para. 3 in the particulars of claim, it is alleged by the plaintiff that because of the departure of the other tenant, the right of sharing the kitchen "has accordingly reverted to the plaintiff." The particulars of defence set up the Rent Acts generally as a defence, but do not in terms challenge that statement; but I construe it merely as an allegation that, because the former tenant has gone, therefore that tenant's former estate in the premises has no doubt come to an end, and in that sense the landlord is entitled to get possession of the room which the previous tenant formerly occupied. But it does not follow, as I think, that the tenant's terms of tenancy have undergone automatically some change. We are told by Mr. Elman, no doubt accurately, that it is not in any case the fact that the landlord is himself in occupation, and is himself sharing with the tenant the accommodation which she formerly shared with the other tenant.

In those circumstances, I cannot conclude that this particular paragraph in the particulars of claim, which is not challenged, serves to distinguish the present case on these facts from *Lockwood* v. *Lowe*.[2] On the contrary, as I have already indicated, the present case is in my judgment necessarily on its facts governed by the decision of this court in *Lockwood* v. *Lowe*,[2] and, had *Lockwood* v. *Lowe*[2] been cited to the judge, I have little doubt that his opinion would also have been to that effect. I therefore think that the appeal must be allowed and the order for possession set aside.

Mr. Elman has informed us, again I doubt not correctly, that those instructing him served the solicitors of the landlord with the notice of appeal, and that those solicitors accepted service of the notice. Whether after that the plaintiff thought fit to dispense with his solicitors, or for whatever other reason, the landlord has not appeared to support his judgment. Knowing as I do that the commonly used form of notice of appeal

[2] [1954] 2 W.L.R. 296.

might well deceive an inexperienced person, I think it right to say that the present order should not be drawn up for seven days; and I would ask Mr. Elman to direct those who instruct him to take steps to see that notice of this judgment is forthwith given to the landlord with an intimation that, if he desires to be heard, he should so indicate to the court within seven days; in which case we will make arrangements to postpone further the drawing up of the order, so that he may have an opportunity of putting whatever points he wishes before us.

Subject to that, I think that the right order would be to allow the appeal and discharge the order made by the judge, dismissing instead the landlord's action with the usual consequences.

DENNING L.J. I agree that the appeal should be allowed.

ROMER L.J. I also agree. I am quite sure that the decision of the judge would have been different had the report of the decision in *Lockwood* v. *Lowe* [2] been brought to his attention at the time of the trial.

Appeal allowed.

Solicitors: *A. & G. Tooth for Leslie Wilner, Brighton.*

B. A. B.

[2] [1954] 2 W.L.R. 296.

[COURT OF APPEAL.]

* POWELL *v.* BRAUN.

[Plaint No. 860.]

C. A.
1954
Jan. 28.
Evershed M.R., Denning and Romer L.JJ.

Master and Servant—Remuneration—Employee to be paid by salary and bonus—Method of assessing bonus never agreed—Service terminated—Right of employee to bonus—Quantum meruit.
Contract—Uncertainty—Sum payable not stipulated—Reasonable sum. Quantum meruit. "Bonus."

The plaintiff had been employed by the defendant as his secretary in his business for some two years when he wrote to her on March 18, 1946, expressing satisfaction with the services which she had rendered to him in the past and the wish that she should undertake additional responsibility in the future. He offered to pay to her, in recognition of her past services and such additional responsibility, a bonus on the net trading profits of the business instead of an increase in salary. The plaintiff wrote the same day accepting that offer. The manner in which such bonus was to be assessed was never agreed but the defendant did, in fact, pay to the plaintiff a bonus in subsequent years. The plaintiff's contract of service having been terminated, the defendant refused to pay any bonus to the plaintiff

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in respect of her last two years' service contending that, on the true construction of his letter, there was no firm promise to pay the plaintiff anything; alternatively, that his letter was of so vague a character that it was incapable of forming the basis of a claim in contract. :—

Held, that on the true construction of the letters the parties did not intend the payment of a bonus to be purely in the discretion of the defendant; that the principle of quantum meruit was no less applicable when the remuneration was additional remuneration—that was remuneration over and above a fixed salary—than it was when it was the only remuneration; and that, accordingly, the plaintiff was entitled to be paid the sum which the parties had agreed to be payable if the defendant were liable to pay a bonus.

Taylor v. *Brewer* (1813) 1 M. & S. 290 considered.

Appeal from Judge Glazebrook sitting at Bromley County Court.

The plaintiff, Pamela Irene Powell, had been employed by the defendant, H. W. Braun, from 1944, as his confidential secretary. By letter dated March 18, 1946, the defendant wrote to the plaintiff: "You have now been with me for just two "years, both of them very eventful, and during the first you did "without question many things which were hardly within your "contract of engagement; I shall always remember with "particular gratitude everything you did for Mrs. Braun. As I "have mentioned to you on various occasions, it is my wish for "you to act and work on your own initiative rather than to feel "you must always refer matters to me; I am, of course, on hand "for any business problem which may arise, but now we have "two juniors it is more necessary than before that you are able "to handle matters yourself both from the business angle and "from your own personal prestige and authority as befits your "position. I have not hitherto mentioned to you the question "of a rise in salary, and with the added responsibility you now "have I feel that some recognition of this and of past service "is due to you. A stereotyped rise is all very well, but my "opinion has always been that a bonus on the net trading profit "is more interesting to anyone. I therefore propose to adopt "this with you and that, say, about May each year I shall pay "you an amount according to the trading results of the previous "financial year to the end of March; I cannot say at this "juncture what the amount will be, but I am sure you will not "be disappointed with it from year to year. I will conclude "with the hope that you may stay with me for many a day as "my confidential secretary and senior member of the staff even "if the latter be only small."

The plaintiff replied to that letter on the same date as follows: "Your letter of today was quite unexpected, but a very "pleasant surprise. Your idea of a yearly bonus is very con-"siderate, and one which I much appreciate. I do agree with "you that this is more interesting than an actual weekly increase, "and it is certainly very encouraging. You have always done

"everything possible to make my work happy and interesting, "and have assisted me in all ways, and I sincerely hope that I "shall be able to influence our juniors in a similar manner, and "that between us we shall build a really flourishing business. "There are very few people who would have included their "secretary as a member of the family as you and Mrs. Braun "included me during our stay in Ayr. Anything I did for Mrs. "Braun during her illness has been more than repaid in the "friendship and consideration you have both shown to me both "in Ayr and since we returned. I also hope that I shall have "the pleasure of working with you for 'many a day'."

The plaintiff relying on the defendant's offer continued in his employment undertaking additional responsibilities and was paid a bonus in 1946 and in each of the following years, the largest payment being £55 and the smallest £20. The plaintiff did not know on what basis these payments were calculated. She continued in the defendant's employment until April 27, 1953, when she left.

In these proceedings she claimed, first, two weeks' arrears of salary, as to which no question arose in the appeal; secondly, a declaration that she was entitled to be paid a bonus in respect of the two years ending March 31, 1952, and March 31, 1953; alternatively damages for breach of the agreement contained in the correspondence as a quantum meruit. By his defence the defendant denied that his letter of March 18, 1946, contained an agreement to pay an annual bonus.

The county court judge held that the defendant's letter of March 18, 1946, did contain a promise to pay a bonus, but the sum payable was left to his discretion and the contract was too vague to be enforced. He further held that since the plaintiff had undertaken additional work on the terms that she was to be paid a sum depending on the defendant's discretion, she was precluded from relying on a quantum meruit. He accordingly dismissed her claim to be paid a sum for bonus. He found that, if she were entitled to rely on a quantum meruit, the sum due was £25, which the parties had agreed to be the amount of bonus, if any, payable.

The plaintiff appealed.

Michael Scholfield for the plaintiff.
E. A. Bramall for the defendant.

The following authorities were referred to in argument: *Broome* v. *Speak*[1]; *Bryant* v. *Flight*[2]; *Roberts* v. *Smith*[3]; *Taylor* v. *Brewer*[4]; *Loftus* v. *Roberts*[5]; *Way* v. *Latilla*.[6]

EVERSHED M.R. stated the facts, read the relevant correspondence and continued: In this case I have taken a different

[1] [1903] 1 Ch. 586; 19 T.L.R. 187.
[2] (1839) 5 M. & W. 114.
[3] (1859) 4 H. & N. 315.
[4] (1813) 1 M. & S. 290.
[5] (1902) 18 T.L.R. 532.
[6] [1937] 3 All E.R. 759.

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view from the county court judge. The action was one brought for salary by the plaintiff, who was formerly employed by the defendant. The claim comprehended two heads: first, for a certain small sum for fixed remuneration, about which no question arises in this court; and, secondly, for a further sum alleged to be due by virtue of the letter of March 18, 1946, written by the defendant to the plaintiff and the plaintiff's reply. The question for determination turns on the true intention of the parties to be derived from this correspondence.

Unhappily the amiable and generous language in which the plaintiff and defendant addressed each other in March 1946 did not persist very long. Perhaps the moral is that it is highly desirable to be precise in matters of this kind. Certainly, within quite a short time, the defendant appears to have been somewhat grudging in implementing whatever he intended by his letter. I am bound to say that, to my mind, at the present time he cuts a somewhat unattractive figure. Mean to the plaintiff, he was obviously held by the judge to be an unreliable witness. I have no doubt, on the facts as found by the judge, that the plaintiff's continued service of the defendant would never have occurred had it not been for her reliance upon this promise; and, as the judge expressly said, she thenceforth undertook more responsible work than otherwise she had performed, or would have performed. Still, that is no necessary answer to the questions that are raised, whether, having regard to the vague and general terms of these letters, the plaintiff can now sue upon the letters for the sums which she claims.

Two answers to the plaintiff's claim are put forward: First, it is said that on the true construction of the letter of March 18, 1946, there was no firm promise to pay anything; that it was merely a statement that, if the plaintiff continued to serve and to undertake the more responsible work as suggested, the defendant would give her something or nothing as in his discretion he might from time to time think fit. Second, it is said that in any case the whole document is of so vague and general a character that it is incapable of forming the basis of a claim in contract; and further, that a claim based on quantum meruit or its equivalent in a case of this kind is a novelty which finds no parallel, or no exact parallel, in the decided cases.

Through the industry of counsel, we have had the advantage of looking at a number of cases in which this kind of question has been before the court, and it emerges, I think quite plainly, from these authorities that the first and vital question is that of the construction of the two documents which must be taken to represent and evidence the joint intention of the parties on March 18, 1946.

The judge, perhaps influenced particularly by the use of the word "bonus," concluded in his careful judgment that the true effect of this arrangement was that any further payment over and above the fixed salary—to quote the language of Bayley J. in

Taylor v. *Brewer*[1]—should be in the breast of the defendant, whether he should pay anything or nothing. For my part, I am unable to accept that view. I think that the nature of the engagement, the service which the plaintiff had rendered, the circumstances in which the letter was written, the particular emphasis upon the defendant's own desire in his own business interest that the plaintiff should assume more responsibility and act more on her initiative—there having been two juniors engaged—all these matters make it quite plain that this suggestion for what was called a bonus meant an obligation to pay something in lieu of an addition to salary, and the conduct of both parties, to my mind, makes it plain that it was so understood by them both.

The plaintiff, whom the judge clearly regarded as a truthful witness, said: "I said I should not have accepted [this offer] "if I had known that the defendant claimed, as he did shortly "afterwards, that the arrangement did not operate for another "fourteen months"—making it clear, as I think, that she relied upon this promise as being something which she was accepting in lieu of increased salary and in consideration of continued service and greater responsibility. On the other side, there is not the smallest hint or suggestion on the part of the defendant that he was under no liability at all, if he chose not to pay, until the action is brought. When eventually the plaintiff left the defendant's service, the only point the defendant took was that there was only one year's so-called bonus "due" from him instead of two, as she claimed.

Assisted as I have been by the cases cited, which illustrate the approach which the court makes in cases of this kind, I conclude here, as a matter of construction, that the parties did not mean and intend the payment of a bonus to be purely discretionary.

That, however, leaves the further question whether the whole document is in its terms and character too vague and general to be capable of supporting a claim of this kind. Again I reject that view. Once it is concluded that this was not to be a reward in the discretion of the defendant, then inevitably it must mean, according to its terms, that the sum to be paid—unless the parties chose from time to time to agree some other figure—would be a reasonable sum; that is, a sum arrived at so as to bear a reasonable relationship to the trading profit. Of course, if there were no trading profit, no doubt there would be no so-called bonus; but, in any other event, then I think that the principle of a quantum meruit or of reasonable remuneration (which comes to the same thing) is no less applicable where the remuneration in question is additional remuneration—that is over and above the fixed salary—than it is to a case where it is the only remuneration.

[1] (1813) 1 M. & S. 290.

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That being so, the rest of the case is simple. The judge took the view—adopting what the defendant had said—that 12s. a week would be a fair sum to fix, since that would be the sort of additional salary, according to the defendant, which would have been paid if there had not been a bonus. But the parties themselves have seen fit to come to an agreement that, having regard to the trading profits as they in fact were during the two years ending March 31, 1952 and 1953, a reasonable remuneration on the basis of those profits would be £25 for the two years.

In those circumstances, and for the reasons which I have tried to state, I think that the plaintiff should have recovered judgment under this head for the sum of £25. I therefore think that the appeal should be allowed, and that judgment ought to be entered for the plaintiff for £25 in addition to the other sum for fixed salary.

Denning L.J. It was said in the course of the argument that no case has been found in the books where a quantum meruit has been awarded in a case like the present. I hope that this case will provide the deficiency.

The facts are quite simple: In lieu of a rise in salary, the defendant agreed to pay the plaintiff a bonus each year on the net trading profit. The defendant made trading profits, but he refuses to pay any bonus. He refuses to pay anything, whereas the agreement quite clearly contemplated that he should pay something. The judge said that it was a matter for the defendant in his discretion as to what he should pay, that is, whether he should pay something or nothing. I do not agree with that. I think the defendant plainly bound himself to pay something. The precise amount would not be an amount in his unfettered discretion. It would be an amount which a fair and just man would pay in the exercise of a reasonable discretion. That being so, I think that we should award to the plaintiff that sum, namely, £25. I agree that the appeal should be allowed accordingly.

Romer L.J. I also agree. This court is not a court of morals, but I am bound to say that I think that the attitude which the defendant has thought proper to adopt in this dispute reflects very little credit upon him. In March, 1946, he obtained an advantage for himself and his business, and he obtained that advantage from the plaintiff. He now seeks to adopt the attitude that he is under no liability over a period of two years to pay, on the ground that he never was under any legal liability to make any payment at all. When one looks at these two letters of March 18, 1946, setting out the promise from the defendant and the acceptance of that promise by the plaintiff, it seems to me clear that she naturally enough took the view that she was to get from the profits of the business, if there were profits, a bonus instead of an increased salary, and the consideration

which, as the judge found, she was going to give for that increased emolument was her promise to undertake further responsibilities. It has not been suggested that she failed in the fulfilment of that promise but it appears to me clear that it never dawned on her (and there was no reason why it should, having regard to the reference in her employer's letter to the increase of salary) that she was going to take on this extra responsibility at a remuneration which rested solely in the discretion of the defendant himself. That indeed, as far as I can make out, was not the view of the defendant himself at one time because he admitted, as the judge found, that there was one bonus due, and, if he was under no liability to pay anything, then the word "due" would seem to be an inapt word to use.

I think that where the judge was in error was in finding that the intention of the parties was that the defendant should pay such portion of the profits as he in his discretion might decide. I do not think that is right. In my view, it was a matter of a legal bargain giving rise to a legal right, and the plaintiff was to get at all events something provided there were profits. That being so, I think the case is covered by the type of authority exemplified by *Taylor* v. *Brewer*,[2] and *Way* v. *Latilla*,[3] and I agree with my brothers that the plaintiff should be remunerated on a quantum meruit, or reasonable basis in the way that my Lord has indicated.

Appeal allowed.

Solicitors: *Woodroffes; Mealy & Co.*

B. A. B.

[2] (1813) 1 M. & S. 290.

[3] [1937] 3 All E.R. 759.

[CHANCERY DIVISION.]

* *In re* ELSIE INGLIS (LONDON) MEMORIAL FUND.

1954
Jan. 19.
Harman J.

[1953 I. 013.]

Costs — Court fees — Petition under Romilly's Act — Stamp duty — Whether court fees chargeable—Charities Procedure Act, 1812 (52 *Geo.* 3, *c.* 101), *s.* 3.
Revenue—Stamp duty—Court fees. "Stamp duty."

It is enacted by section 3 of the Charities Procedure Act, 1812, that petitions presented under that statute shall not be "subject or "liable to the payment of any stamp duty whatever":—

Held, that the exemption does not extend to court fees, and that the ordinary fees are, therefore, payable on a petition presented under that Act.

PETITION.

This was a question, raised at the conclusion of the hearing of a petition presented by the Attorney-General under the Charities

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Procedure Act, 1812 (the facts of which are not material for the purposes of this report), to obtain the decision of the court as to whether or not "court fees" were exigible in these cases.

By section 3 of that Act it is provided: "And be it further "enacted, that neither the petitions, nor any proceedings upon "the same or relative thereto, nor the copies of any such "petitions or proceedings, shall be subject or liable to the pay-"ment of any stamp duty whatever."

The question was, in effect, whether the phrase "stamp "duty" in that section included court fees.

Denys Buckley for the Attorney-General.
W. F. Waite for the Official Solicitor

No authorities were referred to in the argument.

Harman J. This is a curious point, not of very great importance nowadays, because proceedings under the Act in question are comparatively rare. I have been dealing with a petition entitled "In the matter of the Charities Procedure "Act, 1812." That was an Act passed under the tutelage, or, rather, under the advocacy, as I gather, of Lord Romilly, and has been known, of recent years anyhow, as Romilly's Act. The Act in question is entitled: "An Act to provide a "summary remedy in cases of abuses of trusts created for "charitable purposes." The object of the Act was to allow causes for breach of trust to be brought before the Lord Chancellor, the Master of the Rolls, or the Court of Exchequer in a summary manner by petition and to be heard on affidavit, and in order that it might be done quickly, as lawyers counted time in those days, an aggrieved person could have no more than two years to appeal to the House of Lords. The petition had to be signed by the persons preferring it and attested by the solicitor or the attorney for the petitioners and allowed by the Attorney-General's or Solicitor-General's fiat before it could be presented. Nowadays, the Attorney-General presents such petitions as come under the aegis of that Act. The last section is in these terms: "III. And be it further enacted, that neither the petitions, nor "any proceedings upon the same or relative thereto, nor the "copies of any such petitions or proceedings, shall be subject or "liable to the payment of any stamp duty whatever."

When I asked what stamp duty was then payable on the petitions or proceedings on the same or copies, I was referred to an Act of 1808, then comparatively recently passed (48 Geo. III, c. 149), which is entitled: "An Act for repealing the stamp "duties on deeds, law proceedings, and other written or printed "instruments, and the duties on legacies and successions to "personal estate upon intestacies now payable in Great "Britain, and for granting new duties in lieu thereof." That was a comparatively elaborate Act which altered various rates

of duty including one familiar to us until quite recently, namely, stamp duty under the Legacy Duty Act of 1796.

There were then various stamped papers which had to be bought in order that documents might be copied on them, and it was in that way that the Commissioners of Stamps at that time collected a good part of their revenue. When one looks at the Schedule to the Act of 1808, Part II, it sets out the duties on law proceedings in the courts of law and equity at Westminster and other courts in Great Britain and before the Lord High Chancellor. Looking through those duties, one finds, inter alia, a fee of half a crown on a petition in any suit or action in any of the courts of equity at Westminster or before the Lord Chancellor in matters of bankruptcy and lunacy. That was a stamp duty, which quite clearly was remitted by Lord Romilly's Act.

There were at that time other fees payable by suitors, and the petitioner would have had to pay, so far as I can ascertain, to the clerks in Chancery certain fees by way of court fees for the assistance which they gave him and which they put in their pockets as their remuneration. It follows, then, that although in 1812 the stamp duty was remitted, the court fee was not.

There was a further Act of 1824 by which certain amendments were made in the duties, as they were called, in law proceedings, and also so-called duties on the parchment or vellum on which certain documents had to be copied, but I need not go into that Act.

In 1833, as I am told, though I have not been referred to the Act, there were some reforms of the Court of Chancery made under which the clerks in Chancery were no longer entitled to take such fees as they could obtain and put them in their pockets, but they had to account for the surplus of them over and above that which paid their salaries and pay that surplus into the Consolidated Fund.

At a later date, namely 1866, an Act was passed whereby many of the court fees could, if the Treasury thought fit, be paid by stamps instead of in cash. That Act was repealed by the Public Offices Fees Act, 1879, which shows the method of collecting fees in public offices at that time. Section 2 provided: "The fees payable in any public office shall be collected either "in money or by means of stamps, or partly in one way and "partly in the other way, according as may be from time to time "directed by order of the Commissioners of Her Majesty's "Treasury." The Treasury was empowered to make regulations regulating the manner in which the fees taken were to be accounted for and paid over and for determining the use of impressed or adhesive stamps and the mode of cancellation of adhesive stamps. Therefore, from that time onwards their Lordships of the Treasury could determine how fees payable, including court fees, could be discharged—whether in cash or by means of stamps.

By the Judicature Act, 1925, the power of regulating that

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sort of matter was vested in the Lord Chancellor with the concurrence of the judges. That is provided by section 213, which provides: "Subject to the provisions of this Act, the Lord "Chancellor, with the advice and consent of the judges of the "Supreme Court or any three of them, and with the concurrence "of the Treasury, may by order fix the fees and percentages to "be taken in the High Court" and so on. In accordance with that, the Supreme Court Fees Order of 1930 is now the regulating instrument, that having, by virtue of the Judicature Act, statutory force. The Lord Chancellor directs that the fees and percentages set out in the second column of the Schedule to the order are to be taken in the Supreme Court. By paragraph 5, "the fees and percentages described by this order shall, subject "to the provisions of this and the next following paragraphs, be "taken by impressed stamps." There are certain exceptions to that. For instance, some stamps are to be adhesive stamps. Curiously enough, paragraph 6 provides that in the district registries of the High Court, other than in Manchester, fees are to be taken in cash and not in stamps at all.

It is said, that being the position, that, as in the High Court fees on an originating petition, being, I think, 50 shillings, are payable by way of impressed stamps in the ordinary course, that is a duty payable in stamps—therefore a stamp duty, and within the very words of Romilly's Act "any stamp duty "whatever." In my judgment, that is not so. Stamp duties are one thing: court fees are another. It is notable that in the Stamp Act, 1891, which is now the code for all stamps, court fee stamps and judicature stamps are excluded. It seems to me that the fact that, for half a century after Romilly's Act was passed, it was ordained that certain judicature stamps were to witness the collection of court fees is irrelevant and does not enlarge the ambit of exemption which Lord Romilly's Act sought to confer. In my judgment the ordinary fees are payable on a petition under that Act.

Solicitors: *Treasury Solicitor; Official Solicitor.*

J. L. D.

[PROBATE, ETC., DIVISION.]

1954 *Feb.* 1, 2, 3, 4, 5.

Barnard J.

* GUNNER *v.* GUNNER.

Practice Note.

Husband and Wife — Divorce — Practice — Pleading — General cruelty allegation—No particulars—What may be proved—Need for notice.

A respondent in a defended divorce suit alleged, inter alia, on a charge of cruelty: "That the petitioner who is a man of foul "and abusive language has neglected the respondent and treated

"her with cruelty." No particulars were requested of the answer and the respondent referred in her evidence to a specific allegation of neglect which had not been pleaded.

BARNARD J. rejected a submission that in the absence of a request for particulars allegations of specific occurrences might be made under the general charge, and, referring to *Jewell* v. *Jewell*,[1] said that the proper way to proceed on such a matter was to give notice of the allegation.

His Lordship gave leave for the following specific allegation to be made by notice at the hearing, no objection being taken on behalf of the petitioner: "That in or about the month of June, 1946, at a time when the respondent was confined, the petitioner gave the maidservant presents to the distress of the respondent."

D. Wacher for the husband.
John Syms for the wife.

Solicitors: *Mossop Privett & Co.; Gard, Lyell & Co., for Theodore Bell, Sutton.*

J. B. G.

[1] (1862) 2 Sw. & Tr. 573. The headnote reads: "Evidence to prove "a species of cruelty not pleaded in "the petition is not admissible; "though evidence of violent demeanour and language not pleaded, "but leading up to and making probable acts of violence pleaded, may "be admissible."

[QUEEN'S BENCH DIVISION.]

* HIGGINS AND ANOTHER *v.* NORTH WEST METROPOLITAN HOSPITAL BOARD AND BACH.

1954
Jan. 15, 18, 19, 29.

Pilcher J.

Limitation of Action—Public authority—Persons protected—National Health Service — Hospital — Specialist employed part-time by hospital—Injury to patient—Person acting on behalf of hospital board in execution of public duty — Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21 (1).

Negligence—Hospital—Negligence of medical staff—Part-time specialist — Vicarious liability. National Health Service — Negligence — Vicarious liability.

A part-time specialist, acting in the ordinary course of his duties at a hospital for which a regional board constituted under the National Health Service Act, 1946, was the responsible authority, treated a patient at the hospital in a manner alleged to be negligent. He denied negligence and pleaded the protection of

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[Reported by Miss ELAINE JONES, Barrister-at-Law.]

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section 21 (1) of the Limitation Act, 1939,[1] in respect of a writ issued some two and a half years after the cause of action arose. On the trial of this issue as a preliminary point:—

Held, whatever the precise relationship between the specialist and the hospital board, he was, at the material time, acting as an agent for the board in the execution or intended execution of a public duty, and was, therefore, entitled to the protection of the Act.

Nelson v. *Cookson* [1940] 1 K.B. 100; 56 T.L.R. 2; [1939] 4 All E.R. 30 applied.

Gold v. *Essex County Council* [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237; and *Cassidy* v. *Ministry of Health* [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574 considered.

Preliminary point of law.

On July 17, 1949, the second-named plaintiff, Mrs. Margaret Higgins, attended the Mount Vernon Hospital, a hospital for which the first defendants, the North West Metropolitan Regional Hospital Board, were the responsible authority, for treatment which was prescribed and given in the ordinary course of his duties by the second defendant, Dr. Bach. The plaintiffs alleged that the treatment, which consisted of an injection made into the left trapesius was negligently given, and that the needle consequently penetrated the pleural cavity and caused a traumatic pneumothorax resulting in serious illness and loss of work for over two years. As a result of the matter passing through the hands of several solicitors the writ was not issued until February 13, 1952.

The North West Metropolitan Regional Hospital Board by their defence denied negligence; Dr. Bach also denied negligence and pleaded the protection of section 21 (1) of the Limitation Act, 1939, as a person who "at all material times was acting in "pursuance or execution or intended execution of an Act of "Parliament, namely, the National Health Service Act, 1946, "and/or a public duty or authority." On May 11, 1953, the latter issue was ordered to be tried as a preliminary point.

It was admitted that Dr. Bach was, at all material times, employed by the hospital board as physician in charge of the physical medicine department of the hospital by virtue of and on the terms of a contract to be collected from a letted dated June 23, 1948, from the hospital board to Dr. Bach, and his acceptance thereof dated July 3, 1948, and letters from the hospital board to Dr. Bach dated February 28, 1949, and June 22, 1949.

G. G. Blackledge Q.C. and *Andrew Rankin* for the plaintiffs.
James Stirling for the first defendant.
J. R. Cumming-Bruce for the second defendant.

[1] Limitation Act, 1939, s. 21: "(1) "No action shall be brought against "any person for any act done in pur-"suance, or execution, or intended "execution of any Act of Parliament, "or of any public duty or authority, "or in respect of any neglect or "default in the execution of any such "Act, duty or authority, unless it "is commenced before the expiration "of one year from the date on which "the cause of action accrued."

The cases cited in argument are contained in the judgment.

Cur. adv. vult.

January 29. PILCHER J. read the following judgment, in which he stated the facts, and continued: Dr. Bach was called, and his evidence can be summarized as follows: "I specialise in "physical medicine. Before July 5, 1948, which was the "'appointed day' under the National Health Service Act, 1946, "I was the consultant physician in charge of the Physical "Medicine Department at the Mount Vernon Hospital. This "hospital then was and still is a general hospital with some "800 beds. Before the appointed day it was a voluntary "hospital. The hospital is organized in departments, of which "the Physical Medicine Department is one. The functions of "this department are to supply facilities for the rehabilitation of "patients by means of physiotherapy, remedial gymnastics, "occupational therapy, etc. Patients are referred to me by "members of the consultant staff of the hospital, and by medical "practitioners outside the hospital. As physician in charge of "the department, I was at all times responsible for the "organization and internal administration of my department, "the general supervision of patients presented to me for treat-"ment, the supervision of diagnoses and actual diagnosis in "cases which I considered to require my personal attention. "I also, myself, gave treatment in cases when I considered this "desirable.

"Immediately under me I had a medical registrar, a part-"time house physician for patients in the ward and a team of "medical auxiliaries qualified to give treatment prescribed by "myself. I myself was, at all material times, the hospital's "recognized specialist in physical medicine. I did not, before "the appointed day, and do not since, recognize the right of "anyone to control the way I do my work. Before the appointed "day I was paid a salary. I was supposed to work at the "hospital for seven hours a week, but, in fact, as a rule I "worked there considerably longer than this. After the "appointed day I entered into a contract with the Hospital Board "to carry on the same duties at the hospital as I had previously "performed. In fact, I worked considerably longer at the "hospital than I had before the appointed day. Under my "contract with the board, I was supposed to devote two "'notional half-days' to my work at the Mount Vernon Hospital, "and on this basis I was, at the material time, paid at the rate "of £400 per annum by cheque, monthly.

"My appointment at the Mount Vernon Hospital was that "of a part-time specialist. In July, 1949, I held similar appoint-"ments at other hospitals, and was devoting eight-elevenths of "my time to hospital work. The remainder of my time was "spent in attending to my private consulting practice in

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"Devonshire Place. I specialise in rheumatic diseases as well "as physical medicine. Under the terms of my contract with "the board, I can be required, within certain limits, to attend "at other hospitals in the region. If the board so desired they "would be entitled to criticize and control my work in so far as "it consists of internal hospital administration.

"Mrs. Higgins was an out-patient of the hospital. She was "referred to me for treatment. I diagnosed her case, prescribed "the treatment and, on July 17, 1949, gave her the injection "complained of. I do not recognize that any official of the "board had any right to control my actions in any way in regard "to the way in which I gave the injection. I have taken the "oath of Hippocrates to do my work as well as I can. I am "classed as an 'employed person' for the purposes of National "Health Insurance. I subscribe out of the salary which I "receive from the hospital board towards a superannuation "fund." I have thought it desirable to summarize Dr. Bach's evidence fairly fully in order that a reasonably clear view of his position and duties at the Mount Vernon Hospital may be presented.

On June 23, 1948, the hospital board sent a printed form of letter to Dr. Bach. This was headed: "North West Metropolitan "Regional Hospital Board. National Health Service Act, 1946. "Medical and Dental Staff of the Hospital and Specialist "Services: Arrangements from the Appointed Day." The letter then proceeds as follows: "By virtue of the provisions of the "Regional Hospital Boards, etc. (Functions) Regulations, 1948, "and Regulations to be made under section 14 (2) of the Act, it "will be for regional boards to appoint specialist staff including "staff senior to the grade of registrar—and for management "committees to appoint other medical and dental staff. "Specialists will be remunerated by the regional boards." I only propose to read short passages from this rather long document. "The invitation to take part in the service on the basis of the "remuneration and conditions now proposed is made for a "limited period only in order to allow of review and the sub-"stitution of firm contracts on a permanent basis as soon as "possible. Broadly, the position under the National Health "Service Act is that medical and dental staff engaged whole-time "in hospital, clinic, etc., work, will be transferable to the service "of the board and no new contract will be required; but that "part-time staff will not, in general, be transferable and a new "contract will be necessary in each case. The following para-"graphs set out the position in more detail." I merely pause there to say that Dr. Bach was a member of the part-time staff. Transferable staff and non-transferable staff are then defined in detail, and the necessity for making short-term arrangements is gone into.

The question of remuneration for specialists is referred to in the following terms: "The contract with each part-time

"specialist and the remuneration paid to him will cover all "services rendered to the board other than domiciliary visits "(which are referred to below). The scale of remuneration which "the Ministry of Health have directed the board to offer is set "out in the appendix, together with the conditions of service "which will be applied provisionally. To arrive at the appro-"priate remuneration, the average time given to the various "activities has been assessed and aggregated in terms of half-"days per week."

A number of further provisions follow with regard to the remuneration of medical officers acting under this form of contract, and in the schedule at the end of the form Dr. Bach is appropriated, if that be the correct word, to the Mount Vernon Hospital, and his duties are said to be the "Existing duties as "physician in charge of the Physical Medicine Department," two half-days per week. Now, Dr. Bach signed the form at the end of that letter and sent it back to the board, and, in substance, continued to perform his duties in exactly the same fashion as he had before he signed that document.

On February 28, 1949, a further letter was addressed to Dr. Bach which, in effect, provided that the interim arrangements arrived at under the document to which I have referred should be extended from the contemplated date of March 31, 1949, to July 4, 1949. On June 22, a further document of the same nature was addressed to Dr. Bach by the hospital board, which had the effect of continuing the provisional arrangement after July 4, 1949, on the same terms as had been entered into before. Finally, on March 14, 1950, a more permanent arrangement was arrived at with Dr. Bach on substantially the same terms, except as to remuneration, and it is quite unnecessary that I should say anything about that.

The matters out of which this case arises having taken place on July 17, 1949, it was whilst carrying on his duties at the hospital under the provisional arrangements set out in the board's original letter to which I have referred that Dr. Bach gave the treatment to Mrs. Higgins which gave rise to these proceedings.

It is common ground that the first defendants in the action, the hospital board, are a public authority. At one stage of the hearing before me, Mr. Blackledge, on behalf of the plaintiffs, developed an argument based upon an examination of sections 1, 3, 11 and 12 of the National Health Service Act, 1946, in which he contended that the Minister had only delegated to hospital boards the duty to "administer" the services provided under the Act and not the actual duty to "treat" patients. Mr. Blackledge submitted that the duty to "treat" remained in the Minister. Alternatively, he contended that if the Minister had purported to delegate to hospital boards the duty to treat, such delegation was ultra vires, and, in the circumstances, he submitted that the Minister should be joined as a defendant in the action. It is unnecessary that I should refer to this branch

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of Mr. Blackledge's argument in more detail, because, upon being given an assurance during the course of the case that the first defendants would not take the point that the Minister should be joined as a defendant, he did not pursue the matter.

[His Lordship referred to section 21 (1) of the Limitation Act, 1939, and continued:] I am not now concerned as to whether Dr. Bach was or was not negligent in giving the treatment which he did to Mrs. Higgins; nor am I concerned as to whether the relationship of Dr. Bach and the hospital board was such as to render the board liable for the negligence, if any, of Dr. Bach upon the principle of respondeat superior. My only task is to determine whether, in the particular circumstances of this case, Dr. Bach is entitled to claim the protection of section 21 (1) of the Limitation Act, 1939.

It was not really in dispute that, in giving to Mrs. Higgins the injection which he did, Dr. Bach was acting in the ordinary course of his duty as a part-time specialist under the National Health Service Act, 1946, in charge of the Physical Medicine Department of the Mount Vernon Hospital. For the purposes of this case, I assume that the duty of treating patients within the region which they administer, as well as the duty of administering the health service provided under the Act, was upon the hospital board, which was itself a public authority and entitled to the protection of section 21 (1) of the Act of 1939. If Dr. Bach, who was a part-time specialist at the hospital, can properly be regarded as a servant of the hospital board, and if he was at the material time performing or purporting to perform, as the servant of the board, a public duty laid upon the hospital board by statute, it is not in dispute that he is entitled to the protection of section 21 (1).

The plaintiffs, however, contend that, in giving the treatment which he did, Dr. Bach was not the servant of the hospital board, but was in the position of an independent contractor in respect of whose negligence, if any, the board was not responsible upon the basis of respondeat superior. They contend that principals can only act through servants, for whose acts they are legally responsible, or through independent contractors, for whose acts they are not responsible. Admitting that the servants of a public authority, whilst performing a public duty on behalf of the authority, are protected by the section, they deny that persons in the position of Dr. Bach, who are, it is said, independent contractors in the sense that they are uncontrolled and uncontrollable in the exercise of their professional duties, are entitled to any protection.

The argument presented on behalf of Dr. Bach ran along these lines. In giving the treatment which he did, Dr. Bach was performing on behalf of the hospital board one of the very duties which it had been directed to perform by the Minister. This duty was a public duty and one which the board (on the assumption that the duty had been properly delegated to them) could

only properly perform by the hand of an experienced doctor. Dr. Bach, in giving the treatment in question, was in no sense performing an act collateral to the duty of the board, as was the case in *Bradford Corporation* v. *Myers*.[1] I do not propose to spend time upon this branch of the argument advanced on behalf of Dr. Bach, because I am satisfied that it is correct. In support of this view, I need only refer to *Griffiths* v. *Smith*,[2] and in particular to the passages in the speech of Viscount Simon L.C.[3] I also refer to *Firestone Tire & Rubber Co. (S.S.)* v. *Singapore Harbour Board*.[4] The act of which the plaintiff complains in the present case was, in my view, clearly an act done by Dr. Bach on behalf of the hospital board in execution or intended execution of a public duty. It was an act in respect of which the hospital board, if they are responsible in law for the negligence of Dr. Bach, would have been entitled, had they thought fit, to claim the protection of section 21 (1) of the Act of 1939.

I was referred during the course of the argument to a long line of cases dealing with the responsibility in law of hospitals of different constitutions for the negligent acts of their "staff," using that word in its widest sense. This line of cases starts with *Hillyer* v. *Governors of St. Bartholomew's Hospital*.[5] Until *Gold* v. *Essex County Council*[6] came before the Court of Appeal, *Hillyer's* case was regarded as having decided that the only duty owed by the governors of a public hospital towards a patient was to exercise due care and skill in selecting their medical staff, that the relationship of master and servant did not exist between the governors and the medical staff and that the nursing staff, when assisting at an operation performed by a consulting surgeon, ceased to be the servants of the governors. *Gold's* case[7] in effect reversed what had hitherto been regarded as the effect of the decision in *Hillyer's* case,[8] and since the decision in *Gold's* case,[9] which concerned the negligence of a competent whole-time radiographer on the staff of a hospital, the law has been that a public hospital, whether administered by a local authority or by a board of governors, owes to a patient the duty to nurse and treat him carefully and is liable for the negligence of its whole-time staff with the possible exception of honorary physicians and surgeons.

Lord Greene M.R., in the course of his judgment in *Gold's* case,[10] said: "The question which presents itself in the present "case may, therefore, be formulated as follows: When a patient "seeking free advice and treatment such as that given to the "infant plaintiff knocks at the door of the defendant's hospital,

[1] [1916] 1 A.C. 242.
[2] [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 66.
[3] [1941] A.C. 177–9.
[4] [1952] 2 A.C. 452; [1952] 1 T.L.R. 1625; [1952] 2 All E.R. 219.
[5] [1909] 2 K.B. 820; 25 T.L.R. 762.
[6] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.
[7] Ibid.
[8] [1909] 2 K.B. 820.
[9] [1942] 2 K.B. 293.
[10] Ibid. 302.

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"what is he entitled to expect? He will find an organisation "which comprises consulting physicians and surgeons, presumably also house physicians and surgeons, a staff of nurses, "equipment for administering Grenz ray treatment and a radiographer, Mead, employed to give that treatment. So far as "consulting physicians and surgeons are concerned, clearly the "nature of their work and the relationship in which they stand "to the defendants precludes the drawing of an inference that "the defendants undertake responsibility for their negligent acts. "The same may be true of the house physicians and surgeons, "but their case is not relevant to the present inquiry and I say "nothing about it. The position of the nurses again, although, "no doubt, analogous, is not strictly relevant, but if the nature "of their employment, both as to its terms and as to the work "performed, is what it usually is in such institutions I cannot "myself see any sufficient ground for saying that the defendants "do not undertake towards the patient the obligation of nursing "him as distinct from the obligation of providing a skilful nurse. "Nursing, it appears to me, is just what the patient is entitled "to expect from the institution and the relationship of the nurses "to the institution supports the inference that they are engaged "to nurse the patients."

In *Collins* v. *Hertfordshire County Council*,[11] Hilbery J. found the hospital authority responsible for the negligence of a resident non-qualified junior house surgeon. In *Cassidy* v. *Ministry of Health*,[12] the Court of Appeal in effect decided that a qualified medical practitioner, in that case a whole-time assistant medical officer at Walton Hospital, Liverpool, was a person for whose negligence the hospital authority were responsible. Denning L.J., in an interesting judgment,[13] went further than this and clearly took the view that hospital authorities, in every case when the patient did not select his own physician or surgeon, were liable on the basis of respondeat superior for the negligence of part-time consulting staff as well as permanent full-time staff. This point was not necessary for the decision of *Cassidy's* case,[14] but it would seem that Denning L.J. would, in the present case, have been prepared to hold the hospital board responsible for any negligence proved against Dr. Bach. In *Roe* v. *Minister of Health*,[15] McNair J. took the view that the hospital authority would not be responsible for the negligence of a part-time consultant anaesthetist, who was, I suppose, a specialist in much the same position as Dr. Bach.

I hope that I have made it quite clear that I am not now concerned with the question as to whether or not the hospital board in the present case are vicariously responsible for any negligence which may be proved against Dr. Bach, and I have only

[11] [1947] K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.

[12] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[13] [1951] 2 K.B. 359.

[14] [1951] 2 K.B. 343.

[15] [1954] 1 W.L.R. 128.

referred to the line of cases dealing with the vicarious responsibility of hospital authorities for the negligence of their staff because these cases were cited to me in argument and tend to show the way in which the view of the courts has changed since the decision of the Court of Appeal in *Gold's* case [16] in regard to the vicarious responsibility of hospital authorities for the negligence of their staff.

I will now turn to cases which have a more direct bearing upon the point which I have to determine, starting with *Nelson* v. *Cookson*,[17] which was a decision of Atkinson J. The facts of the case can be taken conveniently from the headnote: "In "March, 1937, the infant plaintiff entered a county hospital "and was operated on for the removal of tonsils and adenoids "by the defendants, who, at the time, were assistant medical "officers of the institution. After the operation the second "defendant, who acted as anaesthetist, placed a gag in the "mouth of the patient to enable an examination of her throat "to be made, and by reason of the gag, which was taken from "a sterilizer, being too hot, the girl suffered severe burning of "her left cheek, which resulted in a permanent scar. It was "admitted that the hospital was an institution which the county "council were empowered by the Local Government Acts, 1888 "and 1929, to maintain for public health purposes, and, the "writ in the present action having been issued more than six "months after the act complained of, the defendants, while "denying negligence, pleaded that the action was barred by "section 1 of the Public Authorities Protection Act, 1893." It will be seen that this case raises very much the same point as I have to determine in the present case, there being no difference, for my purposes, between the terms of section 1 of the Public Authorities Protection Act, 1893, and the terms of section 21 (1) of the Limitation Act, 1939.

It is to be observed that *Nelson* v. *Cookson* [18] was decided some three years before *Gold's* case [19] and at a time when the responsibility or lack of responsibility of hospitals for the negligence of their permanent staff was regarded as being settled by the decision in *Hillyer's* case.[20] This is clear from the argument advanced by Mr. Noakes,[21] and the fact that this was then the situation is referred to by Atkinson J. in his judgment in a passage which I will presently quote. Recognizing that, as the law then stood, a hospital was not in general terms vicariously responsible for the negligence of its permanent staff, Atkinson J. none the less came to the conclusion that two whole-time medical officers of the hospital in question were entitled to the benefit of section 1 of the Public Authorities Protection Act.

[16] [1942] 2 K.B. 293.
[17] [1940] 1 K.B. 100; 56 T.L.R. 2; [1939] 4 All E.R. 30.
[18] Ibid.
[19] [1942] 2 K.B. 293.
[20] [1909] 2 K.B. 820.
[21] [1940] 1 K.B. 100, 102.

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It was argued on behalf of the plaintiff in *Nelson* v. *Cookson*[22] that it was anomalous to confer upon medical practitioners, for whose negligence on the law, as then understood, the hospital was not responsible, the protection afforded to the hospital by the Act. It was submitted that the two defendant doctors in that case were in the position of independent contractors, and reliance was placed on *Thomas Tilling* v. *Dick, Kerr & Co. Ld.*,[23] where a firm of independent contractors, carrying on work on behalf of the London County Council under contract, were held not to be entitled to the protection of the Act. This argument was rejected summarily by Atkinson J.

Unless *Nelson* v. *Cookson*[24] can be distinguished from the case now before me on its facts or on principle, it is a decision which binds me and a decision with which, if I may say so with respect, I agree. The only distinction which is sought to be drawn between the facts of the case which I have to decide and the facts in *Nelson* v. *Cookson*[24] is that in the present case Dr. Bach was a part-time specialist, whereas the defendants in *Nelson* v. *Cookson*[24] were whole-time medical officers on the permanent staff of the hospital and, as such, more in the category of "servants" than was Dr. Bach. Even if it be assumed that Dr. Bach is now a person for whose negligence the hospital board are not vicariously responsible, the defendants in *Nelson* v. *Cookson*[24] were, at the time of the decision of that case, regarded as being in precisely the same position. This fact in itself does not, therefore, in my view, afford any distinction between the present case and *Nelson* v. *Cookson*.[24] I think, moreover, that the development of the law since the decision in *Hillyer's* case[25] in regard to the vicarious responsibility of hospital authorities for the negligence of their medical staff serves rather to support than to weaken the decision in *Nelson* v. *Cookson*.[26]

Mr. Blackledge, on behalf of the plaintiffs, submitted that, in so far as actions in tort were concerned, a person carrying out a duty on behalf of another must be either a servant for whose negligence the principal was responsible or an independent contractor for whose negligence the principal was not responsible. He submitted that Dr. Bach, who did not admit the right of the hospital board to control the way in which he carried on his professional work, should be regarded as an independent contractor. He submitted that there was no decided case in which the protection of the Public Authorities Protection Act, 1893, or the Limitation Act, 1939, had been held to cover the deliberate act or negligence of anyone who could not properly be called a servant of the public authority. He referred to *Greenwell* v. *Howell*,[27] where the protection of the Act was

[22] [1940] 1 K.B. 100.
[23] [1905] 1 K.B. 562; 21 T.L.R. 281.
[24] [1940] 1 K.B. 100.
[25] [1909] 2 K.B. 820.
[26] [1940] 1 K.B. 100.
[27] [1900] 1 Q.B. 535; 16 T.L.R. 235.

granted to a county surveyor and a deputy clerk of a council who were in fact the servants of the council, although in the case they are referred to also as "officials" and "subordinates."

In this connexion the decision of Lord Goddard C.J. in *Western India Match Co. Ld.* v. *Lock*[28] is of some interest. In that case, three defendants, the representative at Basra of the Minister of War Transport, a sea transport officer and the divisional sea transport officer at Bombay, were held entitled to the protection of the Limitation Act, 1939, although the exact position of two of these officers in relation to the Minister of War Transport was never precisely defined and nowhere in the report are they referred to as servants.

Reverting to *Nelson* v. *Cookson*,[29] I respectfully adopt the reasoning of Atkinson J. in that case. He says[30]: "It is curious "that the precise point now raised never seems to have been "argued before, but it has been recognized as law for a long "time that if some duty or act is done in pursuance of a public "authority and is being carried out by a public authority through "a servant or agent, that servant or agent has the same right "to the benefit of this section as the public authority would "have. That was treated as being the law in *Greenwell* v. "*Howell*,[31] and common sense would indicate that that must "be the position, for a public authority must act by a servant or "agent, and it would be idle merely to protect the public "authority itself if the party complaining could still bring an "action against the actual person who committed the act com-"plained of. I do not gather that it is challenged in this case "that this as a general principle is undoubted law, but it is "said that it is equally clear law that, if local authorities are not "responsible in law for the negligence of their medical officers "and therefore cannot be sued, the medical officers individually "nevertheless can be sued. In such a case, that is, where "you have acts done by an agent or servant in circumstances "which would not render the authority liable to litigation it is "said that the medical officer or other person acting cannot claim "the benefit of the statute. That would be an interesting point "to discuss, and I do not know but that I might have been "disposed to give some weight to the argument if it were not "that the contrary seems to have been recognized as law in quite "a number of cases."

The judge then refers to *Freeborn* v. *Leeming*,[32] and *Venn* v. *Tedesco*,[33] in both of which it was conceded that medical officers on the staff, in the one case of a workhouse infirmary and in the other of a public hospital, were entitled to the protection of the

[28] [1946] K.B. 601; 62 T.L.R. 419; [1946] 2 All E.R. 227.
[29] [1940] 1 K.B. 100.
[30] Ibid. 103.
[31] [1900] 1 Q.B. 535.
[32] [1926] 1 K.B. 160; 42 T.L.R. 119.
[33] [1926] 2 K.B. 227; 42 T.L.R. 478.

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Public Authorities Protection Act. He goes on[34]: "In the circumstances, it is difficult to take a different view. When one finds that for a long time a certain view has been accepted as good law, it takes a great deal to convince one that it is a wrong view. I am not satisfied that it is wrong. Indeed, I think that it is right. It seems to me that these two defendants were exercising what was really a public authority, because it was an authority given to the Middlesex County Council to provide and maintain this hospital. The council could not exercise that authority by their own hands, but must act through other people, and on the relevant occasion their authority was being exercised by these two medical men. It seems to me idle to say that they were not acting in pursuance of a public duty and authority conferred on the Middlesex County Council. They were performing this public duty or authority, whichever you may like to call it, as agents or delegates for and on behalf of the council, and they are entitled to the benefit of the Act of 1893."

Dealing with *Thomas Tilling* v. *Dick, Kerr & Co. Ld.*,[35] Atkinson J. said[36]: "It seems to me hopeless to regard them [the defendants] as I am asked to do, as independent contractors. The case relied on in support of that contention is *Thomas Tilling* v. *Dick, Kerr & Co. Ld.*,[37] where it was held that the defendants were independent contractors. In that case Warrington J. said: 'It has been held that the protection of the (Public Authorities Protection) Act extends to the officers of a public body and to persons acting under their direct mandate'." Then he goes on[38]: "It seems to me an absurdity to ask me to regard the defendants in this case as independent contractors, and not as officers of a public body performing duties imposed on a public authority which it cannot discharge except through servants or agents."

I entirely agree with what is said by Atkinson J. in this last passage, and I would add that since the decision in *Nelson* v. *Cookson*[39] the development of the law along the line that a doctor's uncontrollability in the exercise of his professional functions does not take him out of the servant category to which the principle of respondeat superior applies tends to weaken any argument which can properly be advanced upon the authority of such cases as *Thomas Tilling* v. *Dick, Kerr & Co.*[40]

Whilst it is not binding upon me, *Goodisson* v. *Byrne*[41] is interesting. In that case, the Supreme Court in Ireland decided that the defendant, a house surgeon at the material time in the whole-time service of the county hospital at Wexford, which was a public authority, was entitled to the protection of the Public Authorities Protection Act. FitzGibbon J., delivering the

[34] [1940] 1 K.B. 100, 105.
[35] [1905] K.B. 562.
[36] [1940] 1 K.B. 100, 105.
[37] [1905] 1 K.B. 562.
[38] [1940] 1 K.B. 105.
[39] [1940] 1 K.B. 100.
[40] [1905] 1 K.B. 562.
[41] [1938] 2 Ir.R. 580.

judgment of the court, held that any "person" to whom a public authority or the performance of a public duty has been lawfully delegated is entitled to the protection of the Act if the delegation be that of a master to a servant or of a principal to an agent, the words of the Act applying not only to bodies corporate but also to persons identifiable with them.

It is not necessary for me to ascertain precisely what Dr. Bach's position was in relation to the hospital board. He was certainly acting as an agent for the board at the material time. He would no doubt be properly described as an officer of the board. He may have been the servant of the board. At the material time I am satisfied that he was a person acting on behalf of the hospital board in the execution or intended execution of a public duty. The duty which he was performing or intending to perform was, moreover, one which, for the purposes of this case, I take to have been imposed upon the hospital board by the National Health Service Act, 1946, and the orders made under the Act. Dr. Bach is accordingly, in my view, entitled to the protection of section 21 (1) of the Limitation Act, 1939, and I determine the preliminary point submitted to me in his favour.

Judgment accordingly.

Solicitors: *R. I. Lewis & Co.; J. Tickle & Co.; Hempsons.*

[COURT OF APPEAL.]

* MARSDEN *v.* REGAN

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Jan. 28, 29.
Evershed M.R., Denning and Romer L.JJ.

[Plaint No. J. 336.]

Administration of Estates — Devastavit — Presumption — Action by landlord against executrix—No plea of plene administavit—Judgment for possession, mesne profits and costs—Execution—Return of nulla bona testatoris—Executrix carrying on business of testatrix—Assets exhausted—Second action brought by plaintiff against executrix—Plea of plene administavit—Whether presumption of devastavit rebutted—Whether executrix acted reasonably and ought fairly to be excused—Trustee Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 19), *s.* 61—*County Court Rules,* 1936, *Ord.* 32, *r.* 2.

County Court—County Court Rules—Whether affecting general law. Presumption.

A testatrix died in 1951 leaving an estate consisting of a second-hand clothes business carried on in premises held on a weekly tenancy. The goodwill of the business was valued at £150, stock-in-trade at £30 and miscellaneous items at £50, including furniture valued at £20, and there were no other assets. Her debts and funeral and testamentary expenses amounted to £78. The defendant proved her will in 1951 and took possession as executrix of the business and continued to carry it on first at a profit and later at a small loss. The defendant, having spent £2 in cleaning certain of the

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effects of the testatrix, gave all the furniture and effects away. The plaintiff, who had acquired the freehold reversion of the premises, took proceedings against the defendant as executrix to recover possession and mesne profits. The defendant did not plead plene administavit and on February 13, 1952, the plaintiff obtained judgment against her for possession and for the sum of £29 mesne profits and costs taxed at £21. The defendant did not then give up possession but applied under the Landlord and Tenant Act, 1927, for the grant of a new lease or compensation for loss of goodwill. That application was dismissed in November, 1952, but the defendant did not give up possession of the premises until May, 1953. The plaintiff tried to levy execution for the unpaid sums of £29 and £21 and in March, 1953, the sheriff made a return of nulla bona testatoris. The plaintiff then started these proceedings against the defendant as executrix to recover the £29 and £21 and a further sum of £55 in respect of mesne profits, alleging a devastavit. The defendant, who acted throughout on the advice of her solicitor, had paid all the creditors of the testatrix and of the business until it had been wound up and the legal expenses incurred in respect of the first action and of the proceedings under the Landlord and Tenant Act, 1927: the only person unpaid was the plaintiff. The defendant pleaded plene administavit. The county court judge dismissed the action holding that the defendant had acted honestly and reasonably and ought fairly to be excused:—

Held, (1) that the effect of the judgment obtained by the plaintiff in the first action, in the absence of any plea of plene administavit by the defendant, together with the return of the sheriff of nulla bona testatoris, was that the defendant must be taken conclusively to have admitted assets in her hands at the date of the judgment sufficient to pay all debts then known to her; and that there was, as against the defendant, a rebuttable presumption that not now having any assets she had committed a devastavit.

Decision of Farwell J. in *Batchelar* v. *Evans* [1939] Ch. 1007; [1939] 3 All E.R. 606 approved;

(2) that the admission and presumption which flowed from the first judgment did not cover the sum of £21 for costs;

In re Marvin [1905] 2 Ch. 490; 21 T.L.R 765 distinguished;

(3) that Order 32, r. 2, of the County Court Rules was directed to procedure and was not intended to and had not altered or abrogated the general rule of law as to the presumption which arose when an executor failed to plead plene administavit; and that that presumption applied in county court proceedings;

(4) that the defendant had not rebutted the presumption with regard to the judgment debt for £29 and she was prima facie liable for that sum;

(5) that with regard to the claim for £55 the defendant had acted throughout on the advice of her solicitor in the administration and it was not clear that she had been guilty of a devastavit;

(6) that the defendant had no answer to the plaintiff's claim for the sum of £22, the value of the furniture of the testatrix which the defendant had given away, and the plaintiff was entitled to judgment for that sum; and

(7) that as to the balance of the claim the finding of the county court judge that the defendant had acted honestly and reasonably and ought to be fairly excused should not be disturbed.

Appeal from Judge Archibald sitting at Huddersfield county court.

In these proceedings Joe Marsden claimed against the

defendant Mrs. Martha Annie Regan, as executrix of Jane Marsden, three sums, namely, £29 15s., £21 18s., and £55 5s., which he alleged was due to him. He alleged in his particulars of claim that the defendant had wasted assets forming part of the estate of the testatrix upwards of £200 in value. The defendant denied that she had been guilty of devastavit and pleaded plene administavit.

The county court judge dismissed the action holding that the defendant had acted honestly and reasonably and ought fairly to be excused. The facts are fully stated in the judgment of Evershed M.R.

The plaintiff appealed.

A. C. Sparrow for the plaintiff

R. W. Goff Q.C. and *C. Raymond Dean* for the defendant.

The following cases were cited in argument: *In re Blow* [1]; *Batchelar* v. *Evans* [2]; *In re Wragg* [3]; *In re the Goods of Bryce* [4]; *McLean* v. *Weaver* [5]; *In re Kay* [6]; *In re Stuart.* [7]

EVERSHED M.R. This was an action brought by the plaintiff against the defendant in her capacity as executrix of the mother both of the plaintiff and the defendant, one Jane Marsden deceased. It is unfortunately clear that the case, as not uncommonly happens, is one in which hostility has arisen between brother and sister. That is, of course, deplorable; but it is not the function of the court to express moral judgments in these matters and the question raised is one of the strict rights as between these two parties to the proceedings according to the law as I understand it to be.

The testatrix, Mrs. Jane Marsden, died on June 15, 1951. Her will, made some few years earlier, and proved after a little delay at the end of the year 1951, was short in form and incomplete in scope. By it, Mrs. Marsden appointed the defendant to be her sole executor, directed that her death and funeral expenses should be paid, and then confined herself to this one bequest: "I give and bequeath unto Martha Annie Regan the business "at 13 Northgate." No. 13 Northgate, Huddersfield, was the house in which the testatrix lived; she lived upstairs and carried on downstairs a business of a second-hand or old clothes dealer.

These facts, when taken in conjunction with the limited form of the bequest, gave rise to the problem whether the bequest of the business to the defendant carried with it any (and if so what) interest in the premises themselves. I find it unnecessary to decide that matter; indeed it is doubtful whether we have any materials sufficient to enable us to do so; but I think that

[1] [1914] 1 Ch. 233; 30 T.L.R. 117.
[2] [1939] Ch. 1007; [1939] 3 All E.R. 606.
[3] [1919] 2 Ch. 58.
[4] (1839) 2 Curt. 325.
[5] (1924) 41 T.L.R. 47.
[6] [1897] 2 Ch. 518.
[7] [1897] 2 Ch. 583.

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it is not open to doubt that the question was a real question and not an easy one to answer.

According to the evidence before us, the assets of the estate were not considerable. They consisted, according to the probate valuation, of three items: goodwill—that is the goodwill of the second-hand clothes business—which was put at £150; stock-in-trade (presumably old clothes) £30; and miscellaneous, £50, the last mentioned figure including furniture, to which was set a value of £20.

The debts due at the date of the death, or immediately thereafter, consisted almost exclusively of funeral and testamentary expenses, and they amounted to not less than £78 or £79. The figure of £78 or £79 was stated to us, but I have said "not "less" because, according to the accounts which are before us, the Huddersfield Co-operative Society's funeral account was £61, the doctor's account was £13 11s., there was an item of £9 19s. 1d. for drink supplied for a funeral tea—which at one stage loomed somewhat significantly in the case, but has more or less disappeared from it—and finally a fee of £2 to the clergyman officiating at the burial service, items which together exceed the figure of £78 that I have mentioned. However that may be, I think that the point was well made by Mr. Goff that, as a practical matter, and paying regard to the circumstance that inevitably some costs would have to be incurred in obtaining probate, etc., and to the fact that the liquid assets consisted of only a small amount of stock and these miscellaneous items—obviously of somewhat dubious value in the market—the estate was, in fact, not solvent at the date of the testatrix's death.

The defendant, as executrix, took possession of the business. It may be that other members of the family continued, at any rate for a time, to live on the premises. The defendant, in fact, lived next door; but, as regards the business, she took possession of it and continued to carry it on. It is true that according to this will, she herself as legatee was beneficially interested in the business; but the will was not proved for some time, and the defendant's possession of the business, therefore, could not at that early stage have been certainly for her own benefit. I gather that there was in this matter, as in others, some dissension in the family, and some doubt about what will would ultimately be proved. I accept the argument of Mr. Goff that, in considering this matter, at any rate until we come to the difficult problems arising under section 61 of the Trustee Act, 1925, it is not strictly a relevant consideration that the defendant was herself beneficially interested in the business under the will which was eventually proved.

The first question for determination is: was the defendant justified as executrix, and having regard to the condition of the estate, in carrying on the business in the interest of the estate? It was obviously a most significant and important matter to the executrix, when carrying it on, that she should, if possible, be

able to preserve for the benefit of all concerned, not only the goodwill of the business but also (and, of course, the goodwill of the business was closely connected with it) an interest in the premises themselves.

Very soon after the death of the testatrix, the plaintiff acquired, first by contract and later on completion, the reversion to the deceased's interest in the premises, and he then proceeded to bring an action against the defendant for possession of the premises, and for mesne profits. The defendant was carrying on the business and in possession, therefore, of this business and of its assets, and in possession of the premises in which the business was being carried on.

The action was not originally in the plaintiff's name. We are told that the issue of the proceedings was after the plaintiff had acquired the reversion by contract. However that may be, it is I think quite plain that the action could have been brought against the defendant personally to make her personally liable for the rent, as being the person in occupation, or substantially in occupation, of the premises.

But that course was not followed. The action was brought against the defendant in her capacity as executrix, as was the present proceeding. Whatever other remedies (and I think that there were others) were available to him, the plaintiff (I gratefully adopt Mr. Goff's phrase) ventured into the field of devastavit. Having so ventured, he has brought before this court for consideration points of a somewhat unusual character and not free from difficulty and interest; and I should like to say at the outset of my judgment how much we are indebted in this case for the very careful and thorough arguments which have been presented to us by Mr. Sparrow for the plaintiff, and by Mr. Goff for the defendant.

Having so ventured into the field of devastavit, the plaintiff proceeded along that path in a manner or direction which may, so to speak, have surprised him. Sued as executrix, the defendant of course had it open to her to make use of pleas which are available to executors, such as the plea of plene administavit or plene administavit praeter, or the general plea of no assets. The defendant, however, perhaps surprised by this action of her brother, failed to avail herself of pleas of that (no doubt to her) thoroughly unfamiliar character, and in the result on February 13, 1952, judgment was obtained against her; first for possession, second for the sum of £29 10s. mesne profits, and third for costs to be taxed.

The adventurous character of the plaintiff's litigious course may also have taken a little unawares those responsible for drawing up the orders in the county court, for they failed to draw up an order strictly in accordance with the action brought —that is to say, on the face of it the order which was made on February 13, 1952, was an order against the defendant without any qualification or reference to her position as executor; it was

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an order against her personally. What the result of that may be hereafter is not for me to say. Obviously both parties have proceeded on the footing that the right form of order, having regard to the form of the proceeding, would have been an order against the defendant in her capacity as personal representative; and, as will presently appear, the stage later taken of levying execution and the present proceedings have followed the course which, had the form of order been that which was properly appropriate, it would have indicated. There was no plea of absence of assets or plene administavit.

The defendant appealed against the decision, and particularly against the order for possession. That appeal, which was presented under the advice of the experienced solicitor upon whom the defendant throughout appears to have relied, was eventually, also on his advice, abandoned. But the defendant, adhering, not unnaturally and I think not unreasonably, to her course of taking advice throughout while sailing upon what must have been somewhat uncharted waters, also proceeded to apply in July and August, 1951, under the Landlord and Tenant Act, 1927, for a new lease of the premises on the ground that the business which her mother had carried on had caused goodwill to adhere to those premises; or, alternatively, for compensation under this same Act. That application appears to have taken a long time to come on; the report of the referee, which resulted in the dismissal of the application, was not made until November, 1952.

At that time, just to appraise the situation, the matter stood thus: the appeal against the order for possession had been abandoned, and the attempt to get a new lease had failed; and clearly from that time the occupancy of the defendant of No. 13 Northgate, and the possibility of her carrying on this business from those premises, was in the highest degree precarious.

In February, 1953—that is a year after the original judgment had been obtained—the plaintiff proceeded to levy execution for the unpaid sum of £29 10s., and for the costs which had been taxed at £21 18s. In the following month of March, 1953, the sheriff made a return of nulla bona testatoris, that return indicating that he was proceeding on the view that the judgment was a judgment obtained against the defendant as executrix. In May, 1953, the defendant (whose tenure had become highly precarious) yielded up possession of No. 13 Northgate and removed herself, and no doubt anything that remained of the business assets, therefrom.

It was in that state of affairs that the present proceedings were brought. Again, they are brought not against the defendant personally but against her in her capacity as executrix of the testatrix; and what is sought in these proceedings is a further judgment in respect of the £29 15s. which was not recovered in the first action, a judgment for the £21 18s., unpaid costs, and finally a further sum for mesne profits from

February 13, 1952—which is the date up to which the previous mesne profits had gone—to a date in May, 1953, which was the date when the defendant went out of possession, which amounted to £55 5s.; and the plaintiff claims that he should obtain an order against the defendant personally for those three sums.

In my judgment, different considerations apply to these three sums, and for convenience I will refer to them according to the amount of level pounds involved in each case, ignoring the shillings. There are thus the claims for £29 mesne profits, £21 costs, and £55 mesne profits.

As regards the subject-matter of the previous judgment, the law is in my opinion clearly stated in *Batchelar* v. *Evans*,[1] which came before Farwell J. in 1939. There is I think no question (and counsel has not argued to the contrary) that the effect of the judgment which was obtained by the plaintiff in the absence of a plea of no assets or plene administavit, together with the return, when the sheriff went to execute, of nulla bona testatoris, is, first, that the defendant must be taken to have conclusively admitted assets in her hands at the date of the judgment sufficient to pay all debts then known to her; and, secondly, that there is against the defendant in respect of the sums in question a rebuttable presumption that, as she now has no assets, according to her plea, she has committed devastavit.

After referring to older authorities, including *Leonard* v. *Simpson*,[2] in which the matter was fully considered by Tindal C.J., Farwell J. said[3]: "In my judgment, it is clear from that "case that in the Chief Justice's view the presumption that "arises from the fact of the sheriff's return of nulla bona is not "conclusive against the defendants, but that it is open to them, "if they can, to show why there had been this alteration in the "situation between the date of the judgment, when they "admitted assets, and the date of the return of nulla bona, and "to establish that it is not due to any devastavit committed "by them."

It is clear, however, to my view that the admission and the presumption which inevitably flow from the judgment obtained in the first action does not cover the sum of £21 for costs. Mr. Sparrow, in the course of a very formidable reply, drew our attention to *In re Marvin, Crawter* v. *Marvin*,[4] in which a judgment had been obtained under R.S.C., Ord. 14, for a sum of £5,000 and £7 for costs; and in that case, as Mr. Sparrow observed, the discussion went upon the basis that there was a single judgment for both the sum sued upon and costs, which by some means, which are not at all clear, had arrived at the net figure of £4,519; but having drawn our attention to the case, I think that Mr. Sparrow was not disposed to contend that it was authority for the view that the admission and the presumption

[1] [1939] Ch. 1007.
[2] (1835) 2 Bing.N.C. 176.
[3] [1939] Ch. 1007, 1012.
[4] [1905] 2 Ch. 490.

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could relate to the costs of the proceedings, which had not been taxed, and therefore had not become due or even ascertained at the date when the judgment was obtained.

I therefore take the view that the sum of £21 for costs is for present purposes really out of the picture. In saying that, I am not indicating that the plaintiff is unable to recover it; so far as I can see, if he claims against the defendant personally for those costs, which the defendant has personally been ordered to pay, there would be no answer to the claim, and Mr. Goff, as I followed him, conceded as much.

That I think for the purpose of this judgment disposes of the £21 costs, and I do not propose to refer again to it. As regards the sum of £29, mesne profits, the effect of the first judgment amounted to a conclusive admission that the defendant had, at the date of the judgment, assets sufficient to pay that sum, and involves a rebuttable presumption that, not having the assets now (as she pleads and is the fact) she has committed devastavit.

A point was taken by Mr. Goff that, having regard to Order 32, r. 2, of the County Court Rules, it is not competent in a county court proceeding (for to such length I understand this point goes) for a plaintiff to rely upon the general law, and in particular upon the presumption which results from a judgment such as was obtained there in February, 1952. The terms of Order 32, r. 2, so far as relevant, are: "Where a plaintiff alleges that an "executor or administrator has had assets and has wasted them, "he shall make the allegation in his particulars"—that, of course, means in the points of claim—"and state the amount of "assets alleged to have been left by the deceased and the manner "in which they have been wasted."

The plaintiff's particulars of claim made particular allegations which, as Mr. Goff concedes, would meet the requirements of Order 32, r. 2; for paragraph 7 alleges: "The defendant has "received assets upwards of £200 and has wasted the same" in three particular ways which are thereafter stated. Accepting the correctness of the pleading, Mr. Goff says that the plaintiff in this matter can only rely upon such a plea, and cannot set up the admission and presumption that I have mentioned, although the preceding six paragraphs of the points of claim clearly plead the facts necessary to found an argument based on the admission and presumption.

I am unable to accept Mr. Goff's argument upon this point. To begin with, I am unable to accept the view that the rule-making body under the County Courts Act, 1934, either intended or had power by rules, which were directed to forms of procedure, to alter and indeed to abrogate in the county court part of the general law. And I add that, to my mind, the rule according to its language is not directed to such a case at all, but only to a case where the plaintiff has to allege, and does allege, that an executor has had assets—that is to say, when it is the case of

the plaintiff (which the plaintiff proposes to prove in fact) that the executor had the assets at the relevant date. In this case (as regards the £29) the plaintiff has not so sought to allege or prove, for the defendant is estopped from denying that she had assets, and that is what the plaintiff relies upon. That therefore disposes of that point.

So far, however, as the £55 claim is concerned, it is plain that the plaintiff must both allege and prove assets—they having been denied by the defendant—and must allege and prove devastavit; and paragraph 7 of the particulars of claim which I have mentioned is particularly directed to that aspect of the case. So far, therefore, as the £55 claim is concerned, a separate question arises involving our determination whether the plaintiff can establish not only the existence of assets (as I think plainly he can from what I have already said) but also the devastavit. Assuming that those facts were established as regards the £55, then the position would be that the defendant is presumed to have wasted to the extent of the £29 and would be found to have wasted to the extent of the £55. There would still, however, remain (and this is the last point which I shall have to examine in due course) the plea of section 61 of the Trustee Act, 1925, namely, that in all the circumstances the defendant ought to be excused.

It is convenient at this stage to say that the judge came to the conclusion that the defendant ought in the circumstances to be excused, and so he dismissed the present action.

As regards the £29, the first question is: Has the presumption to which the form of the first judgment has given rise, been rebutted? Mr. Goff says that it has, and for this reason. He says that the defendant has shown that the most substantial asset of all, namely, the goodwill valued at £150, was lost not out of any waste or neglect on the part of the defendant, but because the plaintiff successfully claimed an order for possession of the premises, which automatically destroyed the goodwill; so that, although the asset has been lost, it has not been lost through any neglect on the part of the defendant who, indeed, over a period of time, by defending proceedings, appealing against orders, and applying under the Landlord and Tenant Act, 1927, did all that lay in her power to preserve that asset; and so, Mr. Goff says, if that premise is right, then this conclusion follows: It is not open to the defendant to give evidence inconsistent with the admission which is conclusively made, but she can give evidence consistent with it, and she can therefore plead that one of the assets which she had was the goodwill; and if she can show that that asset valued at £150 has not been wasted, then whatever may be the facts about other assets—as to which there is no evidence—she has discharged the onus upon her and rebutted the presumption.

I am not satisfied that Mr. Goff makes good that point. I am not satisfied that the whole goodwill was so closely and

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intimately bound up with the premises that the mere loss of the premises alone destroyed the goodwill. In other words, I think that in order to satisfy and discharge this burden upon her, the defendant would have to show that some attempt at least was made by her to preserve this goodwill other than by trying to retain the premises. As she herself lived next door, it would appear obvious that she might have tried to translate the business and the goodwill to the premises next door, and thereby preserve them. I am not therefore for myself prepared to hold that the presumption to which the order has given rise is in this respect rebutted. Prima facie, therefore, in the result the defendant is liable for the sum of £29, but as I have already said not as regards the costs.

It is now convenient to deal with the £55. The evidence before the court includes certain accounts; they were subjected to some criticism in that they were not properly vouched; but they show, or appear to show, that for about a year—that is, up to June 21, 1952—the defendant's conduct of this business was not unsuccessful, since she made in actual fact a net profit of £175, according to the figures over that period. But I draw attention to the fact that June 21, 1952, although a convenient date for the purpose of accounting, has no other particular significance. The business, of course, was continuously carried on; and at that time the landlord and tenant proceedings were pending. The defendant, however, went on conducting the business until February, 1953, and during the second period it is not in doubt, according to the accounts, that the business was less successful, because in this second period she made a small net loss. But the third sheet before us shows, among other things (and it is a point to which Mr. Sparrow has drawn attention in another connection) that in fact the sum made out of this business went, by and large, in paying the costs of the solicitor who advised the defendant. Those costs in the earlier proceedings, including of course the costs in respect of acting for obtaining probate, amounted to something like £150. The defendant also paid various other items in connexion with the business, being payments to employees, payment of telephone and advertising accounts; and Mr. Sparrow naturally enough alluded to the item of travelling expenses which over the period amounted to some £27. In truth—although, as Mr. Sparrow said, this is a matter for consideration later on section 61—the conduct of the business enabled the defendant to pay everything and everyone, and she did pay everyone, with the one notable exception of the plaintiff, the landlord; he alone, so to speak, was left unprovided for and in the cold.

However, the first question is this: Is the defendant, who throughout, as she says, acted on advice, and carried on the business for most of the time successfully but for the latter part of the time unsuccessfully, to be found to have committed a devastavit?

That I think is by no means clearly established. I have already indicated that this matter must be judged not by harking back now from January, 1954, and looking at the material before us in the Court of Appeal, but must be judged by the situation in which the defendant found herself at Northgate in the town of Huddersfield as executrix of her own mother whose estate, when she first took over its administration, was insolvent. Mr. Sparrow has said, with considerable force, that although no doubt she would be justified (or at any rate might be justified) in carrying on the business for some time, the defendant ought to have paused in her tracks now and again to consider whether the game, if I may use the phrase, was really worth the candle; and that, had she so paused, she would or might have concluded —before the matter was forced upon her by possession being given—that the business could not and should not be further carried on; and that in so far, therefore, as she went on conducting the business, beyond the time when it was profitable and fruitful to do it, she committed a devastavit. As my brother Romer has observed, I think that that is, in all the circumstances, a somewhat harsh view to take of the defendant. For myself, therefore, I am not satisfied on this question, although, for reasons to which I will come, it is not necessary for me to express a final conclusion on this matter—for if the defendant did commit a devastavit, then the question still remains: Ought she to be relieved?

I now come to a consideration of section 61; and acknowledging, as I do, the formidable character of Mr. Sparrow's reply on this matter, I say at once that, on the whole, and bearing in mind that if I had been trying this case I am not saying that I should have wholly relieved the defendant, still I am not satisfied that, in a matter which is essentially within the judge's discretion, it would be right that we should interfere with his conclusion.

It is convenient at this stage again to see how the matter stands. Let me assume that the plaintiff has established a devastavit sufficient to entitle him to judgment for the £55. He would then be entitled, upon the presumption which the defendant has failed to rebut, to £29, and on the facts which he has proved to £55. But the section is equally available in both cases, and I think that it is impossible to distinguish between the two, for, if the defendant ought to be relieved at all, then she ought to be relieved in respect of the whole period. I can see no basis upon which we could relieve her upon the £29, and not the £55, or vice versa; although I can see that if I had been trying the case I might have held that she ought not to be wholly but partly relieved in respect of both items.

Before I discuss why I think that we ought not to disturb the judge's conclusion, I must first point out that, as to £22, it seems to me that there is no answer to the plaintiff's claim. It is clear that the defendant proceeded to give away furniture

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which was comprehended in the miscellaneous items, and further that, before she gave it away, she improved or embellished some bedding by spending £2 of the estate money upon it for that purpose. So far as the value is concerned, there is no evidence, except that the defendant herself stated the sum of £20 for the purpose of obtaining probate; and since there can be no possible defence against a charge of devastavit by an executor who admits having given the furniture away, I do not think she can be heard to say that it was of less value than she herself swore it had for the purpose of probate.

The result is that as to £22, the plaintiff must be entitled to recover. Mr. Sparrow has not suggested that in the circumstances he could claim the £29 on the basis of the presumption that has not been rebutted, and the £22 in addition—in other words the defendant would be entitled to say that the £22 went towards the £29, which would leave a sum of £7 or £7 10s. to be considered in reference to section 61 on the first part of the case. But I do not think those arithmetical calculations much matter. The question (and it can be considered as a broad and single question) is: ought the defendant to be relieved, or ought this court to interfere with the judge's order relieving her as regards the payments of the £29 and the £55, that is to say, the balance of those values after allowing for the £22 for which the defendant is undoubtedly liable?

In approaching this matter, Mr. Sparrow rightly drew attention to the three-fold obligation on an executor or trustee seeking relief: he must show that he himself acted honestly and reasonably, and he must further satisfy the court that he ought fairly to be excused, which I take to mean, in fairness to the executor and to other people who may be affected. Mr. Sparrow made some suggestion (and I hope he will forgive me if I say that I regret it) that the defendant had not acted honestly. There was no such suggestion in the court below, and no such finding which could possibly justify such an inference; and no question, therefore, can possibly be raised in this court that the defendant acted otherwise than perfectly honestly.

But it is said that she did not act reasonably, and in any case ought not fairly to be excused; and it was to the last requirement that the most formidable part of Mr. Sparrow's argument, I think, was directed. For he showed that, in effect, the defendant had paid everybody (and used the business for the purpose) except the landlord, whose premises she had occupied throughout for the very purpose of carrying on the business. But first Mr. Sparrow contended that it was not sufficient to say, as the defendant did: "I acted throughout on solicitor's advice." That, he says, was a mere abdication of her duty as executrix; and however wise the solicitor, and however natural it is to seek a solicitor's advice, nevertheless that of itself cannot suffice. The mere fact that you take a solicitor's advice, natural and prudent though such a course be, will not automatically result in relief

being given. With that last contention I do not disagree. But the judge, as I gather from the short note of his judgment which we have before us, did not proceed upon any such general view. As I apprehend, he had his attention drawn to the circumstance which I mentioned at the beginning of this judgment: that there was, to start with at least, the serious problem of who was entitled to what property, and, in particular, what was the beneficial interest in the premises apart from the business, and to the circumstance that, having regard to the financial state of affairs, it was obviously desirable in everyone's interest, if the business could produce some sort of return, that the defendant should try to preserve it; and she is not in any worse position because, when the will eventually was proved, it turns out that she herself was beneficially entitled.

In this court it is our unhappy lot sometimes to come across cases in which nothing is more deplorable than the fact that a person inexperienced in matters in which he is involved fails to take advice from solicitors, who could clearly have given advice, and have protected that person from the consequences of his rash conduct. I think that one must pay some regard to the kind of station in life of the people here concerned, the character of the business, and the difficulties with which they were confronted, including the unfortunate fratricidal strife.

If this court were to say that the defendant ought to have taken some further advice by way of going to counsel or applying to the judge, I think that it would shock the common sense of many people, and certainly be a most disturbing factor when other persons in like situation found themselves in the position of being personal representatives of their deceased relatives.

I therefore acquit the judge entirely from the view that merely taking advice, without more, is necessarily a passport to relief, but I think with him that, in all the circumstances of the case, and bearing in mind the grave difficulties with which the defendant was confronted, it was reasonable for her, having taken the advice, and paying regard to the advice which was in fact given, to act upon it as she did.

There still remains the question: Ought she fairly to be excused? That is the most difficult point of all. But it is essentially a matter within the discretion of the judge; and, although the judgment is a short one, I am not prepared to say that the judge failed to consider any of the points before him, although he may well not have had the advantage of having them so forcibly put to him as Mr. Sparrow put them to us. But having had all the material before him, I think that it would be wrong for this court to assume that in some way he had misdirected himself or left something out of account which he should have taken into account; and therefore I think that we ought not to disturb his conclusion.

Therefore, assuming against the defendant that she committed devastavit as to the £55, and holding that she must be presumed

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to have committed it as to the £29, I still think that she is entitled to retain her judgment, save to the extent that she must be accountable for the £22. That matter seems to have been omitted from consideration in the court below; it is not referred to in the judgment, and I think must have eluded the memory or observation of the judge when he came to deliver his judgment.

Having been through the somewhat complex facts of the case, I hope at not too great length, but having considered to the best of my ability all the points raised, and once more acknowledging my debt to counsel for their very great assistance, I conclude that the plaintiff should have recovered judgment for £22, but no more; and that accordingly the appeal must be allowed but so only as to enable judgment for that sum to be substituted.

Denning L.J. This case ought to have been a simple one, but the lawyers have made it a very complicated one.

The testatrix, an elderly lady living in Huddersfield, carried on an old clothes business, and she died. By her will, she left the business to her daughter, the defendant. Her son, the plaintiff, bought the premises, and gave notice to quit to his sister, the defendant, and sought possession. She resisted the proceedings, and claimed before the appropriate tribunal under the Landlord and Tenant Act, 1927, for a new lease. The trouble was that she did not pay any rent to her brother throughout the time that she was there carrying on the business for the best part of two years, and he seeks in these proceedings to get the rent or the mesne profits from the defendant. I think that in the circumstances he could have sued her personally and said: "You "have carried on this business, and even though you did carry "it on as executrix, you ought to pay rent." But he did not bring proceedings against her personally; instead, he sued her as the executrix and obtained judgment for a portion of the rent, £29 15s., and for £21 costs against her.

The effect of that judgment is not in doubt. As executrix, the defendant, if she had had proper grounds, could have pleaded that she had used up all the assets, or that she had no assets with which to pay the debt. She did not plead any of those things, and judgment went against her. The effect of that judgment is that it is an admission in law that she had assets with which to pay this debt of £29 15s. for rent.

The first question that arises for determination is whether the defendant can rebut the presumption which the law raises against her. As to £22 she clearly had not rebutted the presumption, because she gave furniture away and some bedding of her mother's without getting anything for it, and in respect of that £22 she clearly has no answer to this claim.

As to the remainder, it is said that she has an answer. She says that she has not wasted the assets at all because she spent the money on the litigation. She appealed from the judgment against her for possession to the Court of Appeal. The appeal

was not heard in that court because it was abandoned, but a bill of costs for £55 was run up with the solicitor on that account which she paid. It is said by the plaintiff that that was a devastavit, in other words, that she had wasted the assets in that way.

I am by no means sure that it was a devastavit, because she was carrying on that litigation for the benefit of the estate generally; but, in any event, I agree with my Lord that it is a matter on which, having taken legal advice and acted upon it, she ought fairly to be excused under the Trustee Act.

I was much impressed by Mr. Sparrow's argument on behalf of the defendant. He asked very pertinently why she should pay every other creditor and leave the defendant out in the cold. Why should she pay her solicitor in full? Why should she leave only the plaintiff unpaid? I think that there is much to be said for that view; but, on the other hand, this matter of relief is essentially one for the judge in his discretion; he hears the matter, and he having come to his decision upon it, I do not think that this court should interfere.

For these reasons, although the defendant has no defence as to the £22 in respect of which she wasted the assets, I feel that we cannot refuse to give relief against her in respect of the remainder; and I therefore agree with the order that my Lord proposes.

ROMER L.J. I also agree. I am not myself satisfied that there was a devastavit in respect of the £55, and I share the doubt upon that matter which my brethren have expressed. It seems to me that the plaintiff, seeking as he has done not to sue the defendant in her personal capacity, but in her capacity as executrix, has to prove that she wasted assets of the estate which would otherwise have been available for payment of debts, and that the plaintiff here has no such presumption to support him as he had in relation to the £29. The suggestion made on behalf of the plaintiff was that the defendant really looked more to the beneficiaries in continuing this business than to the creditors, and that that was wrong. But, as has already been pointed out, this estate was not a solvent estate; the defendant had to obtain money for the probate expenses and the testamentary expenses which would be incurred in winding up the estate, and she had not sufficient money for those purposes, so for my part I think that she was well justified in continuing to carry on this business for the purposes of raising some money —which indeed she did very successfully because the first year's accounts showed a profit of £175—from which it follows that she increased the assets of the estate to that extent, and thus raised funds which could be applied for the purpose of paying off the debts.

Apart from that, she was placed in further difficulties. She was advised that her brother and sisters would have an interest

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in the lease of the premises on which the business was carried on, and she had to look after them. That, of course, is no answer to the suggestion that I have mentioned, that she ought to have first met the claims of the creditors; but she acted in accordance with the advice given to her by her solicitor, and I cannot see that she did anything wrong, except perhaps in carrying on the business for a rather longer period than she should have done. It was suggested with some force by Mr. Sparrow, on behalf of the defendant, that at all events she ought to have discontinued the business when she found in November, 1952, that she was not going to make a profit; but we do not know in fact that she did know this or what further loss was in fact incurred between November, 1952, and the time when she actually closed down the business.

Speaking for myself, and taking all the circumstances into account, I do not think that the defendant can be held guilty of a devastavit in the administration of the estate; but even if I am wrong on that, or partially wrong on that, nevertheless I quite agree with what my brethren have said as to the application of section 61 of the Trustee Act, 1925, and I do not desire to add anything to their observations on that part of the case.

Appeal allowed as to part of the plaintiff's claim.

Solicitors: *Torr & Co. for Chambers, Tregoning & Robertshaw, Brighouse; G. E. Hutchinson, Huddersfield.*

B. A. B.

[COURTS-MARTIAL APPEAL COURT.]

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Dec. 14, 15, 18.
Hilbery, Sellers and Barry JJ.

* REGINA *v.* MISKELL.

Criminal Law—Attempt—Indecency—Attempt to procure act of gross indecency—Criminal intention—Overt acts—Surrounding circumstances—Court-martial.
Fact or Law.

The defendant, a soldier serving in Germany, asked the way of a boy in the street and then treated him to beer and ice cream at a café. They went together to a park and while sitting down together the defendant said and did indecent things which manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. He arranged to meet the boy on the next night and at that meeting he suggested that they should go for a walk. On his appeal against his conviction by a court-martial for the offence of attempting to procure an act of gross indecency with the boy:—

Held, that the invitation and the meeting were overt acts and, when considered in the light of the circumstances in which the invitation was issued and the meeting took place, were in law capable of constituting attempts to procure the boy to commit an act

of gross indecency; that, accordingly, it was for the court-martial to decide whether they in fact amounted to an attempt or not; and that the defendant had been rightly convicted.

Rex v. *Cope* (1921) 16 Cr.App.R. 77 applied.

APPEAL against conviction.

The appellant was a corporal serving in Germany. On the afternoon of May 16, a German boy was walking along a street in Hamburg when the appellant spoke to him. The appellant asked him to show him the way to the park. He then asked about a café and they went together to a café where the appellant gave the boy a beer and an ice cream. They then went to the park, and when in the park they sat on one of the seats for a few minutes. The appellant put his arm round the boy's shoulder, and with his hand dangling down his front, pointed at his private parts. The appellant asked if he had a little one down there and said that he had a big one. He also asked whether the boy had ever had sexual intercourse before, using the German word "gefickt." The appellant suggested that they might meet at some time at the station, and suggested the next day at 7 o'clock, and that they might sleep out together in the park or forest at some time. The boy said that he slept at home, but he agreed to meet the appellant, saying that he would ask his father. The next day the appellant kept the appointment which had thus been arranged, and when he met the boy looked at his watch and said: "It is too late to go to the cinema; we'll take a walk." The police then arrested the appellant, who later told them: "Well, what the boy said about Saturday night is all true, but I "only met him tonight in order to put him off. I had no "intention of doing what I suggested."

The appellant was convicted by a district court-martial at Hamburg of attempting to procure an act of gross indecency with a male person; and he was sentenced to 56 days' detention and to be reduced to the ranks.

He appealed.

Ian McLean for the appellant.
Garth Moore for the Crown.

The following cases were cited in argument: *Dugdale* v. *Reg.*[1]; *Rex* v. *Eagleton*[2]; *Rex* v. *Cameron and Robertson*[3]; *Director of Public Prosecutions* v. *Rogers*[4]; *Fairclough* v. *Whipp*[5]; *Rex* v. *Barker*[6]; *Rex* v. *Woods*[7]; *Rex* v. *Cope*[8]; *Rex* v. *Robinson*[9]; and *Rex* v. *Roberts*.[10]

Cur. adv. vult.

[1] (1853) 22 L.J.Mag.Cas. 50.
[2] (1855) Dears. 515.
[3] Unreported.
[4] [1953] 1 W.L.R. 1017; [1953] 2 All E.R. 644.
[5] [1951] 2 T.L.R. 909; [1951] 2 All E.R. 834.
[6] [1924] N.Z.L.R. 865.
[7] (1930) 22 Cr.App.R. 31; 46 T.L.R. 401.
[8] (1921) 16 Cr.App.R. 77; 38 T.L.R. 243.
[9] [1915] 2 K.B. 342; 31 T.L.R. 313.
[10] (1855) Dears. 539.

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Dec. 18. HILBERY J. (reading the judgment of the court). The accused was found guilty by district court-martial at Hamburg of attempted gross indecency with a male person and was sentenced to 56 days' detention and to be reduced to the ranks, and he appeals against that conviction by leave of the court. [His Lordship stated the facts as set out above and continued:] All those facts were unchallenged by the appellant, and no evidence was offered by him or on his behalf. It was submitted that the evidence only amounted at the most to evidence of acts of preparation for procuring the commission of the offence and did not amount to evidence of an attempt to procure the commission. The same contention has been argued as the ground of appeal. No criticism of the summing-up by the judge advocate was advanced by the appellant.

The sole question upon which this appeal depends is whether the act or acts of the accused could constitute as a matter of law an attempt to procure the boy to commit an act of gross indecency with the accused. It has long been established that whether an act or acts can amount to an attempt to commit a crime is a question of law. Once it is decided by the court that what the accused has done can be an attempt to commit the crime, it is a question of fact for the jury whether what was done should be decided to have been an attempt. Not all acts which are steps towards the commission of a crime can be regarded as attempts. Some may be too far removed from the commission of the crime to be regarded as attempts to commit the crime; but just where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it, is often a difficult and nice question. This case indeed affords an example of the difficulty.

The principle to be applied by the court in deciding the question was stated by Parke B. in *Rex* v. *Eagleton*.[1] That statement of the principle was approved and followed in *Rex* v. *Robinson*[2] and in *Rex* v. *Woods*[3] in the following words: "The "mere intention to commit a misdemeanour is not criminal. "Some act is required, and we do not think that all acts towards "committing a misdemeanour are indictable. Acts remotely "leading towards the commission of the offence are not to be "considered as attempts to commit it, but acts immediately "connected with it are."

The difficulty lies in the application of the principle to the facts: *per* Lord Goddard C.J. in *Rex* v. *Robinson*.[4] But in *Rex* v. *Cope*,[5] where, as in this case, the charge was one of attempting to procure the commission of an act of gross indecency, Lord Trevethin C.J., in the considered written judgment of the

[1] (1855) Dears. 515.
[2] [1915] 2 K.B. 342; 31 T.L.R. 313.
[3] (1930) 22 Cr.App.R. 41, 44; 46 T.L.R. 401.
[4] [1915] 2 K.B. 342.
[5] (1921) 16 Cr.App.R. 77; 38 T.L.R. 243.

court, after pointing out that the letters in question which were said to be the acts constituting the attempt to procure did not contain an undisguised invitation to commit the offence, laid it down [6] that in order to see whether the letters did contain such terms that Price (the addressee) would see in them an invitation to commit an act of gross indecency with the appellant, the surrounding circumstances might and should be examined.

The circumstances here were that the appellant had spoken to this boy in the street, had taken him to a café and given him beer and an ice cream, had then gone into a park with the boy and there when sitting with him alone had said and done things which manifested his criminal purpose of inducing the boy to commit an act of gross indecency with him. After putting an arm round the boy and pointing to the boy's genital organ and asking if the boy had a little one there and saying that he had a big one, he had followed this by suggesting that they should sleep out together in a park or the woods and had asked the boy in coarse terms whether he had ever had sexual intercourse. He had then asked the boy to meet him the next night, promising him a reward of 10 marks if he did so, saying that they could then go to a cinema or for a walk. The next night he went to the suggested meeting place and met the boy, and then, making the excuse that it was too late to go to a cinema, invited the boy to go with him for a walk.

It is important to bear in mind that the question is not whether this invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question is whether these acts of the appellant were acts to procure the commission of that offence. Applying the principle as stated, was there on these facts an act sufficiently proximate to procuring the boy to commit the offence to amount to an attempt to procure? It is not a question whether there was an act of procuring but whether there was an act which was an attempt to procure.

The conduct of the accused immediately before and at the time of the invitation, in our view, manifested his purpose in inviting the boy to meet him the next evening and in meeting him and inviting him to go for a walk. The walk which had already taken place had been used for making indecent overtures and suggestions. That conduct made manifest the purpose of the invitation and the meeting and the suggestion of another walk. That the appellant by his conduct and talk had intended to suggest to the boy that they should act indecently together can scarcely be doubted in view of the fact that the appellant himself said to the police after he was arrested: "Well, what the boy "said about Saturday night is all true, but I only met him tonight "in order to put him off. I had no intention of doing what I "suggested."

[6] 16 Cr.App.R. 77, 82.

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The law does not, however, punish a man for a guilty intention but for the overt act done as part of the carrying out of that intention. Now the intention of the appellant here was undoubtedly to procure an act of gross indecency with the boy. The invitation and the meeting were overt acts. When that invitation and meeting are considered in the light of the circumstances in which the invitation was issued and the meeting took place, it appears to us that those acts cannot be said to be incapable of being attempts to procure the boy to commit an act of gross indecency with the appellant. Once it is decided that they could be so regarded as a matter of law, then the question whether they were an attempt or not becomes one of fact for a jury or, as in this case, for the court-martial.

In *Cope's* case[6] the Lord Chief Justice said: "The letters "in the present case obviously do not contain an undisguised "invitation nor is a code suggested, but it is said that they do "contain terms which would have conveyed the invitation to the "mind of their intended recipient as unmistakenly as if it had "been set out in express terms and that the jury have by con-"victing found that this is so." He follows that observation by the passage which I have already quoted. Later on, he said: "We think there was enough (in the letter) to entitle the jury "to find that Price would have read into it an invitation to repeat "with the appellant the offence which he had committed with "Riley, and therefore that the sending of the letters was an "attempt to procure Price."

That invitation in that letter was no less remote from the procuring than the invitation given by the appellant in this case and the meeting in fulfilment of that invitation, coupled, as it was, with a further invitation to another walk. Here, as in *Cope's* case,[6] in the circumstances which had occurred, the invitation in question was understood to be an invitation to an act of gross indecency, and the boy's father and the police were informed, and it is not contended that an invitation however veiled which in the circumstances is an invitation to commit an act of gross indecency, is not an attempt to procure such an act. For these reasons, the appeal is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Courts-Martial Appeal Court; Director, Army Legal Services.*

S. C.

[6] 16 Cr.App.R. 77, 82.

[QUEEN'S BENCH DIVISION.]

* NATIONAL ASSISTANCE BOARD *v.* PRISK.

1954
Jan. 29.

Lord Goddard C.J., Byrne and Parker JJ.

Husband and Wife—Maintenance—Agreement—Maintenance inadequate — Wife receiving national assistance — Liability of husband to National Assistance Board—National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *ss.* 42 *and* 43.
National Assistance.

A married woman, living apart from her husband by consent and receiving a sum under a maintenance agreement which was not, in all the circumstances, an adequate maintenance, was assisted by the National Assistance Board. On appeal by the board from a decision of justices that the board was not entitled to recover from the husband sums paid to the wife by way of assistance:—

Held that, since the existence of the agreement, and its due observance, was no answer to the husband's common law duty to maintain his wife as long as she had not committed a matrimonial offence (*Tulip* v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91; *Dowell* v. *Dowell* [1952] 2 All E.R. 141), the National Assistance Board was entitled to an order, even though the justices had, in previous proceedings, wrongly decided that the husband was not guilty of wilfully neglecting to provide reasonable maintenance for the wife.

CASE STATED by West Penwith justices.

The following facts were proved before the justices: William Prisk was lawfully married to Elizabeth Moon Prisk in 1920. On March 11, 1938, the husband and wife had entered into a separation agreement by which the husband undertook to pay the wife maintenance at the rate of £1 a week, and these payments had been regularly made.

The wife became in need of and received assistance under the National Assistance Act, 1948. On December 17, 1952, on the advice of National Assistance officers, she complained to the justices that her husband had wilfully neglected to provide reasonable maintenance for her, but the summons was dismissed. The wife was not prepared to return to her husband, who was a road foreman employed by the Cornwall County Council with an average gross wage of £7 2s. a week.

On July 17, 1953, two complaints were preferred by the National Assistance Board under sections 42 and 43 of the Act of 1948,[1] applying for a summons to be served on the husband to

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

[1] National Assistance Act, 1948, s. 42: "(1) For the purposes of this "Act—(*a*) a man shall be liable to "maintain his wife and children, and "(*b*) a woman shall be liable to main-"tain her husband and her children."

S. 43: "(1) Where assistance is "given or applied for by reference "to the requirements of any person "(in this section referred to as a per-"son assisted), the Board or the local "authority concerned may make a "complaint to the court against any "other person who for the purposes "of this Act is liable to maintain the "person assisted. (2) On a com-"plaint under this section the court "shall have regard to all the circum-"stances and in particular to the re-"sources of the defendant, and may "order the defendant to pay such "sum, weekly or otherwise, as the "court may consider appropriate."

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show cause why he should not be ordered to repay a sum of £27 19s. given as assistance to the wife under Part II of the Act between January 19, 1953, and July 13, 1953, and why he should not be ordered to pay such sums as the court might consider appropriate in respect of assistance given at the weekly rate of £1 1s. 6d. on March 3, 1953, and divers other days, and which was continuing to be given.

For the National Assistance Board it was contended that, for the purpose of the Act of 1948, the husband was liable to maintain his wife unless she had committed a matrimonial offence, that the wife had committed no matrimonial offence, that the failure of the wife to obtain an order for maintenance on the ground of wilful neglect to maintain was not conclusive as against the National Assistance Board, and that the existence of the separation agreement was no bar to the board.

It was contended for the husband that the liability under section 43 of the Act of 1948 was subject to defences open to the wife at common law, that the existence of the agreement regularly complied with was such a defence and that the matter, having been determined by the justices on the hearing of the wife's complaint on the ground of wilful neglect to maintain, was no longer open to the National Assistance Board.

The justices held that the compliance of the husband with the separation agreement was a bar to the wife in her complaint and that, as the rights of the National Assistance Board were subject to defeasance by any defence open to the husband as against the wife, the board were also under a disability arising from the performance of the agreement. The husband was, therefore, not liable under section 43. The National Assistance Board appealed.

J. P. Ashworth for the National Assistance Board.
H. E. Park for the husband.

The following cases were cited in argument, apart from those contained in the judgment: *Hyman* v. *Hyman* *; *Llewellyn* v. *Turner*† and *Aldritt* v. *Aldritt*.‡

Lord Goddard C.J. It is now too late to argue that it is anomalous that a husband should be said to be wilfully neglecting to maintain his wife if he is paying money that is due under a deed. "Wilful," in the Summary Jurisdiction (Married Women) Act, 1895, means deliberate, that is to say, the husband is deliberately refusing to pay, with no excuse except the deed. *Tulip* v. *Tulip* [1] and *Dowell* v. *Dowell* [2] have decided that the presence of a deed under which the husband has made payments

* [1929] A.C. 601; 45 T.L.R. 444.
† (1922) 126 L.T. 532.
‡ (Unreported) June 12, 1951.
[1] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91.
[2] [1952] 2 All E.R. 141.

is no bar to the wife taking proceedings in respect of maintenance, either before the justices under the Summary Jurisdiction (Married Women) Act, or before the High Court under section 23 of the Matrimonial Causes Act, 1950.

The reason why it has been held in those cases that the deed cannot be set up as an answer is that the husband, at common law, remains liable to maintain his wife unless she has committed a matrimonial offence. The fact that he has covenanted to pay her, as in the present case, £1 a week, may be shown not to provide her with adequate maintenance. One object of orders that are made against husbands in respect of their wives is to prevent the wives becoming a charge upon public funds—that is, in the old days becoming a charge upon the Guardians of the Poor and now becoming a charge upon the National Assistance Fund.

The courts have therefore held in the two cases which I have mentioned (which are binding on this court and which, if I may say so, seem to me to lay down most excellent law) that as long as the obligation remains on the husband to support his wife, the fact that the deed contains a clause under which the husband is bound to pay £1 a week to his wife does not prevent the court saying: "That is not now adequate maintenance, and as you are "bound to supply adequate maintenance, notwithstanding that "£1 a week has been agreed, we shall make an order against "you." It rests entirely with the justices to find what is a fair and adequate sum in all the circumstances of the case, taking into account the £1 a week and the husband's means.

Mr. Park, for the husband, has asked us to say that *National Assistance Board* v. *Wilkinson* [3] is authority for the proposition that if the husband would have had any defence at common law or under any statute, that remains open to him in proceedings taken by the National Assistance Board. *Wilkinson's* case [3] merely decided that a husband can always show, either against the National Assistance Board or against his wife, that his obligation to maintain his wife has ceased. From the earliest times our law has laid down that no husband is obliged to support his wife if she has committed adultery. In *Wilkinson's* case [3] I cited a well-known dictum of Littledale J. in *Rex* v. *Flintan* [4] that the wife "Having rendered herself unworthy of "her husband's protection, she returns to the same state as if "she were not married," and "If the husband is not obliged to "answer for the wife's contracts, or to receive her into his "house, it cannot be said that he is 'legally bound to maintain "'her'."

The law is different where the wife has deserted her husband. *Jones* v. *Newtown and Llanidloes Union* [5] laid down that the right to maintenance of a wife who has deserted her

[3] [1952] 2 Q.B. 648; [1952] 2 T.L.R. 11; [1952] 2 All E.R. 255.
[4] (1830) 1 B. & Ad. 227, 230.
[5] [1920] 3 K.B. 381; 36 T.L.R. 758.

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husband is only suspended, and if she returns to her husband then she has a right to be maintained; but as long as she is in desertion the husband is under no obligation to support her. In *Wilkinson's* case [6] the wife was in desertion. The husband provided a perfectly proper and adequate home for the wife, but she wanted to live elsewhere and would not go and live with him. It was decided that in such circumstances the husband was not bound to support the wife, and it decided nothing else. Similarly, in the present case, if the husband could say that the wife had deserted him, he would be under no obligation to maintain her.

The only other question is whether the National Assistance Board, under these circumstances, can obtain an order against the husband for such amount of the relief which the board is giving to the wife as the court may think reasonable that the husband should, in addition to the sum under the deed, provide.

[His Lordship referred to section 43 of the National Assistance Act, 1948, and continued:] In my opinion the National Assistance Board is entitled to an order because the husband is clearly liable to maintain his wife. The wife was entitled to go to the justices as she did in December, 1952, and they, wrongly, in our opinion, felt that they could not order any maintenance because the husband was paying under the deed. The result was that the wife was left with £1 a week—and one has only to state the amount to show that she could not live on that. What was she to do? She had to go and get relief, her husband still remaining liable to maintain her.

The National Assistance Board having paid money to the wife can have recourse to the husband, who is liable to maintain his wife, and say: "You must repay us the money that we have "paid to your wife because you are in default. You are not "maintaining your wife by paying her reasonable maintenance; "you are only paying her the money under the deed. In spite "of the deed she is entitled to her increased maintenance. She "has not got that increase and we have had to pay her; we there-"fore ask that you should repay us that which we have paid "and shall have to pay her in the future."

Attention has been called to the presence in the deed of what I may call a set-off clause, that is to say, as long as the husband made his payment under the deed the wife was bound to discharge all her debts and liabilities out of that sum, and the husband was entitled to deduct from it any sum for which he had become liable by his wife's pledging his credit. We do not intend that this husband should be entitled to set-off against the £1 that he pays under the deed the amount that he may be ordered by the justices to pay to the National Assistance Board. We intend that the National Assistance Board shall inform the justices what they have paid to the wife and that the husband

[6] [1952] 2 Q.B. 648.

must pay that sum, or so much of it as the justices think reasonable, in addition to the £1 a week which he has been paying. If the justices find that the amount of £27 which was paid by the board between January and July, 1953, was a reasonable amount, they will make an order on him to pay that amount, and he will have to pay it and will not have the right to set-off. If the justices also say that in future he is to pay £1 a week in addition to the £1 he has paid under the deed then his obligation will be discharged by the payment of £2 a week. He may be entitled to set off any amount for which the wife has pledged his credit against the £2 a week, but not against the £1 a week.

For these reasons I think the justices came to an erroneous conclusion in point of law, and the case must go back to them with a direction that they must find what sum the husband should reasonably pay, first in respect of the arrears, and second in respect of future payments.

BYRNE J. I agree.

PARKER J. I agree.

Appeal allowed.

Solicitors: *Solicitor, National Assistance Board; Jaques & Co. for Stephens & Scown, St. Austell.*

[CHANCERY DIVISION.]

* RICHARDSON *v.* JACKSON.

1954
Feb. 3.
Danckwerts J.

[1953 R. No. 1460.]

Restrictive Covenant—Obsolete—Modification—Action to enforce covenants—Application to stay proceedings and for leave to apply to Lands Tribunal—Grounds required—Law of Property Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 20), *s.* 84 (9)—*Lands Tribunal Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 42), *s.* 1 (4).
Lands Tribunal.

In an action for enforcement of covenants application may be made under section 84 (9) of the Law of Property Act, 1925, by any person against whom proceedings are brought, for a stay of proceedings and for leave to apply to the Lands Tribunal for the modification of the covenants.

Such an application should normally be granted if the applicants can show a prima facie case, since the court has no power to modify covenants. The applicants must also have proceeded without unreasonable delay, although they are not obliged to apply before pleadings are delivered, as their advisers must have time in which to examine the circumstances and to decide whether an application to the tribunal has any reasonable chance of success.

Feilden v. *Byrne* [1926] Ch. 620 considered.

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ADJOURNED SUMMONS.

The plaintiff brought proceedings against the defendants for the enforcement of a covenant restricting them from using a shop for the sale of certain articles. The defendants did not deny that they were bound by the covenant, having bought the property with notice of the covenant, which was also registered under the Land Charges Act, 1925. They alleged that the covenant was obsolescent and no longer enforceable, and that if there had been any breach the plaintiff had acquiesced in it, and that in the circumstances it should be modified to permit the user of which the plaintiff complained.

The writ was issued on May 27, 1953, the statement of claim was served on June 6, 1953, and the defence was delivered on July 31, 1953. The present summons was taken out on December 15, 1953, in which the defendants asked for an order staying proceedings in the action in order to apply under section 84 of the Law of Property Act, 1925,[1] to the Lands Tribunal for modification of the covenant.

Maurice Berkeley for the applicants, defendants in the action.
R. O. Wilberforce for the respondent, plaintiff in the action.

Cases cited in argument: *Feilden* v. *Byrne*[2]; *Knight* v. *Simmonds*.[3]

DANCKWERTS J., having stated the facts: This is an application to stay the proceedings to enable the defendants to apply to the Lands Tribunal under section 84 of the Law of Property Act, 1925, for the purpose of obtaining a modification of a covenant. Under section 84 (9) the matter lies in the discretion of the court, but the section does not give any lead to the court as to the considerations which should affect its decision in regard

[1] Law of Property Act, 1925, s. 84: "(1) The authority hereinafter defined shall . . . have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant . . . as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction . . . on being satisfied—(*a*) that by reason of changes in . . . neighbourhood or other circumstances of the case . . . the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for . . . private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user. . . ."

"(9) Where any proceedings by action or otherwise are taken to enforce a restrictive covenant, any person against whom proceedings are taken, may in such proceedings apply to the court for an order giving leave to apply to the authority under this section, and staying the proceedings in the meantime."

Lands Tribunal Act, 1949, s. 1: "(4) The Lands Tribunal shall . . . exercise (*a*) the jurisdiction conferred on the authority under s. 84 of the Law of Property Act, 1925 (which relates to the discharge and modification of restrictive covenants). . . ."

[2] [1926] Ch. 620.

[3] [1896] 2 Ch. 294; 12 T.L.R. 401.

to such an application. The only reported case on the subject is *Feilden* v. *Byrne*,[1] a decision of Eve J.

The matter is not very clear, even when the decision of Eve J. is considered, and I feel some difficulty in deciding exactly the manner in which the discretion of the court should be applied. It is clear that the proceedings should not be stayed for the purpose of such an application if it is plain on the evidence that any application under the section would have no real chance of succeeding before the tribunal. But it seems to me that otherwise such an application should normally be acceded to, because modification of the covenants is not within the power of this court, and it would, therefore, be unfair to deprive the defendants of their chance to obtain a modification from the tribunal, if they can make out a case at all.

On the other hand, it is plain that the application should be made promptly when proceedings are brought. I do not think that it is necessary that the defendants should have applied before the proceedings were begun, because until the plaintiff has proceeded with his action, the defendants may well think that he will not attempt to enforce the covenants; but once the action has been started, the defendants, if they wish to take advantage of the procedure created by section 84 (9) of the Law of Property Act, 1925, should apply promptly to the court.

In the present case the writ was issued on May 27, 1953; the statement of claim was served upon the defendants on June 6, 1953, so that by then the defendants knew definitely what was the complaint against them; and the defence in the action was delivered on July 31, 1953. This present application was not made until December 15, 1953.

It is not possible to compare the present case with the procedure in *Feilden* v. *Byrne*,[1] because nowadays no order under a summons for directions is required for pleadings, whereas at the time of that case pleadings would not normally be delivered till the issue of the summons for directions and the hearing upon it.

I have felt some doubt whether I should not say that the defendants have not proceeded with due despatch. On the other hand, it must be recognized that the advisers of the defendants must have some time in which to examine the circumstances and obtain evidence, so that they can decide and advise the defendants whether an application to the tribunal under section 84 has any reasonable chance of success; and while I feel that the defendants may be open to some criticism—their application certainly would be free from objection, if, for instance, they had applied during the month of October—yet, on the whole, I do not think that it is a case in which I should deprive them of their chance to apply to the tribunal for possible modification of the covenant.

[1] [1926] Ch. 620.

1954

Richardson v. Jackson.

The proceedings will accordingly be stayed to enable the defendants to apply promptly to the Lands Tribunal under section 84 (9) of the Law of Property Act, 1925.

Application granted.

Solicitors: *Collyer-Bristow & Co. for Hett, Davy & Stubbs, Scunthorpe; Bird & Bird for Sergeant & Collins, Scunthorpe.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

1954 *Feb.* 1.

Somervell, Birkett and Romer L.JJ.

* BAMPTON *v.* COOK.

[Practice Note.]

Legal Aid—Costs—Appeal—Security for costs—R.S.C. Ord. 58, *r.* 15 (2).

In an action for personal injuries by the next friend of an infant before Hilbery J. and a jury on December 2, 1953, a verdict was given for the defendant. At the hearing the plaintiff was an assisted person under the Legal Aid and Advice Act, 1949, paying a maximum contribution of £93 10s. on a disposable income of some £343. On notice of appeal being given, the defendant applied to the Court of Appeal under R.S.C. Ord. 58, r. 15 (2)[1] for an order that the plaintiff should give security for the costs of the appeal. At the time of the hearing of the application the plaintiff was not an assisted person for the purposes of the appeal, but it was clear from certain correspondence that legal aid would be granted.

Marven Everett Q.C. and *Malcolm Morris* for the applicant.
Rodney Bax for the respondent.

The following cases were cited in argument: *Conway* v. *George Wimpey & Co.*[2]; *Murray* v. *Stewards & Lloyds Ld.*[3]

Somervell L.J. Counsel for the plaintiff has asked this court to follow the decision in *Conway* v. *George Wimpey & Co.*,* and say that no security should be ordered. In that case the plaintiff was not an assisted person at the time of the application to the Court of Appeal for security for costs. In the

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[Reported by Miss Elaine Jones, Barrister-at-Law.]

[1] R.S.C. Ord. 58, r. 15: "(2) The "Court of Appeal may in special cir-"cumstances order that such security "shall be given for the costs of the "appeal as the court may direct."

[2] [1951] 1 T.L.R. 215; [1951] 1 All E.R. 56.

[3] (Unreported) October 12, 1953.

* [1951] 1 All E.R. 56.

present case the plaintiff as an assisted person in the court below had been ordered to make a substantial contribution to the costs. This is, I think, a "special circumstance" taking the present case out of the general rule in *Conway* v. *George Wimpey & Co.*[1] Counsel for the defendant has drawn our attention to *Murray* v. *Stewards & Lloyds Ld.*,[2] in which the plaintiff had to make a maximum contribution of £95 towards the costs of the hearing in the court of first instance and was an assisted person at the time of the application to the Court of Appeal for security. This court, though differently constituted, ordered security to the extent of £25 to be paid by the plaintiff.

We propose to follow that decision in the present case and order the plaintiff here to give security to the extent of £20. This order is intended to cover the plaintiff when she becomes an assisted person whatever contribution she may be required to make towards the costs of the appeal.

Solicitors: *Barlow, Lyde & Gilbert; Craigen, Hicks & Co.*

[1] [1951] 1 All E.R. 56. [2] (Unreported) October 12, 1953.

[QUEEN'S BENCH DIVISION.]

* CHARLES *v.* S. SMITH & SONS (ENGLAND) LD.

1954
Jan. 21, 22, 25, 26, 27.
Hilbery J.

[1952 C. No. 5136.]

Factory—Dangerous machinery—Fencing—Spindle moulding machine—Dangerous moving parts—Metal box guard with lid closed but not fastened—Lid raised by operative—Machine accidentally set in motion—Accident—Liability of employer—Liability of operative—"Wilfully interfere with or misuse"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 14, 16, 119.
Factory—Duty on workman.

By subsection (1) of section 119 of the Factories Act, 1937, no person employed in a factory "shall wilfully interfere with or "misuse" any appliance provided for securing his safety; and by subsection (2) no person employed in a factory shall "wilfully "and without reasonable cause" do anything likely to endanger himself or others.

Certain dangerous moving parts of a hydraulically-operated mould press, requiring to be fenced under section 14 of the Factories Act, 1937, were covered by a metal box fitted with two glass-panelled lids. The lids were closed, but not fastened. The plaintiff, the operative attending the machine, in order to test certain locking nuts inside the box which controlled the position of the mould spindles, having first immobilized the machine by moving the starting handle into a neutral position, raised one of the lids of the box and inserted his hand therein. While doing so he inadvertently pressed his leg against the starting handle, causing

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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Ld.

the machine to spring into motion, and his hand was injured by a moving ramrod inside the box. He sued his employers, the defendant company, for damages alleging that they had been guilty of a breach of their statutory duty to fence and guard the dangerous parts of the machinery while the machine was in motion contrary to sections 14 and 16 of the Act. The employers denied any breach of statutory duty and contended that it was no part of the plaintiff's duty to test the locking nuts and that his actions in so doing had been in breach of section 119 of the Act in that he had wilfully interfered with or misused the guard provided for his safety and wilfully and without reasonable cause done something likely to endanger himself:—

Held, (1) on the evidence, that the plaintiff was impliedly licensed as part of his duty to test in the way he did the locking nuts.

Held, (2) that the metal box was an insecure guard when the lid was open, so that at the time of the accident the defendant company was in breach of section 14 and, as the plaintiff by his involuntary act had set the machine in motion while the dangerous parts of the machine were unguarded, the company was also in breach of section 16 of the Act.

Cummings v. *Richard Thomas and Baldwins Ld.* [1953] 2 Q.B. 95; [1953] 2 W.L.R. 1104; [1953] 2 All E.R. 43 applied.

Held, (3) that no breach of section 119 had been committed by the plaintiff since his actions did not amount to "wilful interference or misuse" within the meaning of section 119 (1), the words in the subsection being intended to mean "a perverse intermeddling" and not a mere "touching" or "misplacing" of an appliance provided for the safety of the worker; and further that the plaintiff had not, by inadvertently starting the machine while his hand was inside the box "wilfully and without reasonable cause" done anything likely to endanger himself.

Reasoning of Pilcher J. in *Johnson* v. *Croggan & Co. Ld.* [1954] 1 W.L.R. 195; [1954] 1 All E.R. 121 questioned.

Action.

The plaintiff, John Arthur Charles, a mould press operator employed by the defendant company, S. Smith & Sons (England) Ld., was required to attend an Edgwick injection moulding machine installed in the defendant company's factory at Waterloss Road, Cricklewood, London. The moulding machine was powered by a motor and the moulds were brought together by hydraulic pressure. Certain dangerous moving parts, including a ramrod which moved mechanically when the machine was in motion, were guarded by a metal box closed by two sloping metal lids opening towards the back and front of the machine. Each lid was fitted with a perspex glass panel on which was a small raised lip forming a handle by which the panels could be opened. When closed the panels were not fixed in any way. On the left of the metal box over the moving parts was a handle which controlled the hydraulic power, and it was possible by moving the handle into an upright position to immobilise the machine while the motor was switched on. The moulds themselves were on spindles which passed through the side of the metal box. Inside the box were certain locking nuts which, when properly adjusted, kept the spindles in position.

On January 2, 1951, the plaintiff, believing it to be part of his duty to test the locking nuts, having immobilised the machine by pushing the starting handle into the neutral position, lifted the front lid of the box and inserted his hand inside the box. While doing so he inadvertently knocked his leg against the starting handle and so set the machine in motion. His hand was caught by the moving ramrod inside the box and was injured. He sued the defendant company for damages claiming that his injury was due to their negligence and/or breach of statutory duty in failing securely to fence the dangerous parts of the machine contrary to section 14 of the Factories Act, 1937 [1]; in causing or permitting the machine to be in motion notwithstanding that the covers of the guard were not in position contrary to section 16 [2] of the Act; failing to provide proper plant and appliances and exposing the plaintiff to unnecessary risk.

The employers denied negligence and breach of duty alleging that it was no part of the plaintiff's duty to test the nuts, which he well knew was the duty of one Wynne, the foreman and setter; that the injury had been caused by or contributed to by the plaintiff's own negligence; that he attempted to adjust the nut from a position in front of the machine and for this purpose opened the front window and passed his hand across the ram, although he well knew that it was dangerous so to do and although he knew that the correct practice was to lift the rear window in order to make the necessary adjustment; that he knocked the operating lever into a position which he well knew would cause the ram to move at a time when his hand was in jeopardy. The defendant company also pleaded that the plaintiff, by acting in the way he had, had committed a breach of section 119 [3] of the Act in that he had, contrary to subsection (1) of that section wilfully interfered with or misused the guard provided for securing the safety of persons employed in the factory; failed to use the guard; and, contrary to subsection (2),

[1] Factories Act, 1937, s. 14 (1): "Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced: Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this subsection shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with that part."

[2] S. 16. "All fencing or other safeguards provided in pursuance of the foregoing provisions of this Part of this Act shall be . . . constantly maintained and kept in position while the parts required to be fenced or safeguarded are in motion or in use, except when any such parts are necessarily exposed for examination and . . . adjustment shown by such examination to be immediately necessary. . . ."

[3] S. 119: "(1) No person employed in a factory . . . shall wilfully interfere with or misuse any means, appliance, convenience or other thing provided in pursuance of this Act for securing the health, safety or welfare of the persons employed in the factory. . . . (2) No person employed in a factory . . . shall wilfully and without reasonable cause do anything likely to endanger himself or others."

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wilfully and without reasonable cause done something likely to endanger himself.

John Platts-Mills for the plaintiff.

H. I. Nelson Q.C., *Stephen Chapman* and *John Stephenson* for the defendant company.

The following cases were cited in argument: *Smith* v. *Morris Motors Ld. and Harris*[4]; *Johnson* v. *Croggan & Co. Ld.*[5]; *Cummings* v. *Richard Thomas and Baldwins Ld.*[6]; *Carr* v. *Mercantile Produce Co.*[7]; *Norris* v. *Syndic Manufacturing Co.*[8]; *Vincent* v. *Southern Railway Co.*[9]; *Cakebread* v. *Hopping Bros. (Whetstone) Ld.*[10]; *Walker* v. *Bletchley Flettons Ld.*[11]

HILBERY J. having stated the facts and considered the evidence, found that, although it was never specifically made part of the plaintiff's duty to test the nuts, he was impliedly licensed so to do, and that he was not guilty of negligence in opening the box and putting his hand in to see if the nuts were tight. Neither was he negligent in opening the front panel of the machine to inspect the nuts as he was copying the example of the setter who himself had been seen to use the front panel. His Lordship continued: The plaintiff suffered from a moving part of the machine that was dangerous, and the question is whether it had been securely fenced, and, if so, whether the fence was maintained when the machine was in motion, so as to comply with sections 14, 15 and 16 of the Factories Act, 1937.

It does not matter in the present case whether the box, with a loose lid which anyone could open, fenced the machine securely, because, in any event, since the decision in *Cummings* v. *Richard Thomas and Baldwins Ld.*,[1] although the plaintiff set the machine in motion when it was unguarded, his act in so doing involves the master in a breach of section 16 of the Act; but in those circumstances, the fact that it is the action of the servant, though involuntary—it was voluntary in *Cummings* v. *Richard Thomas and Baldwins Ld.*[1]—which involves the master in the breach, is a matter to be taken into consideration when deciding whether the master is wholly liable in respect of the accident or whether the servant is liable.

That drives me to consider whether the plaintiff here was guilty of, first, contributory negligence in doing what he did, or, secondly, a breach of section 119. I think that, in the circumstances, first that the plaintiff was not doing a

[4] [1950] 1 K.B. 194; 65 T.L.R. 642; [1949] 2 All E.R. 715.

[5] [1954] 1 W.L.R. 195; [1954] 1 All E.R. 121.

[6] [1953] 2 Q.B. 95; [1953] 2 W.L.R. 1104; [1953] 2 All E.R. 43.

[7] [1949] 2 K.B. 601; [1949] 2 All E.R. 531.

[8] [1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935.

[9] [1927] A.C. 430.

[10] [1947] K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.

[11] [1937] 1 All E.R. 170.

[1] [1953] 2 Q.B. 95; [1953] 2 W.L.R. 1104; [1953] 2 All E.R. 43.

wholly unauthorized act, and secondly that his action did not amount to contributory negligence, and ought not to be so held. The initial responsibility for the accident lies in the fact that the box was not a secure fencing of the dangerous part of the machine. It is not enough to provide something which will act as a guard if let alone and not made use of in the way in which a part of it is patently intended to be made use of. Section 14 requires machinery to be securely fenced, and it is not sufficient that that machinery is provided with a means of achieving security. This box achieved security so long as the perspex cover was left shut. If the handle on the perspex cover was used and the perspex cover lifted, then it ceased to be any guard for a person who, for any reason, put his hand inside the box. If it was not a secure fencing of the machine (and I think it was not, in those circumstances), then, before the situation is reached where the inadvertent action of the plaintiff himself set the machine in motion after the perspex panel was opened and the machine became unguarded so as to involve his master technically in a breach of section 16, one has the situation where the master was already in breach of section 14, and that breach by the master can, in the circumstances of this case, fairly be said to be causally connected with the accident.

The question which remains to be decided is whether the plaintiff was himself guilty of a breach of section 119. That section is singularly and unhappily bare of authority as to the way in which its words are to be construed. There has not been called to my attention, and I confess I do not know of, any authority stating how the words in subsection (1) are to be interpreted. That subsection provides: "No person employed in "a factory or in any other place to which any provisions of this "Act apply shall wilfully interfere with or misuse any means, "appliance, convenience or other thing provided . . ."

The words "wilfully interfere with or misuse" have to be construed in this case to decide whether the plaintiffs' action with regard to this box which performed the function of a guard was a "wilful interference or misuse" of that appliance. If "wilfully interfere" only means intentionally do something with the guard, then, of course, he did intentionally lift up the panel in order to put his hand inside the box.

I should not so construe those words. In my opinion the words "wilfully interfere with or misuse" in the context, more particularly the words "or misuse," are intended to mean something more than merely "touch" or "misplace." I think they mean something in the nature of a perverse intermeddling with the appliance; and the use of the word "wilful" in our language can and often does convey that meaning. One speaks of a "wilful child," as meaning a naughty child; but in the criminal law and in the domestic law, the word "wilful" is used to mean "intentional"; but this section puts a duty on the servant not wilfully to interfere with or misuse any means, and I think

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that, although a disjunctive is used there, its purpose is not to indicate that "misuse" is something quite different from wilful interference, but to indicate that the wilful interference is intended to be something which is also in the nature of a misuse. Therefore I do not think that section 119 (1) applies to this case.

When it is said in section 119 (2) that: "No person employed "in a factory or in any other place to which any provisions of "this Act apply shall wilfully and without reasonable cause do "anything likely to endanger himself or others," for the reasons I have given in dealing with the question of contributory negligence, I do not consider that the plaintiff was wilfully or without reasonable cause doing anything likely to endanger himself so far as he could tell. He did not foresee the accidental pressure on the starting handle, nor did he foresee—and was not, in my opinion, negligent in not foreseeing—that he might possibly on this occasion, although it had never happened before, start the machine by pressure on the handle.

In the circumstances, although I confess that my mind has vacillated a good deal in the course of the case, I think that on the whole the plaintiff succeeds, and there is no fractional apportionment to be made distributing any part of the blame as attributable to him, because it has not been shown either that section 119 has been violated or that the plaintiff was guilty of contributory negligence. With the greatest respect to the judgment which Pilcher J. has given in *Johnson* v. *Croggan & Co. Ld.*[2] it is quite clear, in my view, that even though a plaintiff in such a case is shown to have been in breach of section 119, it does not make his cause of action a turpis causa; but I need not deal at length with that, because it does not arise in this case.

Judgment for the plaintiff.

Solicitors: *W. H. Thompson; Carpenters.*

[2] [1954] 1 W.L.R. 195; [1954] 1 All E.R. 121.

[QUEEN'S BENCH DIVISION.]

1954 *Feb.* 2.

Gerrard J.

* CALVERT AND WIFE *v.* PICK AND ANOTHER.

[1952 C. No. 4826.]

Practice and Procedure—Discontinuance of action—Effect of settlement—Action for damages—Two plaintiffs and two defendants—Plaintiffs' claims settled—Damages and costs paid by second defendant—Plaintiffs' names left on record—Action brought to trial—No evidence offered by plaintiffs—Whether court has power to determine proportion of damages as between defendants.

Joint Tortfeasor—Contribution—Practice.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

An action for damages brought by two plaintiffs against two defendants was settled, the defendants having reached an agreement whereby the second defendant paid the plaintiffs an agreed sum by way of damages and costs. The defendants arranged to retain the name of one plaintiff on the record to keep the action alive so that the court might determine the proportion of damages and costs properly payable by each defendant. At the trial the plaintiff offered no evidence:—

Held, that in reality the plaintiff's action was dead, and the court had no power to determine the issue between the two defendants.

Croston v. *Vaughan* [1938] 1 K.B. 540; 54 T.L.R. 54; [1937] 4 All E.R. 249 distinguished.

ACTION.

Mr. Monty Calvert and his wife, Mrs. Louise Calvert, brought an action against Mr. Kenneth Pick and Mr. Thomas William Sanders for damages arising out of a collision. Before the trial of the action the defendants, having reached an agreement as to the damages and costs likely to satisfy both plaintiffs' claims against one or other or both defendants, settled the plaintiffs' claims, the agreed sums for both damages and costs being paid by the second defendant with the concurrence of the first defendant. The defendants did not, as a term of that settlement, ask for the action to be discontinued, but arranged for one of the plaintiffs' names to be left on the record thus keeping the action alive, in order that the court could determine the proportion of damages and costs which each defendant should pay.

Mark Gore for the plaintiffs.
Malcolm Morris for the first defendant.
Hugh Forbes for the second defendant.

GERRARD J. stated the facts and continued: The proceedings opened today by Mr. Gore on behalf of the plaintiffs telling me that he had no instructions in this matter at all; that the action has been settled as between the plaintiffs and the second defendant, and that he had no instructions to offer any evidence. After that, the contest began. Mr. Malcolm Morris and Mr. Forbes have sought to persuade me to try the respective proportions which Mr. Pick and Mr. Sanders ought to pay of the moneys which the plaintiffs have received on the settlement. They say that I can do that because, although the claims have been disposed of between the plaintiffs and the defendants, and paid and satisfied, by keeping one of the plaintiffs on the record they can invite the court to, and the court should, proceed with the dispute between the two defendants.

I take a different view of that. It seems to me that the rights between the two defendants in this action could have been determined in a number of ways: they could have been considered in a separate action; they could have been determined, if one only had been sued, through the machinery of a third party notice; and they could have been adjudicated upon in a

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real action on the basis of the decision in *Croston* v. *Vaughan*,[1] if the circumstances had been appropriate. If the proceedings to settle the ratio of contribution between the defendants had been the subject of a separate action, no difficulty could possibly have arisen. Had the proceedings been brought as the result of one of them, being the defendant at the suit of the plaintiff, issuing a third party notice against the other defendant, again no difficulty could have arisen because R.S.C., Ord. 16A, r. 9 (2) is designed to cover the situation where there is a plaintiff, defendant and third party and the defendant and plaintiff come to an accommodation. That rule is specifically inserted in Order 16A to enable the court to sever the action from the proceedings and to allow the third party proceedings to continue in their own right as fully constituted proceedings, although in their ordinary nature they are dependent upon an original action. I think that the Rules of the Supreme Court have there provided for the difficulty which, but for the rule, would have occurred if, as it were, the head of the dog had been cut off and it was desirable to let the tail wag. But that state of affairs does not arise before me. There is no rule corresponding to rule 9 (2) which I can incorporate for the purpose of applying *Croston* v. *Vaughan*.[1] There are no cross-contribution notices in this case under Ord. 16A, r. 12, and (as naturally follows) there are no directions. The question is purely whether or not *Croston* v. *Vaughan*[1] can be invoked. I do not think that it can.

During the course of his judgment in that case Scott L.J. said[2]: "I agree with the judgment delivered by my colleagues "on this point, holding that he had jurisdiction and that it was "the intention of subsection (2) of section 6 of the Act of 1935 "that the trial judge should deal with the matter, and that he "had power to dispense with any formal application. And I am "inclined to think that it was open to the learned judge, even "if one of the parties had dissented, to exercise the jurisdiction "of that section if he thought fit. Reading that section as a "whole, I think it was the intention of Parliament that the "judge who had heard a case of primary liability at the instance "of a plaintiff should, with the knowledge of the facts as proved "in evidence before him, then and there assess the apportionment "not merely of the damage, but also of the blame."

That is a general statement of the intention and policy of section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, to be derived from a consideration of the section. I do not say that I do not propose to invoke the *Croston* v. *Vaughan*[3] jurisdiction merely because I have not heard the question of primary liability at the instance of the plaintiff. I think that that might be taking too narrow a view, although it may be that that is what the Court of Appeal had particularly in mind, and they might think that the narrower view was the

[1] [1938] 1 K.B. 540; 54 T.L.R. 54; [1937] 4 All E.R. 249.

[2] Ibid. 565.

[3] Ibid. 540.

right one. But the view I take about the matter is that this action remains in the list purely as the result of a three-cornered arrangement made to keep one plaintiff in the action so that the court can try an issue between the two defendants—a plaintiff whose damages and costs have been paid. In my opinion the court ought not to be used in that way. Further, there are practical difficulties which seem to me to show that my approach is the right one. In an action brought by a plaintiff against two defendants in which the plaintiff succeeds against both, judgment is given for the plaintiff against both defendants with costs. At that stage of the proceedings there are the plaintiff's costs and the defendants' costs, and when the defendants come to fight out the issue between each other the things to be apportioned between them are not only the plaintiff's claim and his costs but also, it may be, some apportionment of the defendants' costs. That is always a possibility and that emphasizes the matter to me because I can have no knowledge of and no jurisdiction over the defendants' costs which have already been paid to the plaintiff and which will never come before me in these artificially constituted proceedings.

It seems to me that this action has not followed the ordinary course and it has not followed the proper course; and although I would like to oblige the parties and decide the issue between the two defendants, I do not think that the court ought to be used in this way. The ordinary procedures should be followed. I do not mean to suggest that there has been any abuse of the process of the court. The whole matter has been done in completely good faith; but the plaintiff's action is dead in reality. He has been paid and he is on the record merely as a lay-figure to enable the parties to ask the court to settle the other part of the dispute, where for their own convenience they have not followed methods which would have avoided this difficulty but have used a method which has created a completely artificial situation. In those circumstances I do not propose to try the issue between the two defendants.

No order.

Solicitors: *Norman Chinn, Son & Woolley; William Easton & Sons; Neil Maclean & Co.*

[COURT OF APPEAL.]

* JAMES ARCHDALE & CO. LD. *v.* COMSERVICES LD.

C. A.
Dec. 8. 1953
Somervell, Denning and Romer, L.JJ.

[1952 J. 6447.]

Negligence—Contract—Exceptions clause—Building contract—Redecoration of premises—Damage by fire—Contracting out of liability—General words—Whether including negligence—Clear intention of parties—Effect of provision for insurance.

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James Archdale & Co. Ld. v. Comservices Ld.

Contract—Exceptions clause. Building—Contract—Standard agreement of Royal Institute of British Architects. Insurance—Provision for, in contract—Effect on liability inter partes.

A contract under which the plaintiffs employed the defendants to redecorate their premises, provided by cl. 14 (b) that the defendants should be liable for and should indemnify the plaintiffs against and should insure against any liability, loss or claim in respect of any injury or damage whatsoever to any property, real or personal, in so far as such injury or damage arose out of or in the execution of the works, and provided always that the same was due to any negligence of the defendants, their servants or agents, and "subject also as regards loss or damage by fire to the "provisions contained in cl. 15." Clause 15 (b) provided that the existing structures and the works and unfixed materials (except plant, tools and equipment) should be at the sole risk of the plaintiffs as regards loss or damage by fire and the plaintiffs should maintain a proper policy of insurance against that risk.

During the work of redecoration a fire, which was caused by the negligence of the defendants' servants, broke out on the plaintiffs' premises and damage was caused to the building. The plaintiffs claimed to recover the cost of repairs from the defendants, relying on the principle that general words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his servants:—

Held, that the principle on which the plaintiffs relied had no application when the parties had clearly expressed their intention; it was no more than a rule of construction and had not the status of a rule of law; and that in so far as cl. 14 (b) referred to loss or damage by fire it was clearly the intention of the parties that it should be read subject to cl. 15 (b), under which the risk of fire was placed on the plaintiffs.

Decision of Hilbery J. affirmed.

Appeal from Hilbery J., sitting at Worcester Assizes.

The plaintiffs, James Archdale & Co. Ld., engineers and manufacturers of machinery, had employed the defendants, Comservices Ld., to redecorate their factory and office premises under a contract which was in the form of, and included all the matters contained in the standard agreement of the Royal Institute of British Architects, and schedule of conditions for building contracts, as issued in 1952.

By clause 14 (b) of the contract it was provided: "The "contractor shall be liable for and shall indemnify the employer "against and . . . shall insure against any liability, loss, claim or "proceedings in respect of any injury or damage whatsoever to "any property, real or personal, in so far as such injury or "damage arises out of or in the course of or by reason of the "execution of the works, and provided always that the same is "due to any negligence, omission or default of the contractor, his "servants or agents or of any sub-contractor or to any circum-"stances within the contractor's control; and subject also as "regards loss or damage by fire to the provisions contained in "clause 15 of these conditions."

By clause 15 (b): "The existing structures and the works "and unfixed materials (except plant, tools and equipment) shall

"be at the sole risk of the employer as regards loss or damage "by fire and the employer shall maintain a proper policy of "insurance against that risk, which policy and the receipt for "the last paid premium for its renewal he shall upon request "produce for inspection by the contractor and, if any loss or "damage affecting the works is so occasioned by fire, the "employer shall pay to the contractor the full value of all work "and materials then executed and delivered calculated as pro-"vided by clause 9 of these conditions."

In the course of the redecoration a fire occurred on the plaintiffs' premises, causing damage to the building, machinery and plant, and the plaintiffs claimed against the defendants a sum of £2,858 in respect of the cost of repairs to the building, alleging that the fire was caused by the negligence of the defendants' servants, and that the defendants were liable under clause 14 (b) of the contract. The defendants disputed the claim, contending that fire risk was by clause 14 (b) made subject to clause 15 (b) which placed on the plaintiffs the duty to insure against fire.

Hilbery J. found that the fire was caused by the negligence of the defendants' servants. He held, further, that on the true construction of clauses 14 (b) and 15 (b) the defendants were protected from liability to indemnify the plaintiffs against damage by fire to the buildings.

The plaintiffs appealed.

Ryder Richardson Q.C. and *Paul Layton* for the plaintiffs.
F. W. Beney Q.C. and *E. G. H. Beresford* for the defendants.

SOMERVELL L.J. stated the facts and having read clauses 14 (b) and 15 (b), continued: Mr. Ryder Richardson for the plaintiffs referred us to the cases which have considered exception clauses in relation to the negligence of the party claiming the benefit of the exception. Any clause, of course, has to be considered according to its actual wording, but speaking generally one can summarize the cases, I think, in this way: that general words in an exception clause do not ordinarily except the party seeking to rely on the exception from liability for his own negligence or that of his servants. There is an exception to what I may call that prima facie approach if, on looking more closely into the subject-matter, it is found that substantially the only scope for the operation of the exception clause is the negligence of the servant of the person who is seeking the benefit of it. In that case although the words are general it has been construed as excluding a liability for negligence. The example of this exception to what I call the prima facie approach will be found in *Alderslade* v. *Hendon Laundry Ld.*[1]

I do not myself think that clauses which are concerned with what I call an ordinary exception clause in a contract, where

[1] [1945] K.B. 189; 61 T.L.R. 216; [1945] 1 All E.R. 244.

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there is a primary obligation under the contract, and then the exception clauses with which we are familiar, afford any great assistance in construing these two clauses, but no doubt it is right that one should bear in mind the decisions to which I have referred. I think it is worth noting (and this does relate to the principle applied in *Alderslade* v. *Hendon Laundry Ld.*[1]) that clause 14 (b) in the main operates on the negligence of the contractor or his servants or agents. It is true that it brings in negligence of a sub-contractor or, presumably, his servants or agents, for which, normally, at common law the contractor would not be liable. It also contains the, to me, rather cryptic words "or to any circumstances within the contractor's control." But it is worth bearing in mind that far the most probable scope of its operation would be the negligence of the contractor or his servants or agents.

Another point which I think has some importance is that both 14 (b) and 15 (b) contain obligations in the one case on the contractor and in the other case on the employer to insure, and one can quite well understand the importance of such a provision. Indeed, if one looks at 14 (b) it was unnecessary to set out that the contractor should be liable for the negligence of his own servants or agents, and so far as that part of the subject-matter is concerned the operating words are the obligation to insure. Having those two points in mind I am quite clearly of opinion that the judge was right and that the natural construction of these two clauses, read together, is that in so far as loss or damage by fire comes within the earlier wrods of 14 (b), that is to be taken out of 14 (b) and taken out altogether. It is then dealt with under 15 (b), under which, of course, the sole risk is on the employer, who has to insure.

These questions do not bear of much elaboration, but I think that the phrase which was referred to in argument, namely, "the employer shall maintain a proper policy of insurance "against that risk," tends, apart from what I may call the general layout of the two clauses, to reinforce the conclusion to which I have come. For these reasons I think that the judge came to a right conclusion, and I would dismiss the appeal.

Denning L.J. This is not the ordinary case of a clause simply providing who is to bear the loss. The clauses in this case are directed to the additional question: who is to insure? The contractor is to insure against the risk of injury to persons. He is also to insure against the risk of injury to property, save for this: the clause expressly states that loss or damage by fire is in a category by itself. The employer is to insure against the risk of fire. When viewed in relation to insurance it is quite plain that the risk of fire is on the employer however caused (even though it is caused by the negligence of the contractors'

[1] [1945] K.B. 189.

servants) and he is the person who must insure against it. I agree, therefore, with my Lord that the appeal should be dismissed.

ROMER L.J. I also agree. The principle which was established or recognized by the cases to which Mr. Ryder Richardson referred us can and ought to be invoked wherever the parties to a contract leave their intention in doubt. But when the parties have clearly expressed what their intention is there is no necessity to refer to the principle. The principle is one of construction and no more, and it is not entitled to the status of a rule of law.

Construing clauses 14 (b) and 15 (b) of this contract by themselves I have little doubt but that they bear the meaning which my Lord has attributed to them, for the reasons which he has given. If so, it would be quite wrong to attribute a different meaning simply because of a principle of construction which has been evolved for the solution of cases of a similar type, but where the parties have not expressed themselves sufficiently clearly.

With regard to the suggestion that the employers are personally liable to pay the contractors for damage by fire caused to the work by the negligence of the contractors themselves, I think that the clause in that respect has been clumsily worded; but the intention of the parties, I think, is reasonably clear, and the draftsman's mind was directed to the receipt of the policy moneys under the insurance policy which is contemplated by the sub-clause and the payment was to be made only out of those moneys. I do not think, really, that that element throws very much light on the problem which we have to solve. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Gardiner & Co.; E. P. Rugg & Co. for Buller, Jeffries & Kenshole, Birmingham.*

A. W. G.

[CHELMSFORD ASSIZES.]

* REGINA *v.* RIDER.

1953
Nov. 18.
Streatfeild J.

Criminal Law—Carnal knowledge—Defence—Reasonable belief that girl over 16 — "*First occasion on which he is charged*" — *Committal on separate occasions in relation to different girls—Trial on one indictment—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69, *s.* 5 (1)—*Criminal Law Amendment Act,* 1922 (12 *&* 13 *Geo.* 5, *c.* 56), *s.* 2, *proviso.*
"*Occasion*"—"*Charged.*"

[Reported by NIUL HOGG, Esq., Barrister-at-Law.]

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Regina
v.
Rider.

The accused, who was at all material times under the age of 23 years, was alleged to have had unlawful carnal knowledge of two girls, each of whom was under the age of 16 years, contrary to section 5 of the Criminal Law Amendment Act, 1885.[1] He was committed for trial by the justices, separately in respect of each girl, but was tried on one indictment in respect of both: the indictment containing two counts, each alleging an offence against one girl. For the purposes of the proviso to section 2 of the Criminal Law Amendment Act, 1922[2]:—

Held, (1) that the accused was first "charged" when he was brought before a court having jurisdiction to determine the matter in question; i.e., in the circumstances, when he was brought before the assizes.

(2) That, although an indictment might contain several counts alleging offences arising out of different sets of circumstances, yet the trial on that indictment was one and the same "occasion" in respect of all of them; and that, therefore, the accused was entitled to claim that that trial was the first occasion on which he had been charged with such offence within the meaning of the Criminal Law Amendment Act, 1922, s. 2, proviso.

Regina v. *Rogers* [1953] 1 Q.B. 311; [1953] 2 W.L.R. 52; [1953] 1 All E.R. 206 applied.

Trial on indictment.

The facts appear in the judgment.

E. C. S. Russell for the accused.

F. H. Lawton for the Crown.

Case cited in argument: *Regina* v. *Rogers*.[3]

Streatfeild J. I have to rule upon this matter of law, which I do not think has arisen before, and is probably unlikely to arise again. I have to construe section 2 of the Criminal Law Amendment Act, 1922, which amended section 5 of the Act of 1885. Section 2 of the Act of 1922 provides that reasonable cause to believe that a girl was of or above the age of 16 shall not be a defence to a charge under section 5 of the Act of 1885, provided, however, that in the case of a man of 23 years of age or under the presence of reasonable cause to believe that the girl was over the age of 16 years it shall be a valid defence on the

[1] Criminal Law Amendment Act, 1885, s. 5: "Any person who:—(1) "Unlawfully and carnally knows . . . "any girl being of or above the age "of 13 years and under the age of 16 "years . . . shall be guilty of a "misdemeanour. . . . Provided that "it shall be a sufficient defence to "any charge under subsection (1) of "this section if it shall be made to "appear to the court or jury before "whom the charge shall be brought "that the person so charged had "reasonable cause to believe that the "girl was of or above the age of 16 "years."

[2] Criminal Law Amendment Act, 1922, s. 2: "Reasonable cause to "believe that a girl was of or above "the age of 16 years shall not be a "defence to a charge under sections 5 "or 6 of the Criminal Law Amend-"ment Act, 1885 . . . Provided that "in the case of a man of 23 years "of age or under the presence of "reasonable cause to believe that the "girl was over the age of 16 years "shall be a valid defence on the first "occasion on which he is charged "with an offence under this section."

[3] [1953] 1 Q.B. 311; [1953] 2 W.L.R. 52; [1953] 1 All E.R. 206.

first occasion on which he is charged with an offence under this section.

The circumstances of the present case are somewhat unusual. The accused, who, at the material time, was under the age of 23, is charged under section 5 of the Act of 1885 in respect of two girls under the age of 16. He was committed for trial by the justices in respect of one of the girls and was then brought before the justices on a later occasion and committed in respect of the second girl. The case now comes before me on both charges, joined in one indictment. The accused claims that he is entitled to set up the statutory defence in respect, not only of the first girl, but of both girls, on the ground that, today, in this court is the first occasion on which he has been charged with an offence under this section.

Although it is unlikely that this situation was contemplated by the draftsmen of the Act of 1922, nevertheless I have to construe the words which are used, and rule on what is meant by a "charge" in section 2, that is to say, when is a charge made. It is agreed by counsel that, within the meaning of the section, a charge is not that which is stated by a police officer verbally to a man when he is charging him with an offence. The question is whether a man is "charged" before the justices, or whether he is only charged effectively when he appears before a jury on an indictment. I have come to the conclusion that the word "charge" in section 2 refers to a charge before a court which has jurisdiction to determine the matter in question. That may well be the justices, if they refuse to commit a man for trial. They hear the evidence as examining justices, they then determine the question whether there is a prima facie case for committal for trial, and if they find that there is not, that clearly would be a charge before a court having jurisdiction to determine it.

But if the justices, in fact, commit a man for trial they are not adjudicating on the case. The only thing that they have then determined is whether there is a prima facie case to answer, and if there is such a case they commit him. The accused is then brought before the assize court on indictment, and then, for the first time, he is before a court having jurisdiction to determine the matter.

The next question is this: Having decided that the "charge" within the meaning of this section is the charge on indictment before assizes, I have to decide what is meant by an "occasion" and whether it is one occasion or two occasions if a man appears on an indictment on two counts. Force is lent to the argument that in such circumstances it is two occasions when one bears in mind that there have been separate committals for trial, although by the same justices, but on separate occasions. But in this connection I must have regard to *Regina* v. *Rogers*,[1] in which

[1] [1953] 1 Q.B. 311.

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the word "occasions" in sections 21 and 22 of the Criminal Justice Act, 1948, had to be construed.

It is true—as Mr. Lawton has submitted—that one must not necessarily come to the conclusion that a word in one Act bears precisely the same meaning as it does in another Act, but in sections 21 and 22 of the Act of 1948, there occur three times the word, "occasions," in connexion with previous convictions. The Court of Criminal Appeal held in *Rogers'* case [2] that where a man appears on one indictment and is convicted of two offences charged in separate counts of that indictment, the resulting conviction is only one occasion of a conviction. In those circumstances it seems to me to be difficult to put a different interpretation on the word "occasion" in the Act of 1922, holding, as I do, that the charge is made on the indictment.

I admit that the matter is not beyond doubt, but there is another principle that one ought to apply, namely, that section 2 with its proviso exists for the purpose of the liberty of the subject, and if there is any doubt in its construction I think that one ought to lean more in favour of the subject than against the subject. In those circumstances I have come to the conclusion, following, as I do, the principle of *Regina* v. *Rogers*,[2] that the occasion which is applicable is the occasion of his appearance before this court on two counts of one indictment, and it follows, therefore, that the accused is entitled to set up this defence in respect of both counts of the indictment.

Verdict: Not Guilty on both counts.

Solicitors: *G. Houghton & Son, Romford; A. Morgan, Chelmsford.*

[2] [1953] 1 Q.B. 311.

[CHANCERY DIVISION.]

1954 *Feb.* 9.

Roxburgh J.

* FRIEDMANN *v.* AUSTAY (LONDON) LD.

[1953 F. No. 1955.]

Legal Aid—Costs—Security for costs—Plaintiff out of jurisdiction—Security for defendant's costs—Action for account—R.S.C. Ord. 65, *r.* 6A—*Legal Aid and Advice Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 51), *s.* 1 (7) (*b*).

Account—Action for—Preliminary point—Agent—Letter inter partes possible basis of account—Writ indorsed in different terms—R.S.C. Ord. 15, *r.* 1.

In an action by a foreign plaintiff resident abroad, who has obtained legal aid, it is not practicable, from a business point of view, to apply a means test to him before deciding whether or not he should give security for costs. Nor would it be just to accept the certificate of the National Assistance Board in every case as

sufficient evidence of means. In connexion with the quantum, the fact that he has obtained legal aid is relevant; and, in dealing with such a case, care must be taken not to exact a sum by way of security which might have penal consequences; but a legally aided foreign plaintiff resident abroad must not be allowed, by the operation of the Legal Aid and Advice Act, 1949, to obtain an advantage over a British resident not legally aided.

Observations of Somervell L.J. in *Jackson* v. *J. Dickinson & Co. (Bolton) Ld.* [1952] W.N. 9; [1952] 1 All E.R. 104 considered and applied.

PROCEDURE SUMMONS.

An action was commenced by Emil Friedmann, a German national, resident in Hamburg, against Austay (London) Ld., in which he claimed an account "of all goods bought and of all goods "sold by the defendant company as the result of introductions "made by the plaintiff and of the amount of commission due to "the plaintiff in respect thereof." He also claimed payment of the amount found due with interest and, in the alternative, damages for breach of contract.

The plaintiff made an interlocutory application to the master, by summons, in which he sought an order pursuant to R.S.C., Ord. 15, r. 1, that an account (in the terms above set out) might be taken "and that all necessary inquiries and directions be taken "and made and that provision be made for the costs of this "application."

This procedure summons was then taken out by the defendant company in which they applied "for an order that the plaintiff "give security for the defendants' costs in this action to the satis-"faction of the master on the ground that the plaintiff resides at "75 Brennerstrasse, Hamburg I, Germany, out of the jurisdic-"tion of the court, and that in the meantime all further proceed-"ings be stayed, and that the costs of this application be the "defendant's in any event."

Neil Lawson for the applicant company.
Immanuel Goldsmith for the respondent plaintiff.

Cases referred to in argument: *Jackson* v. *J. Dickinson & Co. (Bolton) Ld.*[1]; *Evans* v. *Evans.*[2]

ROXBURGH J. [after stating the nature of the plaintiff's claim in the action and the prayers in the summonses set out above, his Lordship continued:] The plaintiff—who, as I have said, is a German national resident in Germany—has obtained a legal aid certificate to take the proceedings which I have mentioned. The National Assistance Board have determined that his disposable income for the purposes of the legal aid certificate—I shall have to consider the relevance of this later—is under £156, that his disposable capital is nil and that his maximum contribution is nil.

[1] [1952] W.N. 9; [1952] 1 All E.R. 104.

[2] [1953] P. 41; [1953] 1 W.L.R. 127; [1953] 1 All E.R. 70.

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Friedmann v. Austay (London) Ld.

Roxburgh J.

Exactly how the National Assistance Board make determinations of the disposable income and disposable capital of foreigners resident abroad, I do not know. I am not questioning that what they have done is adequate for the purpose of the certificate, but I am wondering how far it is adequate for any other purpose.

The case has had a curious history. There is a written agreement under which the plaintiff is entitled to commission from the defendants, the terms of which are indeed by no means simple. A letter from the defendants to the plaintiff dated September 20, 1950, contains the following words: "For all deals "or transactions negotiated and successfully concluded through "your co-operation in finding buyers for goods offered through our "company"—that is the defendants—"we are prepared to give "you a share in the net profits of 50 per cent. after deduction "of necessary expenses during negotiations and/or any charges "for sub-commissions, etc., that might be payable to agents on "both sides. Statements of accounts of transactions will be open "for your inspection after each transaction." The case has had a rather curious history, because not only was this contract unstamped (that, perhaps, is not curious) but it seems that nobody has really paid very much attention to the letter hitherto. That the letter is somewhat difficult to translate into an account is, I think, undeniable; and all sorts of difficulties would arise in taking an account on the footing of that letter; but at the present moment I am not prepared to say that I think that it is so obscure as to be incapable of interpretation.

Ord. 15, r. 1, under which the first application is made, reads as follows: "Where a writ of summons has been indorsed for an "account" [if the defendant . . .] "does not after appearance, "by affidavit or otherwise, satisfy the court or a judge that there "is some preliminary question to be tried, an order for proper "accounts, with all necessary inquiries and directions now usual "in the Chancery Division in similar cases, shall be forthwith "made."

[His Lordship, considering the application, said that counsel for the plaintiff had withdrawn an admission that the plaintiff would be content with an account in the form indicated in the letter; and that it would be noticed that the form asked for in the writ did not coincide with the form set out in the letter. His Lordship continued:] It seems to me, at once, that there was a preliminary point to be tried, the preliminary point being: on what footing ought the account to be taken? This is a written contract of agency. Everybody knows that it is possible in certain circumstances to vary a written contract by calling the transaction collateral, while in other circumstances that procedure is not to be tolerated. Indeed, the demarcation between those two points of law is by no means so clear that anyone could say that this is not a preliminary point. Therefore, it did seem to me, and does seem to me that, the moment that counsel for the plaintiff says that he is not prepared to have an account on the footing

of the letter, but wishes to have it on the footing of the writ, a preliminary point arises. Therefore, in my judgment, I ought not to make an order for an account at this stage. Indeed, it would be a pure waste of time and money because, if the plaintiff succeeds in his action to the full extent, the account would have to be taken again, twice in all; and that seems to me to be a most foolish procedure, and I do not propose to order an account at the present time for the reasons which I have given.

I come now to the other summons, the summons for security for costs. I think that I can fairly say that, if the plaintiff had not been legally aided, I should have had no hesitation in ordering security for costs. The plaintiff is a foreign national resident out of the jurisdiction, and there is no evidence that he has any assets in this country apart from what he may recover if he is fortunate in this action. I may add that, if the Court of Appeal had not already decided the major part of the question before me, I should have been equally doubtful as to what I ought to do with regard to a legally aided plaintiff, even though he is a foreigner resident out of the jurisdiction; but I have fortunately authoritative guidance on this matter from the Court of Appeal in *Jackson* v. *J. Dickinson & Co. (Bolton) Ld.*[1] In that case the plaintiff, who was ordinarily resident abroad, claimed as an assisted person damages for personal injuries, and the defendants applied for an order for security for costs. "*Held*: the plaintiff being resident out of the "jurisdiction, the fact that he was an assisted person did not "disentitle the defendants to an order for security." Of course, that case binds me (and I am indeed happy to be bound by it) and, therefore, it follows that the defendants are not disentitled to an order for security; but that case does not lay down, of course, that they are always entitled to it. I still have to consider what bearing, if any, the fact that the plaintiff is a legally assisted person has on the problem. I have no doubt it has some bearing, though I am not prepared to do what the Court of Appeal has not done and to say precisely what bearing it has.

In that case Somervell L.J. delivered the judgment, in which Jenkins L.J. concurred. What I am about to read was not the ratio decidendi or the whole case—I think that is quite clear—but, in passing, Somervell L.J. did say[3]: "The fact that he is an "assisted person may well be relied on as some indication that "a full order for costs will probably not be made against him, "but we have had the advantage of having read to us the certifi-"cate under which he became an assisted person, and, having "regard to the figures therein, it is plain that it may well be that "some order for costs may be made against him should he lose "the action."

Naturally enough, counsel for the plaintiff, laying very proper hold on those words, says that, as the plaintiff's contribution is to be nil, there is no justification for ordering security. First of all,

[1] [1952] 1 All E.R. 104; [1952] W.N. 9.

[3] [1952] 1 All E.R. 104, 106.

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Friedmann v. Austay (London) Ld.

Roxburgh J.

I do not think that it can be said that Somervell L.J. meant quite that, though undoubtedly the passage does raise difficulties. In the second place, I do not think that it is what the Lord Justice made the basis of his judgment. In the third place, it appears to me to raise procedural difficulties of great complication. It is perfectly true that the National Assistance Board figures are always looked at, when the question of ordering a legally aided person to pay costs is under consideration, and it is perfectly true that they are properly to be looked at; but nobody has ever suggested that they are conclusive even for that purpose. Indeed, it is quite plain that they are not conclusive for that purpose; though it is true that, as a matter of practical application, it is often difficult or impossible to get away from those figures. That is the position when one is dealing with somebody resident in this country. How the National Assistance Board carry out the means test with regard to a foreigner resident abroad, I have no idea. I should think that it was an extremely difficult problem. I am by no means satisfied, notwithstanding the certificate, that the plaintiff is without assets, or is a person who could not properly be ordered to pay some costs if he failed in the action, even though he has obtained a certificate which says that his income is under £156 a year and that he has no disposable capital.

In order to raise this procedural difficulty, I invited counsel for the plaintiff to put in an affidavit as to his means, warning him that, of course, his client might have to attend in this country to be cross-examined as to his means before the question of security for costs could be determined. I did that in order to indicate the procedural difficulties which would result if counsel's submissions were accepted; and counsel—and, if I may say so, quite obviously for a good reason—said that he did not want to do so, and there that matter ends. I am only mentioning it to show that I do not think it is feasible to apply a means test to a foreign plaintiff resident abroad before deciding whether or not he should give security for costs. Theoretically it is quite practicable, but I do not think it is practicable from a business point of view. Nor do I think that it would be just to persons resident in this country, if in every case a certificate of the National Assistance Board should be accepted as sufficient evidence of the means of a foreigner resident outside the jurisdiction. Therefore, and notwithstanding the able way in which counsel for the plaintiff put the case, I think that this is a case in which I ought to order some security for costs. Then comes the question of how much, for I have no intention of sending it back to the master on that point.

That is a difficult question. I think, in connexion with the quantum, that the fact that the plaintiff has obtained legal aid is relevant. Somervell L.J. appears to have said so, and I am of the same opinion. I think that one must be careful in dealing with such a case as this, not to exact a sum by way of security which might have penal consequences, although they were not intended; but, of course, one must hold the balance even. One must not

allow the legally aided foreign plaintiff resident abroad to obtain an advantage over the British resident not legally aided by the operation of the Legal Aid and Advice Act; and, therefore, it must come down to a rather nice balance of consideration.

There is another point which is perhaps special to this case, though it may arise in some other cases. If this plaintiff had been content to rely on the written contract of agency, and to ask only for relief founded on that written contract, he would appear to me to have so strong a case prima facie—I am not of course, deciding the merits—that I should be inclined to put the figure as low as I could possibly put it, in order that he should not, perhaps, be penalized; but he has chosen to open his mouth, as I think, very wide. He may succeed. I am not saying that he will not, but everybody knows that it is not easy to vary the terms of a written contract and thereby obtain something more than the written contract purports to give. This legally aided and foreign plaintiff, resident abroad, has elected, when he could have had now, without trial, an account on the footing of the written instrument, to put his case as high as it possibly could be placed. I think that that should incline me to make the figure rather larger than I should otherwise have done; because I feel that he may well win what I originally offered to him and yet find that, on balance, he has more to pay than to gain; because, if he goes to trial on this issue of what the form of the account ought to be and fails, the costs of that issue may well swamp anything that might come to him under the account which he would not accept. I do not know whether that will be so or not, but it is a possibility.

Taking everything into consideration, I think that £40 is the proper security to order, and I have endeavoured to give my reasons, because I think this question is one of some general public importance. The action will be stayed until security in the sum of £40 is given. The costs of the two summonses will, by agreement, be costs in the action.

Solicitors: *Kenneth Brown, Baker, Baker; Cardew-Smith & Ross.*

J. L. D.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* BIRKENHEAD BOROUGH JUSTICES. *Ex parte* SMITH.

1954
Feb. 9.

Lord Goddard C.J., Cassels and Slade JJ.

Justices—Committal warrant—Affiliation order—Order made against American soldier—Arrears of payments—American forces' immunity from arrest—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *ss.* 64 (1) *and* 74—*Army Act,* 1881 (44 *&* 45 *Vict. c.* 58, *as re-enacted*), *s.* 145—*United States of America* (*Visiting Forces*) *Order,* 1942 (*S.R. & O.* 1942, (*No.* 966) *I, p.* 844).
Military Law—Immunity from arrest. Bastardy.

[Reported by MISS ELAINE JONES, Barrister-at-Law.]

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The United States of America (Visiting Forces) Order, 1942, extends to American soldiers serving in this country the same privileges or immunities as were conferred by the Army Act on British soldiers; and therefore justices have no power to issue a warrant for the arrest of an American soldier for non-payment of money due under an affiliation order.

Application for an order of mandamus.

On April 17, 1953, the applicant obtained an affiliation order against Robert L. Warren, a soldier serving in the American forces in England. Payments under the order were made but they eventually became in arrear and the applicant applied to the justices at Birkenhead under sections 64 (1) and 74 of the Magistrates' Courts Act, 1952,[1] for the issue of a warrant to bring

[1] Magistrates' Courts Act, 1952, s. 64 (1): "Subject to the following "provisions of this Part of this Act, "and to section one hundred and "seven of this Act, where default is "made in paying a sum adjudged to "be paid by a conviction or order of "a magistrates' court, the court may "issue a warrant of distress for the "purpose of levying the sum or issue "a warrant committing the defaulter "to prison."

S. 74 (1): "Where default is "made in paying a sum ordered to "be paid by an affiliation order or "order enforceable as an affiliation "order, the court shall not enforce "payment of the sum under section "sixty-four of this Act except by an "order made on complaint.

"(3) A magistrates' court shall "not hear a complaint under this section except in the presence of the "defendant; and for the purpose of "securing his presence a justice of "the peace acting for the petty sessions area for which the court acts "may, if the complaint is substantiated on oath, issue a warrant to "arrest the defendant and bring him "before the court, whether or not a "summons has been previously "issued."

Army Act, 1881, s. 145 (1): "A "soldier of the regular forces shall be "liable to contribute to the maintenance of his wife and of his children, "and also to the maintenance of any "illegitimate child of which he may "be proved to be the father, to the "same extent as if he were not a "member of the regular forces; but "execution in respect of any such "liability or of any order or decree in "respect of such maintenance shall "not issue against his person, pay, "arms, ammunition, equipments, "instruments, regimental necessaries, "or clothing; nor shall he be liable "to be punished for the offence of "deserting or neglecting to maintain "his wife or family, or any member "thereof, or of leaving her or them "chargeable to any area or place.

"(2) When any order or decree is "made under any Act . . . or at "common law for payment by a "man who is or subsequently becomes a soldier of the regular forces "either of the cost of the maintenance of his wife or child, or of any "illegitimate child of whom he is the "putative father, . . . a copy of such "order or decree shall be sent to the "Army Council, or any officer deputed "by them for the purpose, and in the "case—(*a*) Of such order or decree "being so sent; or (*b*) Of it appearing to the satisfaction of the Army "Council or any officer deputed by "them for the purpose that a soldier "of the regular forces has deserted "or left in destitute circumstances, "without reasonable cause, his wife "or any of his legitimate children "under sixteen years of age, the "Army Council or officer shall order "to be deducted from the pay of the "soldier and to be appropriated in "liquidation of the sum adjudged to "be paid by such order or decree "(including any sum paid on account "thereof in accordance with the provisions of subsection (3) of this "section), or towards the maintenance of the wife or children of the "soldier, as the case may be, in manner directed by the order, such portion of the soldier's pay as the "Army Council or officer in their or "his discretion from time to time "think or thinks fit. . . ."

United States of America (Visiting Forces) Order, 1942, Sch. 2: "(3) "Subject as hereinafter provided, any "enactment (whether contained in

the American soldier before the court that he might be committed for non-payment.

The proceedings took place on the footing that the defendant was still a soldier serving in the American Forces. The justices, expressing doubts as to their jurisdiction in the circumstances, refused to issue a warrant.

The applicant applied for an order of mandamus.

C. J. I. Cunningham for the applicant.

Sir Lionel Heald A.-G., Q.C., and *J. P. Ashworth* as amici curiae.

No cases were cited in argument.

LORD GODDARD C.J. referred to sections 64 (1) and 74 of the Magistrates' Courts Act, 1952, and continued: The justices who heard this case were faced with a point which was novel to them because, although they no doubt knew that American soldiers could not be brought before English criminal courts, that is to say petty sessional courts sitting in a criminal capacity, they felt some difficulty about the extent of their powers in a quasi civil matter, for a bastardy order is a civil matter although it may be enforced by imprisonment.

Accordingly we have to consider whether this is a case in which we should issue a mandamus. When the court is asked to issue an order of mandamus there is often more than one consideration: one is whether the court is entitled to issue mandamus; and another, subject to some limitations, is whether the court in the exercise of its discretion will issue a mandamus.

First of all let us see what is the position in law. In 1942 the Visiting Forces Act, 1933, was applied by the United States of America (Visiting Forces) Order, 1942, to American forces then about to visit the country. The Order was made on May 22, 1942, and it will be remembered and must be a matter of common knowledge of which we should take judicial notice that the declaration of war against Japan, which led to the Americans entering the war, took place in December, 1941; and their forces began to arrive in this country in working parties to get ready for the larger numbers due to arrive in 1942. So his late Majesty was pleased to apply the provisions, or some of the provisions, of

"the Naval Discipline Act, the Army "Act, the Air Force Act or any other "statute) which— . . . (*b*) in virtue "of a connexion with the home forces "or any of them, confers a privilege "or immunity on any person; or (*c*) "in virtue of such a connexion, "excepts any property, trade or "business, in whole or in part, from "the operation of any enactment, or "from any tax, rate, imposition, toll "or charge; or (*d*) imposes upon any "person or undertaking obligations in "relation to the home forces, or any "of them, or any member or service "court thereof; or (*e*) penalises mis-"conduct by any person in relation "to the home forces or any of them, "or any member or service court "thereof, shall, with any necessary "modifications, apply in relation to "an American force as it would apply "in relation to a home force of a "like nature to the American force."

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the Army Act to the American Forces, and he extended the Visiting Forces Act, 1933, to the United States of America.

[His Lordship read Schedule II, paragraph (3) (*b*) (*c*) (*d*) and (*e*) of the United States of America (Visiting Forces) Order, 1942, section 145 (1) of the Army Act and continued:] As I understand that, it seems to be perfectly clear that paragraph (3) (*b*) of the Order was intended to confer on American soldiers the same privileges or immunities as were conferred by the Army Act on British soldiers. The Army Act provides that the person or the pay of a British soldier cannot be taken in execution for the purpose of enforcing a bastardy order. Paragraph (3) of the Order in Council clearly extends that immunity to American soldiers. It would, therefore, seem to follow that if a court in this country is asked to make an order which can only result in commitment against an American soldier, the court would be right in refusing to do so because such an order would be contrary to the provisions of the Army Act, which has been extended to American soldiers.

Mr. Cunningham, who has argued this case with great ability and has put before the court everything that can be said on behalf of his client—and of course we have every sympathy with women who have obtained orders which cannot be enforced—has called our attention to various other matters and, in particular, to the following words of paragraph (*d*) in the Order in Council, "imposes "upon any person . . . obligations in relation to the home forces, "or any of them, or any member or service court thereof," and suggests that that, read together with section 145 (2) of the Army Act, imposes a duty upon the American Army authorities to deduct from the pay of the soldier some amount towards the payment of this bastardy order. [His Lordship read section 145 (2) and continued:] Any opinion we were to give upon that proposition would be obiter because what we are asked for is the issue of a warrant against the man; but I should be very sorry to think that we should have to construe this legislation to mean that his late Majesty in Council was purporting to impose a duty upon the American Command to make deductions from their soldiers' pay. That must be a matter for the American Government to consider if they choose to do so. Apparently the American army authorities did at one time make such deductions but now, as the Attorney-General has told us, this procedure has been changed. That is entirely a matter for the authorities concerned. We cannot construe this Order as providing that there is an obligation upon the American Army authorities to make deductions from service pay and if there were, the present procedure would not be the proper means of enforcing it. I do not think that Mr. Cunningham was suggesting that, but rather that, as such deductions were not being made from service pay,

therefore, the remedy in the courts of law must be open to the applicant. I am afraid I cannot agree to that. There is an absolute prohibition from taking a man in execution so long as he is a member of the American Forces.

The justices at Birkenhead were, therefore, justified, on being told that this man was an American soldier and that the application was being made to them on the footing that he was an American soldier, in refusing to issue their warrant, and this court will not order them to do otherwise.

If, on the other hand, it was put that the justices at Birkenhead ought to have taken the view that the defendant was a civilian, the affidavits which have been filed in this court exhibit letters from the American Army authorities stating that he has gone abroad. Nobody has contradicted that, and although the letters relied on may not be strictly evidence there seems to be no doubt, if we look at the realities of the situation, that the man has gone abroad. I cannot, therefore, see what use it would be at the present time for the applicant to have an order, because if the justices did issue their warrant there would be no means of serving the defendant in America and no means of issuing execution upon him in America. He is not extraditable from America. Should he return to this country as a civilian the applicant would then be able to take proceedings against him. It is some satisfaction to hear from the Attorney-General that this matter is engaging the attention of Her Majesty's Government and it may be when the Visiting Forces Act, 1952, comes into operation some reciprocal arrangement will be made under which these bastardy orders may be enforced against either American soldiers or those who have been American soldiers. We cannot speculate on that.

In this case I am satisfied that the justices were right in refusing the order and, therefore, this application fails and must be dismissed.

CASSELS J. I agree.

SLADE J. I agree.

Application refused.
Order for mandamus refused.

Solicitors: *Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; The Treasury Solicitor.*

[CHANCERY DIVISION.]

1954
Feb. 10.

Danckwerts J.

* WOODWARD *v.* EARL OF DUDLEY.

[1953 W. No. 4153.]

Agriculture—Agricultural holding—Notice to quit—Validity—Reference to part only of land — Joint tenancy — Tenant dying within three months—"Tenant" including tenants—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *s.* 24 (1) (2) (*g*)—*Interpretation Act,* 1889 (52 *&* 53 *Vict., c.* 63), *s.* 1.

The provision in subsection 1 of section 24 of the Agricultural Holdings Act, 1948, that a notice to quit an agricultural holding requires the consent of the Minister is subject to the exception, inter alia, in subsection 2 (*g*) where "the tenant with whom the contract "of tenancy was made had died within three months before the "date of the giving of the notice to quit, and it is stated in the "notice that it is given" for that reason.

Landlord and Tenant. Statute — Construction — Singular including plural. Joint ownership.

An agricultural holding was let to the plaintiff's father and grandfather as joint tenants by a memorandum of agreement dated September 24, 1928. The father died on May 13, 1948, and the grandfather died on September 17, 1952. The plaintiff was the sole executor of the grandfather's will. On February 5, 1953, the landlord served a notice to quit on the plaintiff, which, on the face of it, referred to only part of the property comprised in the agreement of 1928.

The notice concluded: "The reason for giving this notice to quit "is as follows: The said E. C. W. [the father] died some years "ago and the said C. W. [the grandfather] died on September "17, 1952."

The plaintiff contended that the notice was invalid because: (1) it referred to part only of the property comprised in the tenancy, and (2) the word "tenant" in section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, included the plural, and as both the tenants had not died within three months of the notice being given, it was ineffective:—

Held, that the plaintiff succeeded on both contentions so that the notice was ineffective.

In re Bebington's Tenancy [1921] 1 Ch. 559; 37 T.L.R. 409 followed.

ADJOURNED SUMMONS.

By a memorandum of agreement, dated September 24, 1928, and made between Edward Henry Loyd, the predecessor in title of the defendant as landlord, and Charles Woodward and Ernest Charles Woodward, who were respectively the grandfather and father of the plaintiff as tenants, the landlord agreed to let and the tenants agreed to take the property described as "the "messuage buildings and enclosures of land known as Jeffries "Farm situate in the Parishes of Abbots Langley and Kings "Langley in the County of Hertford containing eighty-seven acres "two roods thirteen perches (little more or less) more particularly "described in the First Schedule hereto and the enclosures of

"land formerly part of the farm known as Langley Lodge Farm "situate in the said Parish of Kings Langley containing forty-five "acres (little more or less) more particularly described in the "Second Schedule hereto," subject to certain exceptions not here material.

The first schedule referred to Jeffries Farm, Kings Langley, and contained a statement of the various fields which aggregated 87 acres, 2 roods, 13 perches. The second schedule contained a reference to two fields "or part of Langley Lodge Farm" aggregating 45 acres. In the aggregate, the tenancy was created in regard to 132 acres, 2 roods and 13 perches of land; it was a tenancy for a year and then from year to year.

The plaintiff's father died on May 13, 1948, and his grandfather died on September 17, 1952. The plaintiff obtained probate of his grandfather's will, of which he was the sole executor, on May 9, 1953. On the terms of the memorandum of agreement the father and the grandfather were joint tenants of the farm.

On February 5, 1953, before the grant of probate, a notice to quit was served by the solicitors for the defendant, the present landlord. It was headed "Notice to Quit," and was in these terms: "As solicitors for . . . your landlord we hereby give you "notice to quit and deliver up to your landlord on September 29, "1954, or at the expiration of twelve months from the end of "the now current year of your tenancy possession of the "messuage buildings and enclosures of land known as Jeffries "Farm situate in the parishes of Abbots Langley and Kings "Langley in the County of Hertford containing 87 acres 2 roods "13 perches or thereabouts and more particularly described in "the agreement dated September 24, 1928, made between "Edward Henry Loyd of the one part and Charles Woodward "and Ernest Charles Woodward of the other part and which "said premises are held from year to year. The reason for "giving this notice to quit is as follows: The said Ernest Charles "Woodward died some years ago and the said Charles Woodward "died on September 17, 1952." The notice to quit was dated February 5, 1953, signed by the solicitors and directed to "the "personal representatives of Charles Woodward deceased (the "surviving tenant under the above-mentioned agreement), the "occupiers of Jeffries Farm, the President of the Probate, Divorce "and Admiralty Division, High Court of Justice, and to all others "whom it may concern."

It appeared from the defendant's evidence that the managing clerk in charge of the matter in the solicitors' office intended to serve a notice to quit relating to the whole of the land comprized in the agreement of September 24, 1928. He drafted a notice and then gave it to a typist and directed her to copy the parcels from the agreement in question into the notice. She failed to copy the whole of the parcels on the first page of the body of the agreement, and ignored the schedule showing that there were another 45 acres included in the agreement as well

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as the 87 acres, 2 roods, 13 perches referred to in the notice itself.

As the notice to quit was not compared and checked with the agreement, the managing clerk did not discover the error until the notice had been sent to the tenant.

The plaintiff served a counter-notice on February 12, 1953.

The tenant by this summons asked for a declaration that the notice to quit was invalid on the ground: (1) that it referred to part only of the land comprized in the tenancy, and (2) that it failed to comply with section 24 of the Agricultural Holdings Act, 1948.*

A. C. Goodall for the plaintiff.
H. F. J. Teague for the defendant.

Cases cited in argument are set out in the judgment.

Danckwerts J., having stated the facts, continued: The notice on its face plainly does not refer to the whole of the land comprized in the agreement of September 24, 1928. In fact, if it were desired to give notice for the part of the land relating only to Jeffries Farm, it is difficult to think of a more effective way of calling attention to the fact that the notice related only to that part of the land.

The first ground given by the plaintiff, the tenant and present occupier, for alleging that the notice is bad is that, as the notice refers only to part of the land included in the tenancy, the notice to quit is bad on well-established principles. It is plain from *In re Bebington's Tenancy*,[1] and other cases, that a notice to quit which refers only to part of the land included in the tenancy is invalid and ineffective.

But Mr. Teague, for the landlord, has argued on the authority of *Doe d. Rodd* v. *Archer*,[2] that, as it is obvious that the landlord could not have been expected to want to give a bad notice, the notice must be construed in such a way as to give it an effect in law, and it must, therefore, be treated as a notice referring to the whole of the land included in the agreement of tenancy. It is further contended that Jeffries Farm has for long been used as a method of describing not only the land originally known as Jeffries Farm but that part of the farm formerly called Langley

* The Agricultural Holdings Act, 1948, s. 24: "(1) Where notice to "quit an agricultural holding or part "of an agricultural holding is given "to the tenant thereof, and not later "than one month from the giving of "the notice to quit the tenant serves "on the landlord a counter-notice in "writing requiring that this subsec-"tion shall apply to the notice to quit, "then, subject to the provisions of the "next following subsection, the notice "to quit shall not have effect unless "the Minister consents to the opera-"tion thereof. (2) The foregoing "subsection shall not apply where ". . . (*g*) the tenant with whom the "contract of tenancy was made had "died within three months before the "date of the giving of the notice to "quit, and it is stated in the notice "that it is given by reason of the "matter aforesaid."

[1] [1921] 1 Ch. 559; 37 T.L.R. 409.

[2] (1811) 14 East 245.

Lodge Farm which was included in the tenancy. In *Doe d. Rodd* v. *Archer* [2] there were certain circumstances which aided the court in reaching the conclusion that the notice there referred to the manor house or mansion on the property and the notice added the word "etc." In those circumstances, it was possible for the court to reach the conclusion which it did. Mr. Teague also referred to *Doe d. Cox and Others* [3] and *Doe d. Armstrong* v. *Wilkinson*,[4] but those cases have little to do with the present case, because they refer to property which was included in the tenancy, and, though there was a mistake in the name of the property, it was perfectly obvious that the notice was referring to property held by the tenant from the landlord, the tenant in those cases holding no other property. They do not therefore assist me in reaching the conclusion which I ought to reach in the present case.

In *Hankey* v. *Clavering*,[5] it was pointed out by Lord Greene M.R. that the matter of giving a notice to quit has always been treated as a matter of technicality, and one cannot get out of difficulties merely by saying that there was an obvious mistake, and by saying that the notice which does something wrong should be treated as doing something right. In that case the date of December 21 was referred to, though it was a mistake for December 25, which is the quarter day, when the tenancy would be likely to end. None the less, though the mistake was purely inadvertent, the court refused to cure the mistake in the notice to quit and held that it was ineffective. It is quite plain that the notice in the present case is bad, because it refers in the most definite terms possible to part only of the property included in the relevant tenancy.

That is sufficient to dispose of the case, but I will also consider another point made against the landlord which arises under section 24 of the Agricultural Holdings Act, 1948.

[His Lordship read section 24 (1) and (2) (*g*) of the Agricultural Holdings Act, 1948, and continued:]

The reference in the notice to quit to the deaths of Ernest Charles Woodward and Charles Woodward was an attempt to bring the matter within the terms of paragraph (*g*). It seems clear to me, however, that the terms of the paragraph do not apply in the circumstances of this case. It appears from section 1 of the Interpretation Act, 1889, that words in the singular in a statute are capable of being treated as the plural. There were two tenants in this case, Ernest Charles Woodward and Charles Woodward. The notice must therefore be read in the following way: "The tenants with whom the contract of tenancy was "made having died . . ." but the "tenants" with whom the contract of tenancy was made was both Ernest Charles Woodward and Charles Woodward. They did not both die within three months before the date of giving the notice to quit, because Ernest Charles Woodward, the father of the plaintiff, died in

[2] 14 East 245.
[3] [1803] 4 Esp. 185.
[4] [1840] 12 A. & E. 743.
[5] [1942] 2 K.B. 326; [1942] 2 All E.R. 311.

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1948. The wording of paragraph (*g*) is such that this case falls outside its terms. Although it is possible that the matter was never considered by the legislature, who would have treated it differently had it been brought to their notice, I have to consider the actual words contained in the statute. It seems to me that no construction of those words is possible other than that which I have stated.

It is argued by Mr. Teague that this paragraph does not apply to the case of a joint tenancy, because joint tenants hold per mie et per tout, and their tenancy is regarded as one and the whole. It is true that there is only one tenancy, but it does not alter the fact that the tenants with whom the contract was made are two persons and not simply one. There is nothing in the terms of the paragraph to include the survivor of the two joint tenants or the survivor of a number of tenants. It is plain that both or all tenants, if they were more than one, must have died within three months of the date of the giving of the notice to quit in order that the terms of the paragraph may be applicable.

This construction is supported by a number of cases in which the court has had to construe the reference in statutes to one person where the position is that there are several persons involved, and it has been decided that where there are several persons involved the singular includes the plural. See, for instance, *T. M. Fairclough & Sons Ld.* v. *Berliner*,[6] *McIntyre* v. *Hardcastle*,[7] *Weatherall & Co. Ld.* v. *Stone and Others*.[8]

In *Howson* v. *Buxton*[9] a liberal construction was given in the circumstances of that case, or was suggested as applicable, by Scrutton L.J., but the other members of the court decided the case on somewhat different grounds. That case was very different from the present. It does not seem to me that it is possible, however liberal one may be in one's desire to construe paragraph (*g*), to give any meaning to it other than that which the words contain and that which I have already stated.

In the absence, therefore, of the consent of the Minister, the landlord is also unable to succeed on this point on the construction of the words of the statute. Accordingly, I am of opinion that the application by the tenant is successful.

I will declare that on the true construction of the notice to quit dated February 5, 1953, and also having regard to section 24 (2) (*g*) of the Agricultural Holdings Act, 1948, the notice to quit is not valid or effective to determine the tenancy now vested in the plaintiff and created by the memorandum of agreement.

Declaration accordingly.

Solicitors: *George Tilling & Knight, for Norman E. Kelly, Watford, Herts; Taylor & Humbert.*

I. G. R. M.

[6] [1931] 1 Ch. 60; 47 T.L.R. 4.
[7] [1948] 2 K.B. 82; 64 T.L.R. 260; [1948] 1 All E.R. 696.
[8] [1950] W.N. 572; 66 T.L.R. (Pt. 2) 1095; [1950] 2 All E.R. 1209.
[9] [1928] 97 L.J.K.B. 749.

[QUEEN'S BENCH DIVISION.]

* V. M. SALGAONCAR E IRMAOS OF VASGO DE GAMA v. GOULANDRIS BROTHERS LD.

1954
Feb. 8, 12.

Devlin J.

Shipping — Charterparty— Demurrage—Lay time—Calculation—Cargo to be shipped "at the rate of 600 *tons when vessel is in a berth "and* 350 *tons whilst in stream."*

The number of lay days allowed under a charterparty which provides, "The cargo is to be shipped at the rate of 600 tons when "vessel is in a berth and 350 tons whilst in stream" per day, are ascertained by applying the formula:—

$$\frac{\text{Quantity loaded in berth}}{600} + \frac{\text{Quantity loaded in stream}}{350}$$

SPECIAL CASE stated by an umpire.

By a charterparty dated London, November 27, 1952, the charterers, V. M. Salgaoncar e Irmaos of Vasgo de Gama, chartered the steamship "Granford" to load a cargo of iron ore of 9,200 tons 10 per cent. more or less at captain's option for discharge at Antwerp or Rotterdam on the terms and conditions therein mentioned. The charterparty contained inter alia the following clauses: "(2) That the said ship . . . shall after "delivery of her outward cargo, proceed with all convenient "speed to Mormugao (Portuguese India) and there load at one "or two safe berths in charterers' option always afloat in the "customary manner when, where and as soon as ordered by "shipper's agent a full and complete cargo of iron ore, say "9,200 tons, 10 per cent. more or less at captain's option . . . "and being so loaded, shall with all convenient speed proceed "to Antwerp or Rotterdam . . . (5) The cargo to be shipped "at the rate of 600 tons when vessel is in a berth and 350 tons "whilst in stream and to be discharged at the rate of 1500 tons "per clear working day of 24 consecutive hours (weather per-"mitting), Sundays and holidays always excepted . . . (6) Time "for loading to count from 8 a.m. after the ship is reported and "ready, and in free pratique (whether in berth or not), and for "discharging from 8 a.m. after ship is reported and in every "respect ready, and in free pratique, whether in berth or not. "(8) Demurrage (if any) at the rate of £300 and part day pro "rata per running day. Owners to pay despatch money at half "demurrage rate on all time saved both ends. (9) Charterers "to have the right to average the days allowed for loading and "discharging."

Disputes having arisen between the parties in pursuance of a clause in the charterparty they appointed arbitrators who being unable to agree appointed an umpire.

The following facts were not in dispute and were stated in the umpire's award: The "Granford" loaded in Mormugao a cargo of 9,600 tons of iron ore, and discharged her cargo at

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Rotterdam in accordance with the charterers' directions, the outturn quantity weighing 9,473·239 tons. Notice of readiness at Mormugao was given at 4 p.m. on January 30, 1953, and was effective at 8 a.m. on Monday, February 2, 1953, whereafter the charterers were allowed a further 48 hours in pursuance of clause (2) of the charterparty. The vessel completed loading on March 9, 1953, at 10 a.m. The vessel commenced discharging in Rotterdam on April 10, 1953, at 3 p.m. and completed on April 11, 1953, at 10 p.m. The lay time allowed for discharging the cargo at Rotterdam was 6 days 7 hours 34 minutes. The charterers exercised their right to average the days for loading and discharging pursuant to clause (9). The vessel loaded in Mormugao 2,020 tons while in stream and 7,580 tons while in berth.

The disputes between the parties concerned the method of calculating the lay days at the loading port of Mormugao. The charterers contended that they were entitled first to ascertain the times the vessel was in the stream and in berth respectively and then to multiply those times by the quantities the vessel was obliged to load as a minimum in accordance with clause (5). The owners submitted that one calculated the lay days by ascertaining the quantity loaded at each place, i.e. in stream and in berth, and then dividing it by the rate appropriate to each place. The umpire came to the conclusion that the clause was to be interpreted in accordance with the owners' formula and made an award in their favour subject to the approval of the court.

Ashton Roskill Q.C. and *Desmond Neligan* for the charterers.
Sir Robert Aske Q.C. and *B. B. Goodden* for the owners.

Compania de Navigacion Zita S.A. v. *Louis Dreyfus et Cie.*[1] was cited in argument.

Cur. adv. vult.

Feb. 12. Devlin J. read the following judgment: This is one of those cases like *Compania de Navigacion Zita S.A.* v. *Louis Dreyfus et Cie.*[1] in which the parties have introduced a refinement into the ordinary method of calculating lay-days. It is now usual, instead of providing for a fixed number of days, to provide for loading at a daily rate. If the exact quantity of cargo to be loaded was known in advance, the number of lay-days could be specified exactly in advance by dividing the quantity by the daily rate. But the exact quantity is not usually known; in the present case it may vary between 8,280 tons and 10,120 tons, and in fact turned out to be 9,600 tons. It is, therefore, fairer to leave the lay-days to be fixed retrospectively instead of trying to estimate the correct number in advance. But it is well settled that the lay-days when they are ascertained

[1] [1953] 1 W.L.R. 1399; [1953] 2 All E.R. 1359.

in this way have just the same effect as they would have if they had been inserted in the clause from the beginning.

The refinement in this case is that instead of there being one daily rate, there are two. A daily rate is, of course, an estimate based on what the ship ought with reasonable diligence to be able to do, and must depend to some extent on the facilities afforded at the port of loading. It appears that in Mormugao, the port of loading in this case, the vessel may not get a berth and may have to do the whole or part of her loading in the stream —I suppose from lighters. That will take much longer than in berth; so the charterparty, by a special typewritten addition to clause (5), provides for two rates—600 tons a day in berth and 350 tons a day in stream.

The owners submit that this presents no difficulty in the calculation of the lay-days. When there is one loading place the lay-days are fixed by ascertaining the total quantity loaded and dividing it by the daily rate. Where there are two loading places the method is just the same, except that one calculates two figures instead of one and adds them together: instead of taking the whole quantity loaded, one takes the quantity loaded at each place and divides it by the rate appropriate to that place. The same method would be followed, the owners say, if, for example, the charterparty provided for different loading rates for different cargoes.

The charterers say that one must calculate the lay-days day by day as one goes along. For each day the ship is in the stream one debits her, so to speak, with 350 tons; then, if she moves to a berth, one debits her for each day with 600 tons, and when the total debit reaches 9,600 tons, the quantity loaded, she has exhausted the lay-days.

The reason why the two calculations produce a big difference in this case is that out of the 15 working days which the vessel spent in the stream she was loading only on the last three days; for the first 12 days, or thereabouts, she lay idle. To illustrate the difference simply, let me assume that after 12 days in the stream doing nothing the ship had moved to a berth and loaded her whole cargo there. On the owners' calculation the lay-days would be 16, i.e., 9,600 divided by 600. That would be the charterers' calculation too if the waiting days in the stream were ignored. But if those days are counted the lay-days are 21, arrived at as follows:

12 days in stream at 350	4,200
9 days in berth at 600	5,400
21 days	9,600

The charterers submit that one must count the waiting days because that is what clause (5) requires: "The cargo to be "shipped at the rate of 600 tons when vessel is in a berth and

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350 tons whilst in stream." The fallacy in the owners' calculation, they submit, is that it counts only the days on which loading takes place and treats the clause as if it read: "The "cargo to be loaded (shipped) at the rate of 600 tons when "vessel is *loading* in a berth and 350 tons whilst *loading* in "stream."

In my judgment, the clause is to be construed as if it contained the words I have put in italics, because I think that the sense and object of the charterparty as a whole plainly so requires. When the ship is in the stream, she is there either because for some reason or other she cannot load at all or because she is using it as a loading place instead of a berth. If she is in the stream waiting to load, it is the intention of the charterparty that, as is usual, she should be at the charterers' expense, that is, that the lay-days should run during the waiting period. Clause (6) provides: "Time for loading to count from 8 a.m. "after the ship is reported and ready, and in free practique "(whether in berth or not). . . ." The reduced loading rate is, I think, intended to apply only when the stream is actually being used as a loading place and is not intended to bring indirectly relief to the charterers in respect of the waiting period. The typewritten addition to clause (5) must be construed as part of a clause dealing with the calculation of the lay-days and the computation of loading time; so construed, it is, I think, plain that the words "whilst in stream" do not refer to the mere presence of the vessel in the stream, but mean while she is loading in the stream. The scheme of clauses (5) and (6) is that the lay-days are to be calculated on the assumption that loading will begin as soon as the vessel is reported and ready and will proceed at the rate of 600 tons if in berth and 350 tons if in stream.

If this construction is given to clause (5), the difference in result between the two calculations must be considerably narrowed, if not eliminated. If the charterers' calculation did not begin until the ship actually started loading, I am not sure whether there would be any difference in the results produced by the two methods. If there is, it is because the charterers' method is affected by the actual movements of the ship, for example, whether she loads first in berth or in stream. In my judgment, the actual movements of the ship are irrelevant to this calculation. Clause (5) is not really prescribing what the ship has actually got to do. It is setting a standard by reference to which the lay-days can be calculated. The lay-days are not intended to be made more or less according to the directions which may be given to the ship. The only thing in this type of clause that depends on actuality is the exact quantity of the cargo loaded in each place; if that were known in advance, the exact period for loading could be specified in the charterparty. I think that follows from the observations of Lord Sumner in *Love & Stewart Ld.* v. *Rowtor S.S. Co. Ld.*[2]; and as I considered the same sort

[2] [1916] 2 A.C. 527, 535.

of point recently in *Compania de Navigacion Zita S.A.* v. *Louis Dreyfus et Cie.*,[3] I need not elaborate it here.

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The point is, however, well illustrated by one aspect of this case. If the loading time is greater than the lay-days, the charterers' method, by which the ship, as it were, consumes the lay-days until they are eaten up and then goes on demurrage, can, whether it be right or wrong, be made to work. But suppose the loading time is less than the lay-days: suppose the ship finishes loading in stream with 700 tons to her credit and then moves into a berth where she keeps pace exactly with the prescribed rate. How is the time saved to be assessed? Before the ship moved into berth she had saved two days. But if she had not saved them she would have used only an additional one day and four hours to complete her loading in berth. Mr. Roskill argues that the saving should be assessed at the rate appropriate to the place where the ship ends up. It is true that if the loading of 700 tons had not been accelerated the ship would have been detained for only one day and four hours *if* she remained in her berth; but she might have been moved back into the stream again. Although the umpire was wrong in thinking that this point arose directly on the figures in this case, I think he was right in regarding it as a difficulty in the way of the charterers' argument.

In my judgment, the owners' method of calculating the lay-days, which as Sir Robert Aske submits is the simple and obvious way of doing it, cannot be successfully attacked.

Solicitors: *Sinclair, Roche & Temperley; Stokes & Mitcalfe.*

C. J. E.

[3] [1953] 1 W.L.R. 1399, 1404.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* HIGHGATE JUSTICES. *Ex parte* PETROU.

1954 *Jan.* 27.

Lord Goddard C.J., Byrne and Parker JJ.

Justices—Costs—Penalty in guise of costs—Order for costs exceeding costs of prosecution.

The manager of a club was summoned before justices under the Licensing (Consolidation) Act, 1910, on charges relating to the sale and supply of liquor at the club. The secretary was also summoned to show cause why the club should not be struck off the register. At the conclusion of the hearing the justices were informed that the costs of the prosecution amounted to 21 guineas. They convicted the manager, fined him £10 and ordered him to pay 20 guineas costs. They further ordered the secretary to pay £100 costs and they ordered the club to be struck off the register. On an application by the secretary for an order of certiorari:—

Held, that the order against the secretary was a penalty under the guise of an order for costs and one which the justices had no power to make.

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v.
Highgate
Justices.
Ex parte
Petrou.

Application for an order of certiorari.

The applicant, Helen Costas Petrou, was the owner of premises which she let to one Reeves for use as a club of which she acted as secretary.

Ten summonses were issued against Reeves charging him, as manager of the club, with offences relating to the sale of liquor without a justices' licence, contrary to section 65 (1) of the Licensing (Consolidation) Act, 1910, and the supply of liquor other than during permitted hours, contrary to section 4 of the Licensing Act, 1921, and calling on him to show cause why the club should not be struck off the register under section 95 (1) of the Act of 1910. A summons was also issued against the applicant as secretary to show cause why the club should not be struck off. At the conclusion of the hearing the justices were informed that the costs of the prosecution amounted to 21 guineas. The justices then convicted Reeves, fined him £10, and ordered him to pay two guineas costs on each of the 10 summonses. They also ordered the applicant to pay £100 costs and the club to be struck off the register.

The grounds of the present application were (a) that the justices had no power to inflict a fine or penalty on the applicant under section 95 (1) of the Act of 1910; (b) that, in the circumstances, by ordering the applicant to pay £100 costs the justices were in substance imposing a fine on the applicant and (c) that they had exceeded their jurisdiction and acted improperly.

Norman King for the applicant.
S. A. Morton for the justices.

Lord Goddard C.J. stated the facts and continued: I regret that any bench of justices could have acted as these justices did. They were not imposing costs on the applicant; they were imposing a penalty on her when she had not been convicted of any offence, but had only come before the court to show cause why the premises should not be struck off the register. Under the guise of making an order for costs, the justices inflicted a penalty of £100, which could only have been intended as a penalty. Since, by their order against Reeves, they had satisfied the costs of the prosecution apart from one guinea certiorari will go and I shall direct that the papers be sent to the Lord Chancellor.

Byrne, J. I agree.

Parker J. I agree.

Application granted with costs.

Solicitors: *A. L. Philips & Co.; Sir Clifford Radcliffe.*

J. D. P.

[CHANCERY DIVISION.]

* SERVILLE v. CONSTANCE AND ANOTHER.

1954
Feb. 17.

Harman J.

[1954 S. No. 372.]

Passing Off—Sport—Boxing championship title—Foreign title—No confusion between plaintiff and defendant—Plaintiff no reputation in this country.
Slander of title.

The plaintiff became the "Welter-weight Champion of Trinidad" in December, 1952, and came to England in 1953. He found that the first defendant (who had in fact defeated him in Trinidad in September, 1952), was styling himself as the "Welter-weight "Champion of Trinidad" and "Welter-weight Champion of the "British West Indies." The defendant well knew that he had no right to the first title; the second did not exist. The plaintiff brought an action and launched a motion (treated as the trial) to restrain the first defendant and his manager from permitting the first defendant to assume those titles, or from passing him off as the holder of those titles.

The plaintiff was not able to prove that the first defendant had acted with an intention to injure him, or that he knew that the plaintiff had become the accredited champion:—

Held, that since the plaintiff had not proved that he held any reputation in England, or that there was any possibility of confusion in the minds of the public between the plaintiff and the first defendant, confusion, an element essential to an action for passing off, was lacking and the motion must be dismissed.

Hines v. *Winnick* [1947] Ch. 708; 63 T.L.R. 520; [1948] 2 All E.R. 517 distinguished.

Semble, that had the plaintiff been able to prove malice he would have had a good cause of action for slander of title.

MOTION treated as trial of the action.

The plaintiff, Hugh Serville, a native of Trinidad was recognized as the "Welter-weight Champion of Trinidad." He asked the court for an injunction to restrain the defendants, Hector Constance, also a native of Trinidad, and his manager Jack Burns, from permitting the first defendant to assume the titles of "Welter-weight Champion of Trinidad" or "Welter-weight "Champion of the British West Indies," or passing himself off as the holder of those titles. The facts are set out in the judgment.

Edward Grayson for the plaintiff.
Arthur Bagnall for the defendants.

Cases referred to in argument: *Batty* v. *Hill*[1]; *Balden* v. *Shorter*[2]; *Draper* v. *Trist*[3]; *Forbes* v. *Kemsley Newspapers*

[1] (1863) 1 Hem. & M. 264.
[2] [1933] 1 Ch. 427.
[3] [1939] 3 All E.R. 513.

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Ld.[4]; *Franks* v. *Weaver*[5]; *Hines* v. *Winnick*[6]; *Loudon* v. *Ryder (No. 2)*[7]; *McCulloch* v. *Lewis A. May*[8]; *National Starch Manufacturing Co.* v. *Munn's Patent Maizena and Starch Co.*[9]; *Spalding & Bros.* v. *A. W. Gamage Ld.*[10]; *Tallerman* v. *Dowsing Radiant Heat Co.*[11]

Harman J. This is an action between two young coloured men, natives of the island of Trinidad, each of whom has crossed the seas to this country in order to pursue his fortune with his fists. The plaintiff is the later-comer of the two; he arrived here only in December, 1953. He found the first defendant well established in the world of fisticuffs and describing himself and being described as "Welter-weight Champion of Trinidad." As the plaintiff himself was in fact and in right the "Welter-weight "Champion of Trinidad," he had some cause of complaint. Nothing can be said in defence of the conduct of the first defendant or of Mr. Burns, his manager, both of whom must, in my judgment, have known perfectly well that the first defendant was not the "Welter-weight Champion of Trinidad." The very experienced manager employed by the first defendant must have known the rule in the constitution and regulations of the British Boxing Board of Control, which provides: "A promoter shall "not bill a boxer or publish in the press that the boxer holds a "particular title unless he has fully satisfied himself that the "boxer is officially recognized as holding such title." Mr. Burns could have taken no such steps, because he would have found, if he had made the slightest inquiry into the matter, that his protégé had never held the title of "Welter-weight Champion of "Trinidad." A postcard is exhibited showing the first defendant in a pugilistic attitude on which it is stated "Hector Constance, "Welter-weight Champion of Trinidad: sole manager, Jack "Burns, . . ." I doubt not that so describing himself was of considerable assistance to the first defendant, but he was not content with that description: he went on to call himself "Champion of the British West Indies." There is no such title as "Champion of the British West Indies," as he must have been aware, but I suppose that it gave him an added status.

When the plaintiff arrived here he had been recognized for a year in Trinidad as the welter-weight champion. He was so recognized by the local board of control which performed functions similar to those of the British Board of Control in this country, and was entitled to name the champion at any weight.

[4] [1951] 2 T.L.R. 656.
[5] (1847) 10 Beav. 297.
[6] [1947] Ch. 708; 63 T.L.R. 520; [1948] 2 All E.R. 517.
[7] [1953] 1 Ch. 423; [1953] 2 W.L.R. 863; sub nom. *Lewis's Declaration of Trust, Lewis* v. *Lewis, Lewis* v. *Ryder* [1953] 1 All E.R. 1005.
[8] [1947] W.N. 318; [1947] 2 All E.R. 845.
[9] [1894] A.C. 275.
[10] [1915] W.N. 151; 31 T.L.R. 328; 32 R.P.C. 273.
[11] [1900] 1 Ch. 1.

The plaintiff, having become welter-weight champion of Trinidad in December, 1952, defended his championship title in November, 1953. He came to this country in December, 1953. It is fair to say that the defendant had come to England in September, 1952, before the plaintiff had been declared champion, and that earlier in 1952 the defendant had, in a ten-round contest, defeated the plaintiff. The plaintiff said that he made a complaint at the offices of the British Boxing Board of Control about the defendants' representations, but that he did not get any satisfaction. He had a coloured man for his manager, and there was a faint suggestion that he was fobbed off by the board, but there is little evidence about it and I am not in a position to say whether that was so or not.

The plaintiff obtained a licence from the British board, but he found, none the less, that he could not get any engagements, which he attributed to the fact that the first defendant was going about clothed in his feathers and had acquired a considerable reputation in the ring in this country, which probably he owed more to the readiness of his fists than to the title to which he wrongly laid claim. Nevertheless, a title of that sort is obviously a matter of importance, as shown by the regulation which I have read, and it gives a man a certain start in the world which will enable him to get engagements.

The plaintiff discovered that the defendant was billed to appear at the Albert Hall in a boxing tournament on Tuesday, January 26. The defendant was billed to box against somebody known as George Happe, and he was described as "Champion of the British West Indies", which, of course, he was not, because such a title did not exist.

The plaintiff consulted a solicitor on Friday, January 22, so that there was not much time before the fight took place. The solicitor applied to the legal aid committee for an emergency certificate for his client, but this action has not, in the events which have happened, involved any expense to the public. The solicitor rang up the British Boxing Board of Control, who by their secretary, one Waltham, told him on Saturday, January 23, 1954, on the telephone, that the British Boxing Board of Control had ample power to deal with this kind of dispute and that it was not worth the plaintiff's while to take legal proceedings in the matter, because the board would dispose of his complaints more quickly and effectively. That is true, because a board of control of this nature has absolute command over those who make their living by following the sport in question. It is the greatest pity that that hint was not taken and that the matter was not referred at once to the board.

Instead, the writ in this action was issued on Tuesday morning, January 26, and an application was made to me on the same day ex parte, the urgency alleged being that the fight was to take place that night at the Albert Hall, and that it was essential that relief should be given, otherwise, it was argued, the whole

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proceeding would be stultified. I did not feel that it was a matter in which to grant that kind of relief; but it appears that some notice appeared in the press of what passed on that occasion and, as a result, the first defendant, to whom no letter about the complaint had been written before action, went with his manager to ask the board what he should do, and he was told that he must withdraw his claim as champion. The master of ceremonies for that evening at the Albert Hall was told that he must not, when introducing the defendant in the ring, describe him any more as "Welter-weight Champion of the British West "Indies."

The result was, that in the next edition of the board's bulletin, which is sent round to their members and also communicated to the press, a notice appeared with the assent of the defendant and his manager in these words: "Boxer Hector "Constance. Hector Constance wishes it to be known that he "does not make claim to be the Welter-weight Champion of "Trinidad or British West Indies. Promoters are therefore "instructed not to bill or advertise in any way that Constance "is the holder of either of these titles." That notice, in fact, gave the plaintiff all that he needed. An offer was also made when the motion first came on for hearing, and before the evidence was complete, of an undertaking substantially to the same effect. But the plaintiff refused it because he was not offered his costs, and therefore the time of the court has been occupied for a day and a half arguing in effect about who shall pay the costs of an action which was, in the circumstances of the case, unnecessary.

The legal problem which, in consequence, I have to decide, is not an uninteresting one. It is, I think, clear enough that the defendants were slandering the title of the plaintiff, or uttering what the law sometimes calls an injurious falsehood about the plaintiff. That the plaintiff had a cause of action against the defendants under that head I do not doubt. The leading modern case on the subject is *Balden* v. *Shorter*,[1] a decision of Maugham J. But the gist of that action is what the law knows as malice. It is not possible to succeed against a man for slander of title unless it can be proved that he uttered the slander, knowing it to be untrue, with the object of causing injury, or with what in other connexions lawyers call a by or sinister purpose. The plaintiff here admits that he is not in a position to prove that the defendants acted with intention to injure him. He is not in a position to prove that the defendants knew that he, the plaintiff, was the accredited welter-weight champion of Trinidad, and therefore those advising the plaintiff elected not to rest their claim on that cause of action.

Instead of that, this action has been dressed up as a passing-off action, or, as was said in the course of the argument, a

[1] [1933] 1 Ch. 427.

colourable imitation of a passing-off action; and as such it seems to me to be a complete novelty. It is said that the championship of Trinidad is the plaintiff's stock-in-trade, and that whosoever steals that is passing himself off in a sense as the plaintiff, and that confusion will arise if there be two Harrys in Harry's coat. It was claimed that he is entitled to an injunction to restrain the defendants from using, in connexion with pugilistic activities, the title of "Welter-weight Champion of Trinidad" or any other style resembling the style or title of the plaintiff, or which is calculated to lead to the defendant Constance being confused with the plaintiff as a boxer under that style, or to lead the public to believe when they see the first defendant box that they are watching the performance of the "Welter-weight Cham-"pion of Trinidad." That, as I have said, seems to me something entirely new.

The action of passing off, without going into the metaphysics or the origins of it, which appear to be doubtful enough, is essentially a cause of action arising out of confusion. That element is entirely lacking here; there is no confusion here between Hector Constance and Hugh Serville. Nobody believes, when he sees Hector Constance in the ring, that he is looking at Hugh Serville. There is no likelihood of the one person being mistaken for the other. The plaintiff cannot allege, as it would be necessary for him to allege, in the statement of claim that the words "Welter-"weight Champion of Trinidad" when applied to a boxer mean to the English public the plaintiff and the plaintiff alone. The answer is that nobody in this country knows anything about the plaintiff. He only came here in December, 1953, and he has no reputation here to protect. The words "Welter-weight Champion "of Trinidad," if they point to anybody in this country, point to the defendant, who appears to have been successful, and is, I suppose, known to some extent by those who attend boxing matches. This is, therefore, so to speak, the opposite of a passing off action—it is the unknown seeking remedies against the known. It is not the well-known trying to stop the unknown from stealing his reputation.

I may also point out that to be a champion is to be here today and gone tomorrow. There is nothing inherent to the plaintiff's self or boxing career in being a champion; two minutes in the ring may on any day easily see the end of it. It is a curious view that one should be able to obtain the permanent remedy of injunction against a defendant from representing himself as being the champion, when that defendant may by hitting the plaintiff sufficiently hard on the morrow become in fact the champion. This is not, therefore, a case of passing off at all; none of the essential elements of passing off is involved. It occurred to me for the first time during the hearing to regret the desuetude of ordeal by battle as a method of trial.

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It was argued that this case was analogous to *Hines* v. *Winnick*,[2] a recent decision of Vaisey J., where the plaintiff had become identified in broadcasts with a certain Dr. Crock; "Dr. Crock and his Crackpots" had become the sobriquet of the plaintiff there, and he had the right to protect that reputation. He had become identified with Dr. Crock, so that when the words "Dr. Crock" were mentioned on the wireless, the plaintiff would be recalled to the listener's mind; but, when "the Welter-weight Champion of Trinidad" is mentioned to the boxing enthusiast, it is most unlikely that he will say: "Ah, that "is the plaintiff"; he has never heard of the plaintiff. That line of cases does not therefore help the plaintiff at all.

I do not propose to enlarge further on the law, because on the facts the essential element cannot even be predicated. Although the plaintiff had great reason to complain of what the defendants did, he has chosen the wrong remedy.

Mr. Bagnall, for the defendants, very properly admitted (a) that the plaintiff is at the present moment holder of the welter-weight championship of Trinidad; and (b) that the first defendant is not, and to give an undertaking not, so long as the plaintiff holds that championship, to represent that the first defendant holds it.

In the circumstances I propose to make no order except that the applicant must pay the costs of the motion and the action.

Action dismissed.

Solicitors: *S. M. Fruitman; Barnett, Janner & Davis.*

I. G. R. M.

[2] [1947] Ch. 708; 63 T.L.R. 520; [1948] 2 All E.R. 517.

[COURT OF APPEAL.]

C. A.

1954
Feb. 12, 15.

Somervell, Birkett and Romer L.JJ.

* S.A. MARITIME ET COMMERCIALE OF GENEVA *v.* ANGLO-IRANIAN OIL CO. LD.

Shipping — Charterparty — Time — Right to substitute vessel "at any "time"—Clause—Construction.

Contract—Construction — Commercial document — Application of rules applicable to other documents—Surplusage.

By a charterparty shipowners contracted to provide the charterers with a named vessel for a series of voyages over a stated period. Clause 38 of the charterparty provided: "Owners have the liberty "of substituting a coiled vessel of similar size and position at any "time before or during the charterparty and owners undertake to "give charterers reasonable notice of such intention." Before the first voyage the owners notified the charterers of their intention to substitute an identical vessel for the named vessel. Thereafter the substituted vessel fulfilled the charterparty until compelled to go

into dry dock for repairs. The owners then proposed to substitute the originally named vessel for the remainder of the charter voyages and so informed the charterers. The latter refused to accept the substitution on the ground that clause 38 gave the owners liberty to make only one substitution and they had already exercised that liberty before the commencement of the charterparty. The owners claimed damages for breach of charterparty:—

Held, that the charterparty must be looked at as a whole, and as it was for a succession of voyages, before and during which the shipowners were given liberty to substitute a vessel similar to the named vessel, the natural meaning was that they could substitute whenever it became convenient to do so.

Decision of Devlin J. [1953] 1 W.L.R. 1379 affirmed.

Appeal from Devlin J. on a special case stated by an umpire.[1]

By a charterparty dated March 27, 1951, between S. A. Maritime et Commerciale of Geneva (the shipowners) and Anglo-Iranian Oil Co. Ld. (the charterers) the shipowners' tank motor vessel *Driade* was chartered to carry oil from the Persian Gulf to the United Kingdom by a series of voyages over a period between September, 1951, and September, 1952.

Clause 38 of the charterparty provided: "Owners have the "liberty of substituting a coiled vessel of similar size and "position at any time before or during this charterparty and "owners undertake to give charterers reasonable notice of such "intention."

On August 7, 1951, the owners informed the charterers that their tank motor vessel *Nayade*, which was a younger sister-ship of the *Driade*, would be performing the charterparty. Thereafter the *Nayade* carried out a number of chartered voyages until in August, 1952, she had to go into dry dock for repairs. The owners then advised the charterers that they proposed substituting the *Driade*, under clause 38, for the remainder of the charter. The charterers declined to accept this substitution on the ground that the owners had already exercised their liberty of substitution under clause 38, by nominating the *Nayade* for the *Driade* before the commencement of the charterparty.

In view of the charterers' refusal to accept the *Driade*, the owners of that vessel found alternative employment for her and claimed damages for breach of charter. The matter went to arbitration, and the umpire stated for the decision of the court the question whether on the facts and on the true construction of the charterparty the substitution of the *Nayade* for the *Driade* by the notice of August 7, 1951, constituted a final exercise of the option conferred on the owners by clause 38.

Devlin J. answered the question in the negative and gave judgment for the shipowners for the alternative award of damages made by the umpire.

The charterers appealed.

[1] [1953] 1 W.L.R. 1379.

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John Megaw Q.C. and *Michael Kerr* for the charterers. *Burton* v. *English*,[2] *Alexander* v. *Vanderzee*,[3] *Ashforth* v. *Redford*,[4] and *Bowes* v. *Shand*[5] were referred to.

Eustace Roskill Q.C. and *B. B. Goodden*, for the shipowners, were not called on for argument.

Somervell L.J., having stated the facts and read the material clauses of the charterparty, said:—The charterers objected to the substitution of the *Driade* for the *Nayade* on the ground that under clause 38 there should be only one substitution. There is what I will call a subsidiary point which I at one time thought might be conclusive. I will mention it though it is not necessary for me to consider it. It was argued below by Sir Robert Aske, who then appeared for the shipowners, that on the basis for which the charterers contend, namely that the clause only allows one substitute, there was here only one substitute because there were only two vessels involved, the original *Driade*, named in the charterparty, and the *Nayade*. As was pointed out, however, the original substitution was indefinite in period and would have been effective if the *Nayade* had done all the voyages in the 12 months. There had therefore to be a further notice to replace the *Nayade* by the *Driade* in the 12 months. If there had been a substitution which was expressly for one voyage or for one month only different considerations might have arisen. I therefore do not think that there was clearly only one substitution.

I will proceed, as did Devlin J., on the basis that the point to be decided is whether this clause provides for only one substitution or whether it provides for successive substitutions, if the owners so require, for the different voyages which might fall under the agreement. Devlin J. said: "I do not think that the language "of the clause gives any indication, on the surface of it, one way "or the other. I say 'on the surface of it' because Mr. Megaw "has analysed it and he relies upon certain matters in the words "as supporting his construction; but there is nothing on the face "of it, no clear phrase, that is a signpost of one meaning or the "other." I agree with that in this sense: there are certain things which can only happen once for all. I gave an example in the course of the argument. If a man undertook to marry A to B before or after a certain date the parties would normally be contemplating only one ceremony. I think that if these words in this contract were by their context restricted to a thing which could be only contemplated as happening once they would not be inapt words and would not have to be distorted in order to cover such a situation. But I am quite clear in my own mind that as a matter of English they are capable of covering successive substitutions. On the construction for which the charterers contend the words "at any time" are in my opinion mere surplusage.

[2] (1883) 12 Q.B.D. 218.
[3] (1872) L.R. 7 C.P. 530.
[4] (1873) L.R. 9 C.P. 20.
[5] (1877) 2 App.Cas. 455.

Although one finds surplusage in contracts and deeds and in Acts of Parliament one leans towards treating words as adding something rather than as mere surplusage. I think that these words are capable of meaning that at any time before, or at any time during, the charterparty the owners may have the liberty of substituting for the first, second or other voyage another vessel, provided she is of similar size. I think that is their natural meaning in this contract.

It was suggested that the judge was going outside what is to be gathered from the agreement itself and the intention of the parties as found in its terms. I do not think that he was, although one might fix upon a sentence or two which looked as if he might be doing so. If he did proceed on that basis, with great respect he would be wrong. I think that this document has to be considered, as other documents, having regard to its provisions as a whole. There was no suggestion that there are here words used in some technical or trade sense. This being a charterparty under which the vessel originally named is to perform successive voyages, or as many as she can, and the owners are given liberty to substitute, I think that the natural meaning is that they can do so whenever it may become convenient. For these reasons I think that the judge came to the right conclusion and I would dismiss the appeal.

Birkett L.J. referred to the facts and continued: Mr. Megaw says that the words of clause 38, read in their primary meaning and on their true construction, mean that the owners can substitute once, but that having done that their powers are exhausted and they cannot do so again. He said, secondly, that if the words are not quite capable of being so simply and clearly disposed of, and there is an ambiguity, then there is a clause which is in favour of the owners and the ambiguity must be resolved in favour of the other party. He says, further, that if there be an ambiguity then the judge was not entitled to do what he purported to do, namely to discuss and decide what was the commercial object of clause 38; and finally, that if the judge was entitled to do that he went wrong in so doing.

I think, for my own part, that those words "a coiled vessel of "similar size and position at any time before or during this "charterparty," read in the context of the charterparty itself and the other clauses, quite clearly mean that the owners were taking power under the charterparty and the additional clauses to say, "At any time before the charterparty comes into opera-"tion, or at any time during the continuance of the charter-"party, we have the liberty of substituting a coiled vessel of "similar size and position." I think this case is vastly different from a case where one voyage only was contemplated. When there is a long series of consecutive voyages it seems to me that these words are not really ambiguous at all. In the context in which they are set I think that that is the true, ordinary and

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reasonable meaning and I should be in favour of dismissing the appeal.

Romer L.J. I agree. I think if one takes clause 38 by itself one could legitimately construe it either in the way contended for by the charterers or in the way relied on by the shipowners without doing undue violence to the language used. But it is not permissible to construe one clause in isolation from the others. Mr. Megaw drew our attention to certain other indications in the charterparty which he relied upon as supporting the view that only one substitution was in contemplation and permitted under clause 38. For example, he drew our attention to the fact that whereas in clause 38 the words are "at any time "before *or* during this charterparty," in some other clauses the words used are "and/or," as, for example, in clause 1; and to certain other indications of that kind. If one looks at the charterparty as a whole, and takes into consideration the duration of the charter and the purposes and objects which the parties had in mind, as disclosed expressly or as a matter of legitimate inference from the charterparty itself, and attributing proper weight to every clause, I think that the original ambiguity (which, as I have said, does exist in clause 38 if taken by itself) disappears, and the clause accordingly should be construed in the sense which my brethren have indicated. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *William A. Crump & Son; Stokes & Mitcalfe.*

A. W. G.

[CHANCERY DIVISION.]

1954
Feb. 18.

Vaisey J.

* *In re* BRANSBURY, decd.
GRECE *v.* BRANSBURY.

[1953 B. No. 3289.]

Power of Appointment—General power—Nature as absolute property—Advancement—Grant of general power by will before 1926*—Exercise of power by will after* 1925*—Whether appointment "constituted "or created before the commencement of" the Trustee Act,* 1925*—Powers over real or personal property—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 32.

A testator who died in 1921 made a disposition in trust "for "such person or persons and in such manner as my wife shall "from time to time by will or codicil appoint." The wife, who died in 1934, by her will made in August, 1926, exercised the power by creating certain trusts under which infants took contingent beneficial interests.

A summons was taken out to ascertain whether the discretionary power of advancement conferred by section 32 of the Trustee Act, 1925, could be exercised in respect of the funds so appointed:—

Held, that the power being a general power, the trusts created by its exercise did not have to be read into the instrument creating the power; so that the trusts were "constituted or created" after the coming into force of the Act, and the trustees were authorized to make advancements pursuant to section 32.

In re Gordon and Adams' Contract [1914] 1 Ch. 110, and observations of Lord Romer in *Williams* v. *Muir* [1943] A.C. 468, at p. 483 applied. *In re Batty* [1952] Ch. 280; [1952] 1 T.L.R. 412; [1952] 1 All E.R. 425 distinguished.

ADJOURNED SUMMONS.

Henry Bransbury, who died in 1921, by his will made in 1915 and a codicil made in 1919, made a disposition on trust "for such "person or persons and in such manner as my said wife shall "from time to time by will or codicil appoint."

The wife, who died in 1934, by her will made in August, 1926, exercised the power of appointment by declaring that her trustees were to hold the property subject to the power "upon "and subject to the same trusts powers and provisions for the "same person or persons and in the same manner in all respects" as the trusts declared in relation to her own residuary estate; which was so settled that certain infants were entitled to shares, contingently on attaining a certain age and on surviving their parents.

Section 32 of the Trustee Act, 1925, which authorizes trustees to advance beneficiaries with contingent interests, provides by subsection (3): "This section does not apply to trusts "constituted or created before the commencement of this Act."

A question arose whether the statutory power of advancement could be exercised in respect to the funds appointed by the wife, and the trustees of both wills (who were the same persons) took out a summons for the determination of the question.

H. E. Francis for the trustees.

A. J. Belsham, *C. D. Myles*, and *P. W. Taylor* for the defendants.

The following cases were referred to in argument: *In re Batty*[1]; *In re Gordon and Adams' Contract*[2]; *Williams* v. *Muir*[3]; *Venables* v. *Morris*.[4]

VAISEY J., after stating the facts: There is no doubt that, so far as the testatrix's own estate is concerned, section 32 of the Trustee Act, 1925, is applicable, so that the powers of advancement can, without any fetter or doubt, be exercised for the benefit of the children entitled in remainder. But a doubt has arisen as

[1] [1952] Ch. 280; [1952] 1 T.L.R. 412; [1952] 1 All E.R. 425.
[2] [1914] 1 Ch. 110.
[3] [1943] A.C. 468.
[4] (1797) 7 Term Rep. 342.

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Bransbury, decd., *In re.*

Vaisey J.

to whether that applies also to the funds which were handed to the trustees of her will by virtue of the appointment to them under the will of her late husband, and I am asked to determine whether or not, in the events which have happened, the power of advancement conferred by section 32 of the Trustee Act, 1925, is exercisable by the plaintiffs as the trustees of the will and codicil of the testator in respect of the capital of the trust funds representing the residuary estate in favour of the infant beneficiaries.

That question, in my judgment, is not aptly framed, because, the appointment having been made in terms by the testatrix to the trustees of her own will, I think that the trusts of the husband's will have long since come to an end. She might have said and declared "that the trustees of my husband's will shall "hold the same upon and subject to the same trusts as I have "declared in respect of my own residuary estate," but she did not. She appointed out and out, and the effect of the appointment was to direct the trustees of the husband's will, if they had been independent persons, to hand over the funds to her own trustees to be held on the same trusts as those declared regarding her own residuary estate. I think the proper answer to this question—I will anticipate my conclusion—is a declaration that the power of advancement conferred by the section is exercisable by the plaintiffs as trustees of the testatrix's will both in respect of the capital of the trust funds which originally represented the residuary estate of her husband, as well as in respect of the property which formed part of her own residuary estate.

I regret that this summons seems to have been instigated in some measure owing to a decision of my own in *In re Batty*,[1] of which the headnote reads: "Where a will, which confers a "power of appointment, takes effect before January 1, 1926, and "that power is exercised by an instrument executed after that "date, the trusts set up by the later instrument are, for the pur-"poses of section 32 (3) of the Trustee Act, 1925, 'constituted' "before the commencement of that Act; and the trustees have "no statutory power to make advancements under the provisions "of that section."

That headnote does not state, as the headnote in another report[2] does, that I was dealing with a special power. I did say at the outset of my judgment that I was dealing with a special power; and I did not go out of my way to say "This decision "has nothing to do with a general power, and nothing I say "must be considered as expressing any view that a special power "and a general power stand in any relevant respects on the same "footing." I will not refer to my judgment, from which I see no ground to depart.

I think, as regards a special power, that the ordinary rule applies, which is this. Where a special power is exercised—and

[1] [1952] Ch. 280.

[2] [1952] 1 All E.R. 425.

remember always that a special power is a power which has to be exercised by a person in the capacity of a trustee, so that it is a fiduciary power—the document exercising the power is read back into the original document on this kind of footing: the document creating the power indicates an area within which the fund has to be allocated, and the document exercising the power fills in what still remains in doubt as to how, among those objects in that limited range, the fund appointed is to go. I should like to make it perfectly clear, if it was not clear before, that my own decision in *In re Batty* [3] applies, and was intended to apply, exclusively to the powers which are called either special powers or—as they are called in the classic text book of Farwell on Powers—limited powers.

Now, does that rule, that the provisions by which a special power is exercised have to be read into the original document creating the power, apply in any way to a general power? In my judgment, I should have thought it was a matter of very clear principle. So far as personal estate is concerned, at any rate, there is no shadow of doubt at all that that principle does not apply in any respect, either applying the rule against perpetuity or any other rule, to a general power. The nature of a general power has been stated many many times and in many places. I should like, in this connexion, to refer to *In re Gordon and Adams' Contract*,[4] the facts of which are not relevant but which contains some very valuable statements, I think, about the law in this respect.

It was held there that, the general power of appointment having been fully exercised by a widow, there was a resettlement of the estate; and, there being no outstanding interests or charges having priority over that resettlement, the original settlement created was at an end, and the following observations were made by Cozens-Hardy M.R.[5]: "Then it is said that the "appointment has to be read into the instrument creating the "power, and therefore" that certain consequences followed. "I am quite unable to assent to that view. The law has made "a clear distinction between general and special powers. A "special power must be read into the instrument creating it, but "that cannot be treated as applicable to general powers." Then he quotes a passage from the second edition of Farwell on Powers in these words: "'There is an important distinction between "'general and particular powers in this respect. The donee of a "'general power is virtually absolute owner of the property over "'which his power extends; and he is to be regarded as absolute "'owner for the purpose of considering the application of the

[3] [1952] Ch. 280.
[4] [1914] 1 Ch. 110.
[5] Ibid. 113.

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Vaisey J.

"'rule against perpetuities to him.'" In my judgment, he is equally to be considered as absolute owner of the property for the purpose of creating trusts which take effect whether under statute or otherwise, in just the same way and in the same manner and in the same consequences as the donee of the power can do with his own property.

Swinfen Eady L.J. said[6]: "This is a case in which there "is a general power of appointment which has been fully exer-"cised." This case is the same. "The whole estate has been "resettled, and there are no interests or charges having priority "to the resettlement. The original settlement is entirely at an "end," and the conclusion was reached which I have already indicated. Now, that decision seems to me to be, I should have really thought, with due respect to everybody concerned, almost a platitude or an axiom.

There is another case to which I referred in *In re Batty*,[7] and that was *Williams* v. *Muir*.[8]. There is a passage in the speech of Lord Romer which puts the point with a force and a conciseness with which we are familiar in the judgments and speeches of that very learned judge. He said[9]: "if a person "be given a general power of appointment over certain property "he is virtually the owner of that property. If and when he "exercises the power the interests of his appointees come to "them by virtue of and are created by the deed of appointment. "In the case of a special power it is very different." Now, that difference is the difference which I desired to emphasize, and which I now again reiterate, in *In re Batty*.[10] I think that the exercise of a general power, and in this case particularly, is such as to destroy altogether the limitations, qualifications and provisions of the earlier document—that is, the document creating the power—and to bring into operation the new power which derives its force and originates in the later of the two documents exclusively.

Declaration accordingly.

Solicitors: *Loxley & Preston for G. Lewis F. Grece, Redhill; Eland, Nettleship & Butt.*

F. R. D.

[6] Ibid. 114.
[7] [1952] Ch. 280.
[8] [1943] A.C. 468.
[9] Ibid. 483.
[10] [1952] Ch. 280.

[COURT OF CRIMINAL APPEAL.]

* REGINA v. MABER.

1954
Mar. 1.

Lord Goddard C.J., Pilcher and Slade JJ.

PRACTICE NOTE.

Criminal Law — Sentence — Probation order — Breach — Charge of — Probation order and statement of breach in respect of which charged to be included in papers.

APPLICATION for leave to appeal against sentence.

The applicant was charged with and pleaded Guilty before a court of summary jurisdiction to a breach of a probation order and was committed to London Sessions for sentence when she received a sentence of borstal training. The probation order was not sent to the sessions nor was it before the Court of Criminal Appeal. The applicant applied for leave to appeal against sentence.

PILCHER J. The application is refused, but inasmuch as it appears that the probation order for the breach of which she was charged was not sent to the sessions, the court wishes to say that where a person is charged with breach of a probation order, the probation order together with a statement of the breach in respect of which the charge was brought should be with the papers in the case.

J. F. L.

[QUEEN'S BENCH DIVISION.]

* DRUMMOND v. BRITISH BUILDING CLEANERS LD.

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Feb. 8, 9, 10, 17.

Pilcher J.

[1951 D. No. 2398.]

Negligence—Safe system of work—General precautions—Window-cleaning—Outside of sash window cleaned by window-cleaner standing on sill — Method recognized by trade — Fall of window-cleaner — Commercial impracticability of instituting system reducing hazards —Employers' liability.

The plaintiff, an experienced and efficient window-cleaner employed by the defendants, was cleaning the outside of a first-floor sash window by standing on a sloping sill outside the window and holding on with one hand by a finger grip under the bottom of the top sash when his foot slipped, his finger hold was wrenched away and he fell to the ground. The window and sill were of sound construction and in good condition. Above the top sash was a transom and above that a fanlight. Although the plaintiff had a safety belt none of the windows in the building had eye-bolts or hooks to which it could be attached. The plaintiff was not instructed to hitch the rope attached to his safety belt round the transom above the window nor to use a ladder provided by the defendants. In an

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action by the plaintiff alleging negligence on the part of his employers and claiming damages in respect of his injuries:—

Held, that the evidence did not justify a finding that in causing or permitting the plaintiff to clean the window from the sill the defendants were in breach of their common law duty to provide a safe system of work; that the method adopted by the plaintiff was the one by which upper storey sash windows were almost invariably cleaned and was the normal and general method in the trade; and that there was no way of reducing its hazards unless eye-bolts were available, and it was commercially impracticable for window-cleaning firms to refuse to clean sash windows unless eye-bolts were installed outside each window or to insist on the provision of cradles; accordingly, the defendants, acting as reasonable and prudent employers, had not been guilty of any lack of care for the plaintiff's safety.

General Cleaning Contractors Ld. v. *Christmas* [1953] A.C. 180; [1952] 2 All E.R. 1110 distinguished.

Observations of Lord Oaksey and Lord Tucker in *General Cleaning Contractors Ld.* v. *Christmas* [1953] A.C. 180, 190, 192, 198, 199 and of Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 All E.R. 42 applied.

Action.

On November 14, 1949, the plaintiff, an experienced and efficient window-cleaner with a good head for heights, had for about three years been in the employment of the defendants, a company carrying out the general cleaning and window-cleaning of offices and other premises. The defendants' practice was to pay their employees 50 per cent. of the contract price for any particular job, a system under which the men had an incentive to work expeditiously and usually earned more than if they had been paid by time. One of the defendants' contracts was for the monthly cleaning of windows in Bovril's factory, a building with some 700 windows which, during his employment by the defendants, the plaintiff and his squad had cleaned many times.

On November 14, 1949, the plaintiff was cleaning a first-floor window, some 21 feet above the ground, in Bovril's factory. It was an ordinary sash type window with two panes in the top and two in the bottom sash. Above the top sash was a transom and above that a fanlight. Both sashes were about three feet in height and the whole construction of the window and its woodwork was solid and well maintained. In order to clean the outside of the window the plaintiff, adopting the "jumping" method, stood on a sloping sill seven inches long, also in good condition, outside the window. Having cleaned the panes of the top sash he pushed the bottom sash nearly down leaving himself a finger grip under the bottom of the top sash. He was holding on to this with his right hand and squatting down to clean the bottom of the left hand pane with his left hand when his right foot slipped, his finger, or hand, hold was wrenched away, and he fell into the yard below, receiving serious injuries.

The plaintiff was provided with a safety belt, with an eight-foot rope with a spring hook attached to it at the end, but there

were no eye-bolts or other solid object fitted to any of the windows of Bovril's factory. The defendants had upon the site a No. 90 two-part extension ladder which reached about 30 feet up if fully extended.

The plaintiff claimed damages in respect of his injuries, alleging that his fall was due to the negligence of the defendants. In particular he alleged that the defendants were negligent in that they (1) failed to provide suitable ladders; (2) failed to arrange with the occupiers of the building for the insertion of eye-bolts; (3) failed to provide a cradle or other safe platform from which he could have worked; (4) failed to provide a device which could have been clamped to the window frame and to which his safety belt could have been attached; (5) failed to instruct him to hitch a rope round the transom above the window and attach it to his safety belt; (6) failed to instruct him to place a short ladder horizontally across the inside of the window and attach his safety belt to it; and (7) required him to clean the window without making adequate arrangements for his safety.

The defendants denied negligence.

Marven Everett Q.C. and *Jonathan Sofer* for the plaintiff.
F. W. Beney Q.C. and *Stephen Chapman* for the defendants.

The following cases were referred to in argument: *General Cleaning Contractors Ld.* v. *Christmas*[1]; *Paris* v. *Stepney Borough Council*[2]; *Latimer* v. *A. E. C. Ld.*[3]; *Winter* v. *Cardiff Rural District Council*[4]; *Bowater* v. *Rowley Regis Borough Council*[5]; *Smith* v. *Baker & Sons*[6]; *Sheppey* v. *Matthew T. Shaw & Co. Ld.*[7]

Cur. adv. vult.

February 17. PILCHER J. stated the facts and continued: A considerable body of evidence was called upon either side and it is perhaps desirable that I should deal at once with certain general matters to which the evidence called was directed. It was not in dispute that it is virtually unknown for eye-bolts, designed to take the hook of a window-cleaner's safety belt, to be found outside the upper storey windows of an ordinary dwelling-house, even where there are windows which cannot be reached by a ladder. Large blocks of offices or flats and factory buildings are seldom fitted with such eye-bolts. Such evidence as was available was to the effect that such fitments are found in less than 5 per cent. of the large blocks of buildings in London.

[1] [1953] A.C. 180; [1952] 2 All E.R. 1110.
[2] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[3] [1953] A.C. 658; [1953] 2 All E.R. 449.
[4] [1950] W.N. 193; [1950] 1 All E.R. 819.
[5] [1944] K.B. 476; 60 T.L.R. 356; [1944] 1 All E.R. 465.
[6] [1891] A.C. 325; 7 T.L.R. 679.
[7] [1952] W.N. 249; [1952] 1 T.L.R. 1272.

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Some window-cleaners do not take kindly to wearing safety belts, even when eye-bolts are provided, as the rope leading from the safety belt to the eye-bolt tends to drop in a bight which is liable to impede free movement on the sill and catch the feet.

Some large buildings are fitted with permanent runners along the roof from which cradles can be suspended for window-cleaning or painting. Such buildings are very rare. Temporary scaffolding can be erected, if the construction of the roof permits of it, from which cradles can be suspended. The use of cradles, even when suspended from permanent runners, enormously increases the cost of a window-cleaning operation. If scaffolding has to be erected ad hoc the cost is still further increased. In practice, window-cleaning is very rarely done from cradles. When cradles are used it is generally because the occupier of the building specifies that they shall be used and agrees to pay the increased price. If a large window which does not open and is too high to be cleaned from a ladder requires outside cleaning the operation must be done from a cradle. Where sash windows are concerned window-cleaning firms sometimes refuse to tender if the sashes and sills of the windows are in bad condition. Casement windows can be cleaned from inside the room.

The vast majority of sash windows which cannot conveniently be reached from the outside by a ladder of manageable length are cleaned by what is called the "jumping" method. This was the method which the plaintiff was using when he fell from the sill. In this method the window-cleaner seldom wears a safety belt because it is only very rarely that the window to be cleaned is fitted with eye-bolts to which he can make fast the hook attached to the rope on his belt. It is essential that whatever the window-cleaner's hook or rope is attached to should be very firmly secured, and window-cleaners are rightly aware of the danger of hooking on to metal window fitments which would, in all probability, break or pull out if subjected to the sudden jerk of a falling body.

Whilst it would be difficult to contend that cleaning sash windows on upper storeys by the "jumping" method was not a hazardous occupation, the experienced window-cleaners who were called before me, including the plaintiff, obviously did not regard the method as a dangerous one for an experienced and active man with a good head for heights. The evidence completely satisfied me that this method was the quickest way of cleaning the outside of a sash window, and thus the most economical, and there is no question upon the evidence that window-cleaners are averse to using any method which tends to slow up their work.

Certain figures were given in evidence with regard to the number of accidents sustained by window-cleaners. By no means all of those which were particularized were due to the fact that the "jumping" method was used, and I do not find it possible to conclude, from such figures as were given, that the accident rate amongst window-cleaners, due simply to the use of the "jumping" method, is high.

There was evidence that a number of associated window-cleaning companies had recently considered on several occasions what, if any, additional precautions could be taken to safeguard window-cleaners working the "jumping" method on the sill. The type of eye-bolts to be recommended to occupiers willing to instal such fitments was considered at these meetings. The horizontal ladder method, which was discussed in the present case, was considered and rejected, because it was thought that even with modifications it would necessarily involve damage to the interior of the premises and might not be effective. I mention this matter only because it serves to show that the directors of some window-cleaning companies have appreciated their responsibilities in regard to the safety of their servants in a trade which the ordinary man would regard as hazardous but which, oddly enough, does not seem to be so regarded by a large body of experienced workmen in the trade itself.

The problem is, of course, to provide inside each window not fitted with eye-bolts something in the nature of a completely reliable anchor to which the rope on a safety belt can be attached. No such anchor exists, as a rule, in the ordinary room, and accordingly it would seem that if such an anchor is to be provided window-cleaning firms must devise and provide such an anchor or contrivance. It must be capable of being moved from room to room, and employers of window-cleaners must institute a system of work which ensures that the anchor or contrivance is always used by their servants. No satisfactory and practical anchor has yet, apparently, been devised.

[His Lordship considered the evidence in detail and found (1) that there was no material difference in the risk involved to an experienced window-cleaner in cleaning a window from the top of a ladder of the type provided and in cleaning it by the "jumping" method; (2) that as most sash windows were not surmounted by a sufficiently stout transom round which a rope could be passed the defendants were not lacking in reasonable care because they failed to instruct the plaintiff to take the precaution of wearing his safety belt, passing the rope round the transom and then hooking it on to itself; (3) that no one had ever used a ladder placed horizontally across the inside of a window to provide an "anchor" to which to attach the rope of the safety belt and the defendants were not to blame for not instituting such a precaution; (4) that the defendants were not guilty of lack of care in not insisting on the provision of cradles or temporary scaffolding from which cradles could be suspended; and (5) that it would have been unsafe for the plaintiff to clean the window in question by sitting upon the outside sill with his legs inside the room. He continued:] During the course of the trial it was inevitable that frequent reference should be made to *General*

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Cleaning Contractors Ld. v. *Christmas.*[1] The facts of the present case are very similar to those in the *Christmas* case,[1] except that the present case is uncomplicated by the "creeping sash," which was present in the *Christmas* case.[1] The general evidence called before me in regard to the practice of window-cleaners was probably fuller than that called in the *Christmas* case,[1] and it was apparent that the parties had done their best to bring before the court all the evidence reasonably available in regard to the general practice of window-cleaners, the hazards attending their work, and such practical measures as could reasonably be taken by employers of window-cleaners to safeguard their servants. The evidence called before me only served to reinforce the evidence given in the *Christmas* case [2] in regard both to the general practice of window-cleaners and to the practicability of taking further precautions for the safety of men working on the sill. It seems clear from a perusal of the speeches in the House of Lords in the *Christmas* case [2] that upon the evidence adduced in that case none of the noble lords would have been prepared to find in favour of the respondent had it not been for the appellants' failure to devise and institute a safe system of work in regard to creeping sashes. The evidence in the case I am considering was, if anything, more favourable to the employers than the evidence in the *Christmas* case.[2]

In the *Christmas* case [2] Lord Oaksey, dealing with a man working on the sill, said [3]: "If either sash is kept open the hand-"hold is available and, on the evidence in this case, is, in my "opinion, reasonably safe." In the case before me one sash was left open. The plaintiff had a handhold and his position was, in my view, reasonably safe. Unfortunately he slipped and his grasp was torn away.

Lord Oaksey said [4]: "A plaintiff who seeks to have condemned "as unsafe a system of work which has been generally used for a "long time in an important trade undertakes a heavy onus: if he "is right it means that all, or practically all, the numerous "employers in the trade have been habitually neglecting their "duty to their men. The evidence in this case appears to me "to be quite inadequate to establish either that the window-sill "method is so inherently dangerous that it cannot be made "reasonably safe by taking proper precautions, or that the ladder "method or the safety belt method are as a general rule reason-"ably practicable alternatives."

This passage occurs in Lord Tucker's speech [5]: "My Lords, "I have felt considerable doubt on this matter. It is true that "in some cases there may be precautions which are so obvious "that no evidence is required on the subject, but in a case like "the present it is eminently desirable before condemning a "system in general use that it should be clearly established by

[1] [1953] A.C. 180; [1953] 2 All E.R. 1110.
[2] [1953] A.C. 180.
[3] Ibid. 190.
[4] Ibid. 192.
[5] [1953] A.C. 180, 198.

"evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff." A little later, Lord Tucker said[6]: "I desire to add that, in my opinion, there is nothing in this case to justify the inference that in all the circumstances the cleaning of windows from the sill by the handhold method is always to be condemned as constituting a breach of the duty to take reasonable care to provide a reasonably safe system of work."

I am well satisfied that in the case before me there is nothing in the evidence which justifies a finding that in causing or permitting the plaintiff to clean this particular window from the sill the defendants were in breach of their common law duty to provide a safe system of work.

In arriving at the conclusions stated above I have borne in mind the general principle that where faults of omission are concerned an employer of labour charged by a servant with failure to institute and maintain a safe system of work is on strong ground if he can show, as the defendants have shown in this case, that the accident to the workman occurred while the work was being done in the fashion recognized by the trade to be normal and general.

In this connexion I draw attention to the well-known passage in Lord Dunedin's judgment in *Morton* v. *William Dixon Ld.*[7]: "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it."

In *Paris* v. *Stepney Borough Council*,[8] Lord Normand, after quoting this passage, said[9]: "The rule is stated with all the Lord President's trenchant lucidity. It contains an emphatic warning against a facile finding that a precaution is necessary when there is no proof that it is one taken by other persons in like circumstances. But it does not detract from the test of the conduct and judgment of the reasonable and prudent man. If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it."

I do not propose to refer to any further cases, but draw attention to some very useful passages in Mr. Monckton's book on Employers' Liability, 2nd ed., pp. 34 to 37.

[6] [1953] A.C. 199.
[7] 1909 S.C. 807, 809.
[8] [1951] A.C. 367; [1951] 1 All E.R. 42.
[9] [1951] A.C. 367, 382.

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Sash windows appear to be the most common type of window in this country. If such windows cannot be cleaned from a ladder of safe and manageable length they are in practice almost invariably cleaned outside by the "jumping" method. It would, in my view, be commercially impracticable for window-cleaning firms to refuse to clean sash windows until the occupiers of the premises installed eye-bolts outside each window. To insist upon the work being done from cradles would also be commercially impracticable. The evidence in the case does not satisfy me that there is any commercially practicable method by which the hazards incurred by a man working on the sill can be reduced unless eye-bolts are available.

In this state of affairs I am not satisfied that the defendants in the present case, acting as reasonable and prudent employers, were guilty of any lack of care for the safety of the plaintiff. The result is that there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Matthew Morris; J. F. Coules & Co.*

J. F. L.

[COURT OF CRIMINAL APPEAL.]

1954 *Mar.* 1.

Lord Goddard C.J., Pilcher and Slade JJ.

* REGINA *v.* FALLOWS.

PRACTICE NOTE.

Criminal Law — Sentence — Preventive detention — Qualifying age — Offence committed before but conviction after thirtieth birthday.

APPLICATION for leave to appeal against sentence.

The applicant who had a number of previous convictions recorded against him, was convicted of attempted warehouse breaking, and sentenced to eight years' preventive detention. The offence was committed a few days before his thirtieth birthday, but at the time when he was convicted he had attained 30 years of age. He applied for leave to appeal against sentence on the ground that he was not of the qualifying age for preventive detention.

LORD GODDARD C.J. The only question that arises in this application is whether, considering that the offence for which he was sentenced was committed a few days before he attained the age of 30, the applicant was liable to be sentenced to preventive detention. He had passed his thirtieth birthday when he was tried and sentenced and, in the opinion of the court, his age at the time of trial is the governing factor. In view of his shocking record a sentence of preventive detention was necessary for the protection of the public and the application for leave to appeal is refused.

J. F. L.

[PRIVY COUNCIL.]

*AMOAH ABABIO, OHENE OF ASAMANGKESE, REPRESENTING THE STOOL OF ASAMANGKESE AND ANOTHER . . . APPELLANTS;

AND

JOHN EDMUND TURKSON . . . . RESPONDENT.

J. C.†

1954
Mar. 2.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Gold Coast—Jurisdiction—Claims in respect of debt or liability against specified Stools—Certificate of Governor in Council —"The amount which ought to be paid"—Reference re whole question of liability and not merely quantum—Asamangkese Division Regulation Ordinance, 1935 (*Laws of Gold Coast,* 1936 *Rev., c.* 78) (*as amended by Asamangkese Division Regulation (Amendment) Ordinance, No.* 5 *of* 1945 (*Gold Coast*), *s.* 2 (*b*)), *s.* 6 (2).
Statute—Construction—Ambiguity—Relevance of inconvenient results of one construction.

The Asamangkese Division Regulation Ordinance, 1935, of the Gold Coast, the effect of which was to withdraw entirely from the jurisdiction of the courts any claim against the Asamangkese and Akwatia Stools for a debt or liability incurred before the date of the Ordinance, provided by section 6 (2), as amended by the Asamangkese Division Regulation (Amendment) Ordinance, 1945, that inter alia, the Governor in Council "if he thinks fit, may "refer the matter to the Executive Council for consideration as "to whether or not it is desirable, in the interests of justice, that "the claim or any part thereof, or the amount which ought to be "paid, should be adjudicated upon in an action against the Stool," and may, upon such reference, if he considers it desirable, in his absolute discretion certify that the circumstances in respect of any such claim were such that the matter might properly be the subject of legal proceedings. Pursuant to those provisions, a certificate was issued by the Governor in Council to the respondent which, after reciting that a claim by the respondent against the Asamangkese and Akwatia Stools for moneys alleged to be due to him under an agreement made in 1921, whereby the Stools agreed to pay him five per cent. of all moneys received by them in respect of certain mineral concessions granted to companies introduced by the respondent, had been referred to the Executive Council, stated that the Governor in Council "hereby certifies that in his opinion the "circumstances are such that . . . the amount which ought to be "paid in respect of the said claim, may properly be the subject "of legal proceedings" by the respondent against the Stools:—

Held, that the words "the amount which ought to be paid" in the Ordinance and certificate covered the question of liability on the claim as a whole, and were not referring to a mere question of quantum.

Judgment of the West African Court of Appeal set aside, and case remitted.

APPEAL (No. 48 of 1950) from a judgment of the West African Court of Appeal (Gold Coast Session—Accra) (February 9, 1949)

† *Present*: LORD PORTER, LORD REID, LORD KEITH OF AVONHOLM.

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which set aside a judgment of the Supreme Court of the Gold Coast (Eastern Judicial Division) (October 1, 1947) which had dismissed an action by the respondent claiming an account of commission alleged to be due to him, and an order for payment of the amount found due, against the then representatives of the Stools of Asamangkese and Akwatia.

On October 22, 1945, the Governor in Council of the Gold Coast, under section 6 of the Asamangkese Division Regulation Ordinance, 1935, as amended, issued a certificate which, after reciting that a claim by the respondent against the Asamangkese and Akwatia Stools for moneys alleged to be due to him under an agreement made in the year 1921 had been referred for consideration to the Executive Council and that the Governor in Council considered it desirable that the amount which ought to be paid in respect of the said claim should be adjudicated upon in an action against the Stools, certified that in the opinion of the Governor in Council the circumstances were such that the amount which ought to be paid in respect of the claim might properly be the subject of legal proceedings by the respondent against the Stools.

The provisions of the Ordinance and the terms of the certificate of the Governor in Council are set out in the judgment of the Judicial Committee.

The respondent thereupon, on August 29, 1946, issued a writ of summons constituting a statement of claim in which he alleged that in or about August, 1921, it was agreed between the respondent and the defendants, the then representatives of the Stools, that if the respondent introduced to the defendants a company or companies who would enter into mining leases with the defendants in respect of minerals on the Stool lands and financed the prospecting for minerals the defendants would pay to the respondent a commission of five per cent. of all rents or royalties paid by the company or companies introduced during the continuance of a mining lease or leases. The respondent further alleged that the Stool lands were prospected at his expense and that on the discovery of diamonds he introduced to the defendants two named companies who entered into mining leases. He further alleged that he received commission at the rate of five per cent. from 1921 to 1935, but not since 1935, although he had orally and by letters requested payment. He claimed an account of all moneys by way of rents and royalties received by the defendants from the companies and the commission due in respect thereof to him, and payment of the amount found due.

The defendants delivered a defence whereby they denied, inter alia, the making of the agreement alleged; said that the alleged agreement was unknown to, invalid by and unenforceable under, native customary law, and, if purporting to be made in accordance with English law, did not comply with the Statute of Frauds.

Coussey J. in the Supreme Court reached the conclusion that the agreement which the respondent alleged and the consideration for it had never been entered into. He found no money to be due to the respondent in respect of his claim, and accordingly gave judgment for the defendants. As regards the contention that the certificate of the Governor in Council precluded the court from finding that there was no binding contract between the parties, Coussey J. held that the court's duty was not limited to adjudication only as to the amount. He construed the Ordinance and certificate as empowering the court to adjudicate upon the claim as brought and to determine whether any money was due to the respondent and, if so, the amount.

On appeal by the respondent to the West African Court of Appeal (Blackall P., Smith Ag. C.J. (Gold Coast), and Lewey J.A.) on the ground, inter alia, that the trial judge was wrong in reopening and trying the whole case in the face of the certificate issued under section 6 of the Ordinance, the Court of Appeal set aside the judgment of Coussey J. and remitted the case to the court below to determine the amount which ought to be paid in respect of the respondent's claim.

The Stools, through their representatives, appealed.

1954. Feb. 2, 3. *Frank Gahan Q.C.* and *W. T. Wells* for the appellants.

S. N. Bernstein for the respondent.

March 2. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM. This appeal raises a short but troublesome question as to the extent of the jurisdiction conferred upon the courts of the Gold Coast Colony, by a certificate of the Governor in Council, to entertain legal proceedings against the Asamangkese and Akwatia Stools. The certificate was issued to the respondent in this appeal and following upon its issue he brought proceedings against representatives of the Stools, in the Divisional Court of Accra. In the writ of summons it was stated that in or about August, 1921, it was agreed between the plaintiff and the defendants that (1) if the plaintiff introduced to the defendants a company or companies who would enter into mining leases with the defendants, and (2) financed the prospecting of the Stool lands for minerals, the defendants would pay to the plaintiff a commission of 5 per cent. on all moneys paid by the company or companies to the defendants by way of rents or royalties during the continuance of a mining lease or leases. The writ states that in consequence of the agreement the defendants' Stool lands were prospected at the expense of the plaintiff, and on the discovery of diamonds the plaintiff introduced to the defendants a company and a syndicate who entered into mining leases with the defendants. The writ further states that in pursuance of the agreement the defendants paid the plaintiff the commission of 5 per cent. as from 1921 to 1935; that the plaintiff is not aware

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of what sums of money the defendants have received from the company and syndicate since 1935: and that the defendants have not since that date paid the plaintiff any money or commission or rendered him any account of moneys received from the companies, although requested orally and by letters to do so. He therefore claims (1) for an account of all moneys by way of rent and royalties received by the defendants from the companies and of the amount of the commission due to the plaintiff, and (2) for the payment of the amount found due on the accounting. The defendants entered a defence denying the plaintiff's allegations and stating various other defences, including invalidity of the agreement by native customary law, the Statute of Frauds, and the Statute of Limitation.

The parties joined issue on the allegations and defences and, after hearing evidence, the trial judge found that the agreement and the consideration for it was never entered into. He also rejected a contention for the plaintiff that by the terms of the certificate of the Governor in Council he was precluded from finding that no binding contract existed between the plaintiff and the defendant because the Governor in Council must be deemed to be satisfied as to the existence of such a contract and that the court was called upon to adjudicate only as to the amount which ought to be paid to the plaintiff. He accordingly found no money due to the plaintiff and gave judgment for the defendants. On appeal, the West African Court of Appeal, for reasons which the Board will consider in a moment, took the view that the trial judge, by considering the validity of the claim instead of confining himself to the question of the amount to be paid to the plaintiff, had gone beyond the matter to be adjudicated upon by the terms of the certificate of the Governor in Council. He had thus acted in excess of the jurisdiction conferred upon him. By their judgment the appeal was allowed, the order of the trial judge was set aside, and it was ordered that the case be remitted to the court below to determine the sole issue which had been left to the court by the certificate of the Governor in Council, namely, the amount which ought to be paid in respect of the appellants' claim.

The certificate issued by the Governor in Council is as follows: "Whereas a claim by John Edmund Turkson against the "Asamangkese andAkwatia Stools for moneys alleged to be due to "him from the said Stools under an agreement made in or about "the year 1921, whereby the said Stools agreed to pay to the "said John Edmund Turkson 1s. in the £1 of all moneys received "by the said Stools in respect of certain concession granted to the "Consolidated African Selection Trust Ld. and the West African "Diamond Syndicate, has been referred for consideration to the "Executive Council pursuant to the terms of the proviso to "section 6 (2) of the Asamangkese Division Regulation Ordinance "(c. 78): And Whereas the Governor in Council considers it "desirable that the amount which ought to be paid in respect to "the said claim should be adjudicated upon in an action against

"the said Stools: NOW THEREFORE pursuant to the terms of para-
"graph (ii) of the proviso to section 6 (2) aforesaid, the Governor
"in Council hereby certifies that in his opinion the circumstances
"are such that the matter, to wit, the amount which ought to be
"paid in respect of the said claim, may properly be the subject
"of legal proceedings by the said John Edmund Turkson against
"the said Stools."

To appreciate the purpose and effect of this certificate it is necessary to have regard to certain legislation affecting the control and regulation of the property, revenues and expenditure of the Stools in the Asamangkese Division. The matter starts with an Ordinance of March 30, 1935, enacted by the Governor of the Gold Coast Colony, with the advice and consent of the Legislative Council, which had for its purpose to prevent the incurring of any debt or liability on behalf of a Stool without the consent of the Treasurer of the Stool Treasuries appointed under regulations made by the Governor in Council. The Ordinance also enacted that as from its commencement no action should lie against a Stool, and no execution should issue or be enforceable against the revenues of the Stool or any Stool property in respect of any debt or liability incurred whether before or after the commencement of the Ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after its commencement was incurred with the consent of the prescribed officer, i.e., the Treasurer of the Stool Treasury. The effect of this Ordinance was to withdraw entirely from the jurisdiction of the courts any claim against the Stool for a debt or liability incurred before the date of the Ordinance. But under a power given by section 8 of the Ordinance to the Governor in Council to permit and regulate the discharge of debts due and liabilities incurred by a Stool prior to the commencement of the Ordinance, regulations were made, to which it is unnecessary to refer in detail, prescribing certain procedure upon which the Governor could approve of the payment of such debts, and expressly providing that no claim for debts existing prior to the commencement of the Ordinance should be paid by the Treasurer of the Stool Treasury unless such debt had been first approved by the Governor. So matters stood until 1945 when an amendment of subsection (2) of section 6 of the Ordinance of March 30, 1935, was made by an Ordinance of April 7, 1945. It is upon the interpretation of section 6 (2) of the Ordinance of 1935, as so amended, that the question in issue in this appeal depends. As amended the subsection reads as follows:—

"(2) From and after the date of the commencement of this
"Ordinance no action save as is hereinafter provided shall lie
"against a Stool or against any officer appointed under section 8
"(*e*) for the collecting, safe custody, and management of the
"revenue of a Stool and no execution shall issue or be enforceable
"against the revenues of the Stool or any Stool property in respect

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"of any debt or liability incurred whether before or after the commencement of this Ordinance by a person on behalf of the Stool, unless such debt or liability if incurred after the commencement of this Ordinance was incurred with the consent of the prescribed officer; Provided that in any case where a claim in respect to a debt or liability alleged to have been incurred by or on behalf of the Stool before the commencement of this Ordinance has been the subject of an inquiry in accordance with any regulations made under this Ordinance, and the Governor, upon consideration of the record of the inquiry and of any recommendation transmitted to him in connexion therewith is in doubt as to whether or not any payment ought to be made in respect to the claim or any part thereof, or as to the amount which ought to be paid, the following provisions shall have effect:—(i) The Governor, if he thinks fit, may refer the matter to the Executive Council for consideration as to whether or not it is desirable, in the interests of justice, that the claim or any part thereof, or the amount which ought to be paid, should be adjudicated upon in an action against the Stool: (ii) where, upon any such reference, the Governor in Council considers it desirable that there should be any such adjudication, he may, in his absolute discretion and without assigning any reason, certify that in his opinion the circumstances are such that, notwithstanding anything in this Ordinance, the matter may properly be the subject of legal proceedings: (iii) in any case where the Governor in Council has so certified, nothing in this subsection shall be deemed to preclude any court of competent jurisdiction from adjudicating upon the matter to which the certificate relates or to prohibit the issue or enforcement, after judgment, of execution against the Stool property or revenues."

Their Lordships have come to the view that, on a sound construction of this provision, the words "the amount which ought to be paid" cannot be read in the restricted sense put upon them by the Court of Appeal. These words, in the context in which they are used, are not in the opinion of their Lordships unambiguous, as the judges in the court below seem to have thought. The word "ought" in itself introduces an element of ambiguity. Does it mean ought as a mere matter of assessment or accounting or ought as a matter of law? The support for the first meaning lies in the contrast between the words "as to whether or not any payment ought to be made in respect to the claim or any part thereof" in the one branch of the alternative and the words "as to the amount which ought to be paid" in the other branch. But in their Lordships' opinion the difference can be explained by the contrast between "debt" and "liability" in the first part of the subsection and in the opening words of the proviso. This contrast, their Lordships think, is between a claim to an ascertained or liquid sum and a claim to an unascertained or illiquid amount. On this reading

the question whether any payment ought to be made refers to a claim in respect to a debt, and the question as to the amount that ought to be paid refers to a claim in respect of a liability. Their Lordships find support for this meaning in the fact that in each of subheads (i), (ii) and (iii) of the proviso "the matter" there mentioned refers naturally to the claim as a whole. If, accordingly, under subhead (ii) the Governor in Council may certify that "the matter" may properly be the subject of legal proceedings there seems to be no point, and maybe even a doubt as to the competence, of excluding any part of the claim from legal proceedings. In their Lordships' opinion, accordingly, it accords best with the natural and reasonable meaning of the language used to construe the words "the amount which ought "to be paid" as covering the question of liability upon the claim as a whole and not as referring to a mere question of quantum.

It is not out of place to point to the difficulties and inconveniences which would result from the more restricted meaning being put upon these words. It was conceded that it would be relevant to consider whether the "amount" had been satisfied by payment, in whole or in part. But if so, why should a defence based on the Statute of Limitation, or the Statute of Frauds, or on the invalidity of the agreement, or the absence of agreement, be excluded? These may all bear on the question whether any sum "ought" to be paid. There are also, in their Lordships' view, practical difficulties and inconveniences in part of a claim being determined by the Governor and part by the courts, and as to the manner of its enforcement. Where there is ambiguity, as in their Lordships' view there is here, these are relevant considerations.

The view was apparently taken by at least one of the Justices of Appeal in the court below that the trial judge should have proceeded on the basis that the claim had already been admitted by the Governor in Council. If the conclusion reached by the Court of Appeal were a sound one that may have been a proper assumption to make, but for the reasons stated it falls to be rejected. There is, in fact, no such statement in the certificate of the Governor.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed, that the judgment of the West African Court of Appeal should be set aside and the case remitted to the Court of Appeal to adjudicate upon the other grounds of appeal contained in the appeal from the judgment of the trial judge. The costs of the appeal and of the hearing in the West African Court of Appeal which led up to the judgment dated February 9, 1949, must be paid by the respondent. The costs otherwise will be dealt with by the West African Court of Appeal after the case has been determined on the merits.

Solicitors: *Sole, Sawbridge & Co.; A. L. Bryden & Williams.*

C. C.

[PROBATE, ETC., DIVISION.]

1954
Jan. 13.

Wallington J.

* IN THE ESTATE OF CAMPBELL, DECD.

Will—Interlineation—Interlineation in codicil—Validity—Examination of circumstances.

Executor and Administrator — Executor — Remuneration—Bank—Bank appointed as executor and trustee by codicil—No charging clause—Bank entitled to charge.

The deceased made and duly executed a codicil to his will. The codicil contained an interlineation, but the attesting witnesses were unable to state whether the words were included in the codicil at the time of execution.

The will appointed certain solicitors as executors and trustees, with a provision that they should be paid their ordinary professional charges. The codicil substituted for the solicitor a bank but neither will nor codicil contained power for a trust corporation to charge remuneration in accordance with its scale fees:—

Held, (1) that an examination of the circumstances surrounding the creation and execution of the codicil, and of the document itself, showed that the interlineation had been included before execution of the codicil.

(2) That the bank was in the circumstances entitled to charge its ordinary charges in administering the estate.

PROBATE MOTION.

The facts before the court were summarized in the case on motion as follows:—

"Fuller Alfred Bromley Campbell late of Trevona Ashtead "Woods Ashtead in the County of Surrey died on September 5, "1953 at Leatherhead Hospital, Leatherhead in the County of "Surrey. By his will dated March 14, 1944, he appointed John "Cyril Perry (who died on December 30, 1948) and John Melliar "Adams Beck to be the executors and trustees thereof. Such "persons were at that time two of the partners in Messrs Parson "Lee & Co. of 35, John Street, Bedford Row, London, solicitors. "By a codicil dated August 6, 1953, the deceased appointed "Westminster Bank Ld. to be executor and trustee of his will "in the place of Messrs. Parson Lee & Co. . . . The learned "registrar has directed that this Honourable Court be moved "to determine the proper person to apply for a grant of probate.

"Neither the said will nor the said codicil contains power for "a trust corporation to charge remuneration in accordance with "its scale fees. The said codicil contains an interlineation. "There appears to be no conclusive evidence that such inter-"lineation was made prior to the execution thereof.

"Subject to specific legacies given by the said will and subject "also to certain questions of construction which may arise as a "result of the wording of the said codicil, it is apprehended that "the persons beneficially interested in the estate of the deceased "are as follows:—(1) Alice Dillon Malcolm Longbotham (sister "of the deceased) and Mary Davison (nurse housekeeper of the

"deceased) are entitled to the income of the residuary estate "during their respective lives; (2) after the death of the sur-"vivor of such persons, Arthur Davison is entitled to the income "of the residuary estate during his life; (3) the capital devolves "on the Greater London Fund for the Blind."

The court was moved "to decree probate of the said will and "codicil (if proper, with the omission of the said interlineation) "to Westminster Bank Ld. and to authorize the said bank to "act as executor and trustee on its standard terms and conditions "in force at the date of the said codicil including those governing "the bank's remuneration in accordance with its scale of fees."

The executor Perry died in December, 1948, but Beck survived the deceased. The bank manager swore in support of the case on motion an affidavit in which he averred:—"The said will "contained the following provisions (shortly stated):—(*a*) The "deceased gave a number of specific bequests. (*b*) The deceased "gave one half of his residuary estate to his sister Alice Dillon "Malcolm Longbotham during her life and after her death to his "nurse-housekeeper Mary Davison during her life. (*c*) The "deceased gave the other half of his residuary estate to the said "Mary Davison during her life subject to a power for the trustees "in certain circumstances to suspend payment of the income to "her and after her death to the said Alice Dillon Malcolm Long-"botham during her life. (*d*) After the death of the survivor of "the said Alice Dillon Malcolm Longbotham and Mary Davison "the deceased gave the income of his residuary estate in per-"petuity to any society or organization selected by his trustees "which undertakes to look after the welfare of aged and incapaci-"tated nurses. (*e*) The will contained a power for a professional "trustee to charge for business done by him. The bank has been "advised that in accordance with the decision in *Re Cooper*[1] this "power would not entitle a trust corporation to charge its scale "fees.

"The deceased was admitted to Leatherhead Hospital on "July 26, 1953. On August 6, 1953, he executed a 'home-made' "codicil to his said will which was to the following effect:—(*a*) "It was addressed to 'my solicitor, Messrs. Parson Lee & "'Co. . . .' (*b*) Subject to certain questions of construc-"tion which may arise as to the exact meaning of the "words used by the deceased, the deceased in substance "revoked the trusts declared by his will concerning his residuary "estate and gave the income thereof to the said Alice Dillon "Malcolm Longbotham and Mary Davison during their respective "lives and after the death of the survivor to Arthur Davison "during his life and subject as aforesaid the deceased gave the "capital of his residuary estate to the Greater London Fund for "the Blind. (*c*) The deceased then provided as follows:—'I "'wish to change the executors and trustees named in my will "'from Messrs. Parson Lee & Co. . . . to the Westminster Bank "'whom I now appoint executors and trustees.'

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"The codicil was witnessed by Dr. Gordon Newbury Box and "Sister Mary Elizabeth Walsh of the Leatherhead Hospital. "The deceased died as aforesaid on September 5, 1953, at the "hospital.

"The primary difficulty which has arisen is whether the West-"minster Bank Ld. has been properly appointed as sole executor "and trustee of the deceased's will. . . . It is understood by "the bank that John Melliar Adams Beck does not dispute that "the effect of the codicil is to appoint the bank to be executor "and trustee in the place of himself. If the bank has been "duly appointed executor and trustee, it would not desire to act "unless it were able to charge remuneration in accordance with "its scale fees. Messrs. Parson Lee & Co. have communicated "with the said Alice Dillon Malcolm Longbotham, Mary Davison, "Arthur Davison and the Greater London Fund for the Blind "and all such beneficiaries have consented to the bank receiving "remuneration in accordance with its scale fees.

"The codicil contains an interlineation to the effect that on "the death of the first to die of the said Alice Dillon Malcolm "Longbotham and Mary Davison the survivor shall be entitled "to the whole income during the residue of her life. The bank "has been advised that if such interlineation were deleted then "on the death of the first to die of such beneficiaries the income "of her share as a matter of construction of the codicil might not "devolve on the survivor but might be payable to the estate of "the deceased beneficiary until the death of the survivor.

"The bank has been informed by Messrs. Parson Lee & Co. "who were accustomed to act as the deceased's solicitors, that "the codicil, including the interlineation, is in the handwriting "of the deceased."

The witness Mary Elizabeth Walsh, after swearing to the attestation of the codicil, stated: "I saw both sides of the piece "of notepaper to the extent that I was aware that there was "writing on both sides. My attention was not drawn to the "interlineation which appears in the said paper and I am unable "to say whether or not such interlineation was present when "Mr. Bromley Campbell signed his name. I did not know the "nature of the document I was signing. After I had signed the "piece of notepaper I gave it back to Mr. Bromley Campbell. "Dr. Box and I then left the room."

The witness Dr. Gordon Newbury Box averred: "I visited "Mr. Bromley Campbell in hospital at frequent intervals and I "was there on August 6, 1953. Mr. Bromley Campbell told me "that he wanted me to witness his signature on a paper and that "another witness was required. Sister Mary Elizabeth Walsh "was in the room with me. Mr. Bromley Campbell produced "a small sheet of notepaper. He then signed his name at the "foot or end thereof as the same now appears thereon in my "presence and also in the presence of the said Mary Elizabeth "Walsh both of us being present at the same time. I was able

"to see that the sheet of paper had writing on both sides of it. "Miss Walsh and I thereupon attested and subscribed the said "sheet of notepaper in the presence of Mr. Bromley Campbell. "The said piece of notepaper is now produced and shown to me "marked 'G. N. B.' My attention has been drawn to what "appears to be an interlineation on the front page of the paper "inserting the words 'survivor of either of the above taking the "whole income.' At the time of the execution of the paper I "did not see the front of it sufficiently closely to examine it. I "could see that both sides contained writing and that I was "signing on the back page. No reference was made by Mr. "Bromley Campbell to the interlineation and I am unable to say "whether or not such interlineation was present when Mr. "Bromley Campbell signed his name.

"In my opinion prior to during and subsequent to the "execution of the said document Mr. Bromley Campbell was of "good mental capacity although physically he was a sick man."

J. A. Brightman for the applicant, the Westminster Bank Ld.

Richard Vick for Mrs. Longbotham.

Michael Bowles for Mary and Arthur Davison.

C. A. Marshall-Reynolds for the Greater London Fund for the Blind.

Reference was made to Mortimer on Probate Law and Practice, 2nd ed., p. 171 (as to interlineations) and to *In re Cooper*.[1]

WALLINGTON J. This is a very interesting matter; although it is within a comparatively small compass.

The deceased made a will dated March 14, 1944, whereby he appointed John Cyril Berry and John Melliar Adams Beck to be the executors and trustees thereof. There was no doubt about the due execution and validity of that will. The executors thereby appointed were then two of the partners in the firm of Messrs. Parson Lee & Co. who were the solicitors for the deceased. On December 30, 1948, John Cyril Perry died.

On August 6, 1953, the deceased made a codicil to his will whereby in effect he revoked the appointment of executors and trustees contained in the will of March 14, 1944, and substituted the Westminster Bank. His language was "I wish to change "the executors and trustees named in my Will from Messrs. "Parson Lee & Co. . . . to the Westminster Bank whom I now "appoint executors and trustees."

The first question which I have to determine is whether or not that codicil (an admittedly home-made document) is, as everybody concerned thinks that it is, a codicil to the will of the testator made on March 14, 1944, and, if it is, whether an interlineation in it is or is not in fact to be treated as part of the

[1] (1939) 160 L.T. 453.

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document and therefore as a valid part of the codicil and included in the probate. The interlineation appears to me to have been written either before or after the rest of the document, and the attesting witnesses in their affidavits are unable, for reasons which they have given, to say whether the words interlined were in the codicil at the time when it was executed. The matter, therefore, must be determined by an examination of the circumstances surrounding the creation and execution of the codicil. I have examined with the greatest care everything upon the face of the document including the interlineation and I have come to the conclusion (*a*) that the whole of the codicil was written by the testator himself; (*b*) that within a short period of time all the words in the codicil including those interlined, were written by him; (*c*) that the ink with which the writing was done is the same throughout; (*d*) that the testator had written the words interlined after the rest of the document was written out; and (*e*) that he wrote those words in the document before it was executed and that he intended that his signature, and that of the attesting witnesses, should authenticate the whole document as it then stood.

In those circumstances my opinion is that the document is a complete document, including those interlined words. There is, in my opinion, no doubt as to its due execution.

Questions have been raised as to: (i) whether there is a valid appointment of the Westminster Bank as sole executor and trustee under both will and codicil; and (ii) whether the bank should be given the right to charge for its services as executor and trustee under the will and codicil. In my opinion it is clear that the codicil contains an express and unambiguous appointment of the bank as executor and trustee under both will and codicil; it is the plain intention of the testator to place the administration of his whole estate in the hands of the bank on the basis of both the testamentary documents.

The only reference in the will to any question of charges is a provision that the solicitors for the testator (who, under the will, were appointed as executors and trustees) should be paid their ordinary professional charges. Obviously that provision cannot apply to the bank. It is however plain that the testator intended the bank should be the executor and trustee and would not have wished them so to act con amore. Moreover the testator clearly intended (for he said so in the will) that his solicitor executors and trustees should be entitled to charge their ordinary professional charges for their work in that capacity. Therefore, when in the codicil, he expressed a wish to change the executors named in his will "from Messrs. Parson Lee & Co. to the Westminster "Bank" it follows that he changed from one professional executor, to be paid, to another who would act in the same capacity and with the same right to be paid.

Further it is plain to my mind that the testator never contemplated the appointment of an unpaid executor or that the bank

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would accept the appointment upon a gratuitous footing. There is also ample authority that the court is entitled in cases of this kind to order that the bank acting in the capacity of executor and trustee should be entitled to charge their ordinary charges for the work they do in administering the estate.

I therefore decree that probate of both the will and codicil, including the interlined words, be granted to the Westminster Bank Ld. and that the bank when acting under the grant so act on their standard terms and conditions in force at the date of the said codicil including those governing the bank's remuneration in accordance with their scale of fees.

[The following order was made:—" . . . it is ordered that " probate of the last will and testament, with codicil thereto " bearing date respectively March 14, 1944, and August 6, 1953, of " Fuller Alfred Bromley Campbell deceased be granted to West- " minster Bank Ld. the sole executor appointed by the effect of " the said will and codicil and it is further ordered that the said " codicil be admitted to proof in its entirety including the inter- " lineation of the words ' Survivor of either of the above taking " ' the whole income ' between lines 10 and 11 thereof. And it " is further ordered that the said Westminster Bank Ld. be " authorized both as executor and trustee of the said will and " codicil to act on its standard terms and conditions in force at the " date of the said codicil including those governing the said " bank's remuneration in accordance with its scale of fees.

" Costs of Alice Dillon Malcolm Longbotham, Mary Davison, " Arthur Davison and Greater London Fund for the Blind to be " paid on a solicitor and client basis out of the estate of the said " deceased."]

Solicitors: *Parson, Lee & Co.; William Sturges & Co.; Woodhouse-Smith & Co.; Gregory, Rowcliffe & Co.*

J. B. G.

[QUEEN'S BENCH DIVISION.]

* SPRINGETT *v.* HAROLD.

1953 *Oct.* 15.

Lord Goddard C.J., Sellers and Havers JJ.

Public Health—Nuisance—Dwelling-house—Rooms in need of decorative repair—Discomfort and inconvenience—Not injurious to health—Public Health (London) Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 50), *s.* 82 (1) (*a*).

The internal walls and ceilings of some rooms in a dwelling-house owned by the respondent were stained and peeling and in need of decorative repair. They were alleged by the appellant, a sanitary inspector, to be in such a condition as to cause a nuisance within the meaning of section 82 (1) (*a*) of the Public Health (London)

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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Act, 1936. The owner having failed to comply with notices served on him requiring him to abate the nuisance, the sanitary inspector preferred a complaint against him. The magistrate, finding that the rooms in question were not damp or verminous or injurious to health and were fit for human habitation, dismissed the complaint, holding that the mere want of decorative repair did not constitute a nuisance within the meaning of the section. On appeal:—

Held, that on the facts found by the magistrate his decision was correct in law.

Betts v. *Penge Urban District Council* [1942] 2 K.B. 154; 58 T.L.R. 283; [1942] 2 All E.R. 61 distinguished on the facts.

Special case stated by metropolitan magistrate sitting at Tower Bridge.

A complaint was preferred by the appellant, John Louis Springett, a sanitary inspector employed by the Bermondsey Borough Council, against the respondent, Harold F. Harold, for that he had failed to abate a nuisance at 12 Culling Road, Bermondsey, caused by his act, default or sufferance, and of which nuisance he had been given notice, contrary to section 82 of the Public Health (London) Act, 1936.

At the hearing of the complaint the following facts were proved or admitted.—The respondent was the owner of the premises which were let to a tenant. On March 20, 1953, following a visit made by the appellant to the premises, a notice was served on the respondent on behalf of the borough council alleging that the premises were in such a state as to be a nuisance by reason of the fact that the walls and ceilings of certain of the first floor rooms and a landing were stained and peeling. The respondent was required to abate the nuisance. On May 15, 1953, a statutory notice was served on him. No work was done in pursuance of the notices prior to the hearing of the complaint save that certain of the rooms in question had been decorated. The walls and ceiling of the first floor rooms and landing were stained and dirty and flaking and were in need of decorative repair. They were not damp or verminous or injurious to health, and the premises were fit for human habitation.

It was contended for the borough council that the rooms and landing were in such a condition as to cause discomfort and inconvenience to the tenant and that consequently there existed in the premises a "nuisance" within the meaning of section 82 of the Public Health (London) Act, 1936.[1]

The respondent denied the contention and asserted that he was prepared to supply the tenant with materials with which to redecorate the rooms and landing.

The magistrate dismissed the complaint, holding that the mere want of internal decorative repair did not constitute a

[1] S. 82 of the Public Health (London) Act, 1936 provides: "(1) "The following matters shall . . . be "nuisances which may be dealt with "summarily under this Act, that is to "say:—(*a*) any premises in such a "state as to be a nuisance or injurious "or dangerous to health; . . ."

nuisance within the meaning of the section even if it did cause discomfort and inconvenience to the tenant. The sanitary inspector appealed.

Leonard Caplan for the borough council. The magistrate was wrong in deciding that a condition causing discomfort and inconvenience could not be a nuisance within the meaning of the Act. In *Betts* v. *Penge Urban District Council*,[2] an authority under the Public Health Act, 1936, it was held that a landlord who caused discomfort and inconvenience to a tenant committed a statutory nuisance under that Act.

[LORD GODDARD C.J. Whatever the court may say in considering a case it must have some regard to the facts before it. In *Betts* v. *Penge Urban District Council*[1] a landlord removed the doors and windows of a house which was occupied by a tenant. That is very far from this case where there is merely a failure to put into decorative repair. Whether or not discomfort and inconvenience caused is such as to be a nuisance must always be a question of degree. The magistrate could not possibly have held that a nuisance had been committed on the facts that he has found in the present case.]

If he had found on these same facts that the want of decorative repair did amount to a nuisance it would be a point of law.

[LORD GODDARD C.J. You are asking the court to give a consultative opinion. It will not do that, but will decide the case on the facts found by the magistrate.]

The defendant appeared in person.

LORD GODDARD C.J. The court has already intimated the view it is taking in this case. The facts are quite different from those in *Betts* v. *Penge Urban District Council*.[1] We do not propose to give a judgment because the case is too clear for argument. The appeal is dismissed.

Appeal dismissed.

Solicitor: *F. W. J. Baldwin.*

[2] [1942] 2 K.B. 154; 58 T.L.R. 283; [1942] 2 All E.R. 61.

[1] [1942] 2 K.B. 154.

[COURT OF APPEAL.]

C. A.

1954
Feb. 18, 19.

Lord Goddard C.J., Singleton and Hodson L.JJ.

* WINGROVE *v.* PRESTIGE & CO. LD.

[1951 W. 1953.]

Building—Safety regulations—Scaffold—Safe means of access—Scaffold protruding across access to building site—Safe means of access to "every place at which any person . . . has to work"—Duty limited to employees of contractor—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 4 (*ii*), 5.

Regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which directs that contractors and employers of workmen must provide "suitable and sufficient scaffolds . . . for "all work that cannot safely be done on or from the ground . . . "and sufficient safe means of access . . . so far as is reasonably "practicable . . . to every place at which any person has at any "time to work" is intended only for the protection of workmen employed by the contractor concerned, and a person not so employed has no right of action for personal injuries suffered by him as a result of a breach of the regulation.

Decision of Hilbery J. [1953] 1 W.L.R. 449; [1953] 1 All E.R. 694 affirmed.

Appeal from Hilbery J.[1]

The plaintiff, Henry James Wingrove, was employed by the Middlesex County Council as clerk of the works in connexion with the building of a school for the county council by the defendants, Prestige & Sons Ld., a firm of building contractors. The defendants were in occupation and control of the building and works on the site which were operations to which regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948, applied.

Sometime before June 29, 1950, the defendants had partially removed some scaffolding which they had erected, with the result that a scaffold pole had been left at a height of about 5 ft. 7 ins. across a passage-way through which people might have to pass. On the day of the accident, the plaintiff, thinking, as he said, that he saw two men "sneaking off" from work, hurried after them through the passage and struck his head against the scaffold pole and seriously damaged his eye. He had already lost the sight of one eye in an accident which he had suffered some years previously, and as the result of the present accident he lost the sight of the remaining eye and subsequently died from the injury received after the trial before Hilbery J. The proceedings were continued by his executor. The plaintiff was aware of the existence of, and the position of, the scaffold pole at the time of the accident and had protested to the defendants' general foreman that it was dangerous. He brought an action against the defendants claiming damages for negligence or, in the alternative, for

[1] [1953] 1 W.L.R. 449; [1953] 1 All E.R. 694.

a breach by the defendants of their statutory duty under regulations 4 and 5 of the Building (Safety, Health and Welfare) Regulations, 1948.[2]

Hilbery J., applying the principle laid down by the House of Lords in *London Graving Dock Co. Ld.* v. *Horton*,[3] held that the plaintiff was an invitee, but that, as he was aware of the existence of the obstruction, it did not constitute an unusual danger so far as he was concerned which entitled him to succeed at common law. He further held that there had been no breach by the defendants of their statutory duty under regulation 5. The plaintiff appealed against the latter finding only, it being conceded that in regard to his claim at common law there was evidence to support the finding of Hilbery J.

J. H. Bassett Q.C. and *W. G. Wingate* for the plaintiff.

Montague Berryman Q.C., *Marven Everett Q.C.* and *Scotney Russell* for the defendants.

The following case was referred to in argument: *Sheppey* v. *Matthew T. Shaw & Co.*[4]

LORD GODDARD C.J. stated the facts and continued: Mr. Bassett argued that the plaintiff had a cause of action for breach of regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948, which provides that "Suitable and sufficient "scaffolds shall be provided for all work that cannot safely be "done on or from the ground or from part of the building, or "from part of a permanent structure or from a ladder or other "available means of support . . ." Stopping there for a moment, it is quite obvious that this accident did not occur by reason of any defect in a scaffold, because the plaintiff was not using a scaffold. The regulation goes on: "and sufficient safe means "of access shall so far as is reasonably practicable be provided "to every place at which any person has at any time to work."

The joint effect of the first and second parts of regulation 5 is that the later words in the regulation in regard to means of access are clearly confined to the contractor's own workmen. The words "any person" mean "any person employed by the "contractor," and, therefore, as the plaintiff was not employed by the contractor he had no cause of action under the words of that regulation. The only question, therefore, is, had he any

[2] Building (Safety, Health and Welfare) Regulations, 1948, reg. 4 (ii): " . . . it shall be the duty of "every contractor and employer of "workmen who erects or alters any "scaffold to comply with such of the "requirements of regulations 5–30 as "relate to the erection or alteration "of scaffolds. . . ."

Reg. 5: "Suitable and sufficient "scaffolds shall be provided for all "work that cannot safely be done on "or from the ground . . . and suffi-"cient safe means of access shall so "far as is reasonably practicable be "provided to every place at which any "person has at any time to work."

[3] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[4] [1952] W.N. 250; [1952] T.L.R. 1272.

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right at common law? It is not now contended that on the findings of Hilbery J. he had such cause of action, and therefore this appeal must be dismissed.

Singleton L.J. I agree that the appeal should be dismissed. I felt some difficulty at one time about the two separate provisions in regulation 5 of the Regulations of 1948, but it appears clear when one examines the regulation more closely that the defect, if defect it be, of which complaint is made here, could not apply to a person who was not in the employment of the contractors at the time.

Hodson L.J. I agree, and have nothing to add.

Appeal dismissed.

Solicitors: *Philcox, Sons & Edwards; Barlow, Lyde & Gilbert.*

P. B. D.

[CHANCERY DIVISION.]

1954
Mar. 1.
Upjohn J.

**In re* WORTHINGTON, decd.
LEIGHTON *v.* MacLEOD.

[No. 193 of 1951.]

Solicitor—Costs—Trustee—Administrator—Insolvent estate—Solicitor acting as administrator—Court's discretion to allow costs—Exceptional circumstances.

Trust and Trustee—Remuneration—Solicitor. Executor and Administrator.

The general rule that a solicitor acting as trustee of an estate cannot charge for his professional services is subject to the inherent jurisdiction of the court to order remuneration where it thinks fit, but that jurisdiction should be exercised sparingly and only in exceptional circumstances.

A testator died in 1947 having appointed his wife sole beneficiary and executrix under his will. The estate was insolvent, the liabilities being greatly in excess of the assets, and the widow on the advice of her solicitors did not take out a grant of probate. During 1948, the first applicant, a partner in the firm of solicitors who were conducting her affairs, negotiated with the principal creditors with a view to a compromise of their claims in order to save something out of the estate for the widow.

She appointed him to act as her attorney, and he obtained a grant of administration with the will annexed. It proved impossible to reach a compromise and he decided that the estate ought to be administered in bankruptcy. He prepared the bankruptcy petition, and carried out the preparation and lodgment of accounts and receipts of the estate during administration under rule 304 of the Bankruptcy Rules, 1952.

The solicitors asked for an order for payment of their profit costs out of the estate in connexion with those matters, notwithstanding that the administrator was a solicitor and a partner in the firm of solicitors acting for the widow:—

Held, that although the partner had acted properly and had done work which had to be done, there were no exceptional circumstances to justify a departure from the rule that a solicitor trustee was not entitled to remuneration.

In re Masters [1953] 1 W.L.R. 81; [1953] 1 All E.R. 19 and *Dale* v. *Inland Revenue Commissioners* [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671 applied. *Bainbrigge* v. *Blair* (1845) 8 Beav. 588 and *In re Salmen* (1912) 107 L.T. 108 considered.

MOTION.

Sydney Neville Worthington, by his will dated May 20, 1940, appointed his wife his sole beneficiary and executrix. He died on September 27, 1947. The widow consulted as solicitors the second applicant, Messrs. Franks, Charlesly & Leighton; and the first applicant, Lionel Lazurus Leighton, a partner in the firm, was concerned with the conduct of her affairs. It appeared that the estate was insolvent, the liabilities amounting to £45,000 and the assets to about £9,500. The widow was advised by Mr. Leighton that it was of little use to take out a grant of probate, as it would occasion great expense with little prospect of her receiving any moneys out of the estate.

During 1948 Mr. Leighton, whom the court held had acted with absolute propriety, conducted negotiations with the principal creditors with a view to a compromise, in order to save something out of the estate for the widow. On October 11, 1948, he wrote to the widow (who had gone to live with a daughter in New Zealand) suggesting that she should appoint an attorney administrator. He pointed out that it would save money if she appointed him or his partner, but that she was of course at liberty to appoint whom she pleased. The widow appointed Mr. Leighton her attorney. On May 10, 1950, he obtained letters of administration with the will annexed.

No settlement with the creditors could be reached, and Mr. Leighton decided that the proper course was to have the estate administered in bankruptcy. He prepared a petition to the court in bankruptcy, and undertook the preparation and lodgment of accounts and receipts during administration of the estate pursuant to rule 304 of the Bankruptcy Rules, 1952.

By this motion the applicants, Mr. Leighton and the firm of Franks, Charlesby & Leighton, asked that notwithstanding that Mr. Leighton was a solicitor of the Supreme Court he might be allowed to charge the estate of the deceased his profit costs for preparing the bankruptcy petition and the preparation and lodgment of the accounts and receipts under rule 304.

Edward Sutcliffe for the applicants.

John Sheldon for the respondent, the trustee in bankruptcy.

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Cases cited in argument other than those referred to in the judgment: *In re Bignell* *; *In re Corsellis* †; *In re Smith's Estate.*‡

Upjohn J. Mr. Leighton is the sole administrator of the deceased, and the law as to receiving remuneration is of course quite clear. He cannot charge for work done as administrator, but must give his services gratuitously. On the other hand it cannot be doubted that the court has a jurisdiction to direct remuneration shall in a proper case be allowed to the administrator. That appears from the recent decision in *In re Masters, decd.*,[1] and from the statement by Lord Cohen in *Dale* v. *Inland Revenue Commissioners*,[2] where his Lordship said this[3]: "These cases undoubtedly establish that a trustee cannot "make a profit out of his trusteeship unless authorized so to do "by the instrument creating the trusteeship or by an order of "the court, and that if a testator attaches remuneration to the "trusteeship, that remuneration is, as between the trustee and the "estate bounty, liable to legacy duty while that duty was leviable "and postponed to the claims of creditors if the estate was "insolvent . . ." Lord Cohen was there referring to *In re White*,[4] a decision of Kekewich J. which was affirmed[5] by the Court of Appeal, where it was held that a trustee in a case where there was a charging clause in the will could not, when the estate became insolvent, charge for his services because that was a gift to him.

It is clear equally that although the court has a jurisdiction to allow remuneration to trustees, that jurisdiction should only be exercised sparingly, and in exceptional cases. Danckwerts J. in *In re Masters, decd.*[6] has given one example of such a case; that was the case of *In re Macadam*[7] where trustees who, by virtue of the trust holding of shares in a company, became directors and received directors' fees, and it was held that in the circumstances of that particular case it would be proper to allow them to keep at any rate part of those fees as and by way of remuneration for doing that exceptional work, that is acting as directors of the company.

Another illustration was given by an ancient case of *Bainbrigge* v. *Blair*,[8] where Lord Langdale M.R. gave, again purely by way of example, the case of a trustee who said that he was willing to carry out certain matters for the benefit of the trust, but that he was not prepared to spend the time necessary to do those things unless he received some remuneration. It might, he thought, in such a case be proper to sanction remuneration. I should

* [1892] 1 Ch. 59.

† (1887) 34 Ch.D. 675; 3 T.L.R. 355.

‡ [1894] 1 I.R. 60.

[1] [1953] 1 W.L.R. 81; [1953] 1 All E.R. 19.

[2] [1954] A.C. 11; [1953] 3 W.L.R. 448; [1953] 2 All E.R. 671.

[3] [1954] A.C. 34.

[4] [1898] 1 Ch. 297.

[5] [1898] 2 Ch. 217; 14 T.L.R. 503.

[6] [1953] 1 W.L.R. 81.

[7] [1946] Ch. 73; 62 T.L.R. 48; [1945] 2 All E.R. 664.

[8] (1845) 8 Beav. 588.

observe in passing that *Bainbrigge* v. *Blair*[8] might have been decided differently had it been heard a few years later because it appears to be the type of case of which the leading authority is *Cradock* v. *Piper*,[9] which decided that where a trustee solicitor acts for himself and co-trustees, and the work which he has done for himself and his co-trustees has been of benefit to the estate, and no additional expense has been incurred by his acting for himself, then he is entitled to claim and to charge for his professional services. That rule is well recognized and must be taken as settled; but it is exceptional and anomalous and not to be extended beyond the case where a trustee is acting for himself and for another or others. Notwithstanding that *Bainbrigge* v. *Blair*[10] might have been decided differently, the statement which I have quoted from the judgment of Lord Langdale in that case is useful, as showing by way of example, the sort of cases in which the court might exercise its discretion to allow remuneration.

I must not be taken as laying down any rule that where trustees act as directors or refuse to undertake work in the future without remuneration, the court ought to treat them as exceptional cases and allow remuneration. I merely refer to those cases as examples of what may in some circumstances be considered exceptional cases and where the court on a review of all the relevant facts may come to the conclusion that remuneration should be allowed.

The matter was also considered by Eve J. and the Court of Appeal in *In re Salmen.*[11] In that case the testator "appointed "three persons as executors and trustees of his will and gave to "them his business and the premises where it was carried on "upon trust to carry on the same for such period as they might "think fit; and he gave power to the trustees to employ one or "more of them at a salary to manage the business. One of the "executors and trustees having been appointed by the others of "them to manage the business at a salary which was duly paid "to him, they claimed to be entitled, in an action brought for "the administration of the estate, to be allowed that remunera-"tion. It was anticipated that the estate would prove to be "insolvent"; and it was held that "the allowance claimed could "not be made to the executors and trustees as against creditors "of the estate."

In his judgment Eve J. said: "I am not saying that the "court has not jurisdiction in exceptional cases to provide for "remuneration of executors and trustees even in the absence of "special provision in the will. And in the face of the decision in "*Foster* v. *Ridley*,[12] to which Mr. Buckmaster has drawn my "attention, it would be impossible for me to say that there is "no such jurisdiction." Eve J. then said that in his view the

[8] 8 Beav. 588.
[9] (1850) Mac. & G. 664.
[10] 8 Beav. 588.
[11] (1912) 107 L.T. 108, 110.
[12] (1864) 4 De G.J. & S. 452.

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jurisdiction ought to be founded on some proposition of implying a contract "on the part of those persons against whom the claim "for remuneration is made to remuneration for services which "the person claiming to be remunerated has discharged . . ." I do not think that it is right to put the matter upon such a basis. I think the true rule is that the court has an inherent jurisdiction to allow a trustee remuneration even as against creditors, but that it must be exercised sparingly and only in exceptional cases. When *In re Salmen*[13] was heard in the Court of Appeal, that court did not consider the question of inherent jurisdiction at all; there the matter was held to be governed by the decision in *In re White*.[14]

[His Lordship stated the facts substantially as set out above and continued:] It was said that the whole object of Mr. Leighton becoming attorney administrator was to keep the costs down to a minimum; the work which he did in preparing the petition and the necessary accounts was work which had to be done by somebody, and the estate, therefore, had suffered no loss; on the contrary it has benefited because Mr. Leighton was, of course, acquainted with the whole matter and could therefore prepare the petition and accounts more quickly and less expensively than anyone else. There is much force in that contention. But the rule seems to me to be a strict one, and if in this case I granted the application it would be open to solicitors to say in almost every case that they had acted honestly and properly, and that there had been no loss to the estate, so that they were entitled to their costs; and the salutary rule that a solicitor trustee cannot charge for his services would be virtually destroyed.

Although I have much sympathy with Mr. Leighton I can find nothing in this case which can be described as exceptional in any way, and on that ground I must refuse this motion.

Application refused.

Solicitors: *Franks, Charlesly & Leighton; Kingsley, Napley & Co.*

I. G. R. M.

[13] 107 L.T. 108.

[14] [1898] 1 Ch. 297.

[COURT OF CRIMINAL APPEAL.]

*REGINA v. WARREN.

C. C. A.

1954
Feb. 22.

Lord Goddard C.J., Cassels and Slade JJ.

Criminal Law — Court of Criminal Appeal — Jurisdiction — Summary conviction—Committed to quarter sessions for sentence—Powers of Court of Criminal Appeal to inquire into committal order—Criminal Justice Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 29 (3).

The appellant, having been convicted by a magistrate on four charges of indecent assault on small boys, was committed to quarter sessions for sentence, the magistrate being of the opinion that the case warranted a greater sentence than he could impose. Quarter sessions passed a sentence of five years' imprisonment. The appellant appealed against that sentence to the Court of Criminal Appeal under section 29 (3) of the Criminal Justice Act, 1948, which provides: "(*d*) if the appeal committee or court of quarter sessions "passes a sentence which the court of summary jurisdiction would "not have had power to pass, the offender may appeal against "the sentence to the Court of Criminal Appeal as if he had been "convicted on indictment":—

Held, that in such cases the Court of Criminal Appeal had no power to inquire into the question of whether the appellant was rightly committed to quarter sessions, but could consider only the sentence under the powers given to the court by section 4 of the Criminal Appeal Act, 1907. The right course for a person who wished to take the point that he had been wrongly committed to quarter sessions was to apply to the Divisional Court of the Queen's Bench Division for an order of prohibition or certiorari before he appeared before quarter sessions.

APPEAL against sentence.

The appellant, Vincent Roy Warren, a housemaster at a London County Council Reception Home, was charged with four cases of indecent assault on small boys. At the hearing the prosecution asked the magistrate to deal with the cases summarily under section 19 of the Magistrates' Courts Act, 1952. The magistrate, being of the opinion that the case deserved a greater sentence than the twelve months' imprisonment which he was empowered to give, exercised his powers under the Criminal Justice Act, 1948, section 29,[1] and the Magistrates' Courts Act, 1952, s. 29,[2] and, having convicted the appellant, committed him

[1] Criminal Justice Act, 1948, s. 29 (3): "Where an offender is [committed to quarter sessions] for sentence . . . the following provisions shall have effect, that is to say:— "(*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment; . . . "(*d*) if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment. . . ."

[2] Magistrates' Courts Act, 1952, s. 29: "Where on the summary trial under . . . section 19 of this Act of an indictable offence triable by quarter sessions a person who is not

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to quarter sessions for sentence. The appeal committee of London Sessions sentenced him to five years' imprisonment.

Montague Waters for the appellant.
J. H. Buzzard for the Crown.

The following cases were cited in argument: *Rex* v. *Dean*[3]; *Rex* v. *Norfolk Justices, ex parte Director of Public Prosecutions*[4]; *Rex* v. *Vallett*[5]; *Rex* v. *Johnson*[6]; *Rex* v. *Evans*[7]; *Rex* v. *Bradford.*[8]

Lord Goddard C.J. delivering the judgment of the court stated the facts and continued: It is contended for the appellant that the magistrate ought never to have sent the appellant to quarter sessions for sentence because he can only do so if he has regard to his character and antecedents, and I understand that Mr. Waters wanted to argue that there was no information as to the appellant's character or antecedents within the meaning of the Magistrates' Courts Act, 1952, which would have justified the magistrate in sending him forward for sentence. I am not going to attempt to deal with the meaning of the words "character and "antecedents" because we have not heard argument on the matter and because the present case differs in some respects from *Rex* v. *Vallett.*[1] I am going only to examine the powers of this court as distinct from the Divisional Court of the Queen's Bench Division. The fact that the judges are the same is quite fortuitous. This court exercises a different jurisdiction and our jurisdiction is a purely statutory one. If a man who is committed for sentence desires to take the point that he was wrongly committed the right course for him to take is to apply to the Queen's Bench Division for a prerogative order, either of certiorari to bring up the order of committal and quash it, or of prohibition directed to sessions to prevent them proceeding, and he must do that before he goes before the sessions. This court has no power to issue certiorari or prohibition.

[His Lordship read section 29 (3) of the Criminal Justice Act, 1948, and continued:] If the offender comes before the Court of Criminal Appeal, as he has in the present case, he does so solely

"less than 17 years old is convicted "of the offence, then, if on obtaining "information about his character and "antecedents the court is of opinion "that they are such that greater "punishment should be inflicted for "the offence than the court has "power to inflict, the court may, in-"stead of dealing with him in any "other manner, commit him in cus-"tody to quarter sessions for sentence "in accordance with . . . section 29 "of the Criminal Justice Act, 1948."

[3] (1924) 18 Cr.App.R. 133.

[4] [1950] 2 K.B. 558; sub nom. *Rex* v. *South Greenhoe Justices, ex parte Director of Public Prosecutions*, 66 T.L.R. (Pt. 2) 452; [1950] 2 All E.R. 42.

[5] (1950) 34 Cr.App.R. 251; [1951] 1 All E.R. 231.

[6] [1909] 1 K.B. 439; 25 T.L.R. 229.

[7] [1915] 2 K.B. 762; 11 Cr.App.R. 178; 31 T.L.R. 410.

[8] (1911) 7 Cr.App.R. 42; 28 T.L.R. 26.

[1] (1950) 34 Cr.App.R. 251; [1951] 1 All E.R. 231.

because the appeal committee has passed a sentence which the court of summary jurisdiction has no power to pass. If the committee had passed a sentence of 12 months, which the court of summary jurisdiction has power to pass, there would have been no appeal to this court. The offender appeals to this court against the sentence as if he had been tried and convicted by quarter sessions on indictment. Section 29 (3) of the Act of 1948 is intended to put the appeal committee or quarter sessions into exactly the same position as though they had before them an offender who at quarter sessions had pleaded guilty. When the offender is once before the quarter sessions and the conviction has been proved and the order of the magistrate sending him for sentence has not been challenged, quarter sessions are to deal with him as though he had just been convicted before them on indictment. It is only offences triable by quarter sessions on indictment that can be sent forward, and the Divisional Court held in *Rex* v. *Middlesex Quarter Sessions, ex parte Director of Public Prosecutions* [2] that where a man had been committed for sentence for an offence which was not triable at quarter sessions, but only at assizes on indictment, and quarter sessions had refused to sentence him, an order of mandamus would not issue to quarter sessions because they had no power to deal with the offence on indictment.

In our opinion, it is clear that once the appellant comes to this court we cannot go into the conviction; we can only look at the sentence which has been passed, and if we find that it is more severe than the court of summary jurisdiction could have passed, we can consider the sentence under the powers given to us by the Criminal Appeal Act, 1907, s. 4 (3) of which provides: "On an appeal against sentence the Court of Criminal "Appeal shall, if they think that a different sentence should "have been passed, quash the sentence passed at the trial, and "pass such other sentence warranted in law by the verdict "(whether more or less severe) in substitution therefor as they "think ought to have been passed, and in any other case shall "dismiss the appeal."

Our attention has been called to certain cases under the Vagrancy Act, 1824. The procedure under that Act has some likeness to the procedure under the Criminal Justice Act, 1948, for this reason: quarter sessions can deal with a person who has been convicted by a court of summary jurisdiction of being an incorrigible rogue and vagabond, and certain cases have been before this court in which the court has quashed the sentence because they found that the man had not been convicted before the magistrates of being an incorrigible rogue. The section under which the court proceeds in that case is section 20 (2) of the Criminal Appeal Act, 1907, which provides: "This Act shall "apply in the case of convictions on criminal informations and

[2] [1950] 2 K.B. 589; 66 T.L.R. (Pt. 1) 804; [1950] 1 All E.R. 916.

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"coroners' inquisitions and in cases where a person is dealt with "by a court of quarter sessions as an incorrigible rogue under "the Vagrancy Act, 1824, as it applies in the case of convictions "on indictments. . . ." Being an incorrigible rogue is not an offence for which a person could have been convicted on indictment, and that section only gives the power to this court to deal with the sentence on a man who has been convicted of being an incorrigible rogue. But the words in section 29 (3) of the Act of 1948 which we are considering are "may appeal against the "sentence . . . as if he had been convicted on indictment."

We have, therefore, a man before us who says: "I have been "sentenced to more than the magistrate could have sentenced "me, and therefore I appeal to you as if I had been convicted "on indictment." If he wanted to challenge the magistrate's power to commit him for sentence, it should have been done by another procedure.

No injustice has been done to the appellant by the way in which the magistrate dealt with him because it was a very serious case. The only question which we have to consider is whether the sentence of five years' imprisonment is one which we would allow to stand. Although it is a serious offence, we are willing to take into account that the man had previously been of good character, as far as is known, and may not have been subject to these tendencies for very long, and taking all the circumstances into consideration, the court has come to the conclusion that they can reduce this sentence and substitute for it one of three years' imprisonment.

Sentence varied.

Solicitors: *Sylvester, Amiel & Co.; Director of Public Prosecutions.*

C. J. E.

[PROBATE, ETC., DIVISION.]

1954
Feb. 10, 11.

Collingwood J.

*WRIGHT *v.* WRIGHT.

Husband and Wife—Maintenance—High Court—Application for injunction to restrain husband from dealing with property—No arrears under current order—Application for further provision pending.

A wife applied for an injunction to restrain her former husband from dealing with certain property and assets pending the disposal of her applications to vary orders previously made in her favour for maintenance and for a secured provision. The husband was not in arrears in his payments under the current order and had provided the security as ordered:—

Held, that although the wife held those orders of the court, that did not give her the right to an injunction to restrain her former husband from dealing with his property until her rights, if any, were determined in regard to the future orders for which she asked;

any right she might have was restricted to the enforcement of the existing order.

Scott v. *Scott* [1951] P. 193; 66 T.L.R. (Pt. 2) 1077; [1950] 2 All E.R. 1154 applied.

SUMMONS for injunction.

The following statement of facts is taken from the judgment of Collingwood J.: On May 21, 1941, the wife, the respondent in a suit, obtained a decree nisi on the grounds of her husband's adultery. On July 16, 1941, she filed a notice of application for maintenance. The decree was made absolute on November 26, 1945. On November 11, 1946, an order was made by the registrar for the maintenance of the wife for £100 per annum secured for her life, and a further £500 unsecured for their joint lives. There was a further sum in respect of the maintenance of the child of the marriage, as to which no question arose. The reason for the delay was that the husband was in Malaya and for a number of years a prisoner of war in the hands of the Japanese.

A deed was duly settled by conveyancing counsel in respect of the order for the payment of the secured sum of £100. On January 19, 1949, the wife took out a summons to vary the amount, and on May 31, 1949, the registrar made an order varying the maintenance, so far as the unsecured sum was concerned, to £620 per annum, as from January 19, 1949. He also varied the sum due to be paid for the child's maintenance. On April 29, 1953, the wife filed a notice of application for further variation of the unsecured maintenance. On July 29, 1953, the application was adjourned by the registrar for the filing of further affidavits by the wife and an interim order was made at the rate of £1,350 per annum. On January 22, 1954, the matter was again adjourned for the filing of further affidavits and the order was varied to £850 per annum as from that date. That application still stood adjourned, pending the return of the husband, at the date of the hearing of the summons.

The husband was a rubber planter in Malaya, and in his affidavit of means, sworn on September 16, 1953, in answer to the wife's summons to vary the unsecured maintenance, he referred to an account with the Provident Fund in Malaya. He stated that his account with that fund stood on December 31, 1952, at £16,306, and that his contributions would continue until December 31, 1953, on which date the total would be £17,020. He continued as follows in his affidavit: "This includes contributions from myself and from my employers and is the amount which I expect to receive on my retirement next year. No insurance policy has been effected in my case since at the time of the fund's inception members were not required to take out an insurance policy. Members who joined later were so required. I expect the payment out to me of my interest in the Provident Fund to be made in or about the month of April, 1954; that is, about a month after my retirement." The

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husband also gave particulars in his affidavit of his salary for the years 1950, 1951 and 1952; and stated that his employment in Malaya would finish on March 10, 1954, and that passages had been booked for him and his present wife on a ship leaving Singapore on March 11, 1954. In paragraph 6 of the affidavit he said: "It is my intention when I receive payment out of the "Provident Fund to devote about £2,500 to the purchase of a "home for myself and my wife and to utilize the balance to "purchase a joint annuity of £600 per annum for my wife and "myself. Any small balance I intend to invest in government "stocks."

On February 2, 1954, the wife filed a further application to vary the secured allowance, and the present application was for an injunction to restrain the husband pending the hearing of that application, from carrying out his intentions expressed in paragraph 6. During the course of the hearing, counsel for the wife applied to amend the summons to cover the disposal of the application as to unsecured maintenance, which, it was expected, would be heard at the same time as the application of February 2, 1954, relating to the secured payments.

D. A. Fairweather for the wife.
J. B. Latey for the husband.

The cases cited are referred to in the judgment.

Cur. adv. vult.

Collingwood J. stated the facts set out above and continued: Counsel for the wife submitted that she had an order in her favour for secured payment of £100 a year, and, further, an order for interim maintenance at the rate of £820 a year, and that once she had obtained an order which gave her the right to be paid out of the property of the husband she was entitled to an injunction in order to preserve that property. Counsel referred to *Scott* v. *Scott*.[1] Mr. John Latey, counsel for the husband, submitted that there was no power to grant an injunction in the circumstances of this case, as so to do would be to grant it quia timet before the right to relief had been established.

In regard to *Scott* v. *Scott*,[1] the parties in that case were still married, and it was an application by the wife under section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (now section 23 of the Matrimonial Causes Act, 1950). Before the hearing and determination of the summons the wife alleged that her husband was realizing all his assets with a view to emigrating with them, and applied for an injunction to restrain him from removing the assets out of the jurisdiction. Wallington J. refused to grant an injunction on the ground that he had no jurisdiction

[1] [1951] P. 193; 66 T.L.R. (Pt. 2) 1077; [1950] 2 All E.R. 1154.

so to do before any order contemplated by section 5 had been made. The wife appealed.

Somervell L.J., after reading section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, and stating the facts, said [2]: "The question here is not on the facts but on the "question of jurisdiction. The judge granted an interim injunc-"tion, but when the summons came on for hearing he decided "that he had no jurisdiction to grant an injunction at that stage "in the proceedings, namely, before any order as contemplated "by section 5 had been made. Unaided by authorities I would "have said that that was plainly right. The general principle "of our law is well known, i.e., that an injunction of this kind "cannot be granted quia timet before some right to relief has "been established. Therefore, reading this section by itself, "notwithstanding the fact that it gives the court the power to "secure the payment, I would have said that if Parliament had "intended that there should be what may be, as Mr. Latey has "submitted, a very important safeguard in some cases, it would "have expressly so provided.

"We are not unaided by authorities however. Under "statutory provisions which, I agree, were different, but which "seem to me for this purpose analogous, it has been held that "an injunction of this kind cannot be granted. The headnote to "*Newton* v. *Newton* [3] states: 'The court will not, in order to "'protect a wife's right to alimony, restrain a husband from "'removing his property out of the jurisdiction of the court "'before an order for alimony has been made.' There was a "considered judgment by Sir James Hannen. He overruled a "case in which he had previously given a decision in a contrary "sense, examined the authorities, considered the matter in the "light of the principle, and said [4]: 'I come to the conclusion that "'as it has been decided that the Judicature Act does not give "'any enlarged powers to the court in this respect, it is not "'competent for a court, merely quia timet, to restrain a "'respondent from dealing with his property. The case "'would be different, of course, if the circumstances were the "'same as in *Sidney* v. *Sidney*.[5] In that case that decision "would be binding on me'." The Lord Justice continued: "*Sidney* v. *Sidney* [5] is interesting, because there a decree absolute "of divorce had been made. The court had ordered permanent "maintenance to be secured to the petitioner, and an application "was made by the wife to restrain the husband from dissipating "his property for the purpose of putting it out of the control of "the court. Sir James Hannen said [6]: 'It is to be observed "'that in that case there was, what there is not in this case, a "'subsisting order for the payment of the annuity.' That "principle was followed by Sir Samuel Evans P. in *Burmester*

[2] [1951] P. 193, 195.
[3] (1885) 11 P.D. 11.
[4] Ibid. 13.
[5] (1867) 17 L.T.(N.S.) 9.
[6] 11 P.D. 11, 12.

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"v. *Burmester*,[7] and in this court in *Jagger* v. *Jagger*.[8] It is "quite true that in the latter case there were other grounds on "which certainly two members of the court thought that the "matter could be decided, but Lord Hanworth M.R. and "Scrutton L.J. stated the principle which I think puts the "difficulty in the way of the appellant here. The latter said: "'I am not aware of any statutory or other power in the court "'to restrain a person from dealing with his property at a time "'when no order against him has been made'." Birkett L.J. agreed.

In *Sidney* v. *Sidney*[9] an order for permanent alimony had been made and a direction given to the respondent to furnish an abstract of title, or abstracts of title, to various properties; or, alternatively, to furnish a draft conveyance in order that it might be submitted to conveyancing counsel for their consideration. The husband did not comply with either of the orders, and the court granted an injunction and a receiver, holding it had jurisdiction to protect the property for the benefit of the wife. *Sidney* v. *Sidney*[9] was referred to in *Newton* v. *Newton*.[10] That was an application for alimony pendente lite, and the court held that it could not, before an order was made, restrain the husband from removing property out of the jurisdiction. The President said[11]: "In support of the application two cases were cited, "the one of *Sidney* v. *Sidney*,[9] decided by Malins V.-C. in 1867, "and the other, a case decided by myself, *Noakes* v. *Noakes & "Hill*,[12] in the year 1878. With regard to the first of these "cases, *Sidney* v. *Sidney*,[9] it was one in which the decree "absolute for a dissolution of marriage had been pronounced, and "the court had ordered permanent maintenance to the amount "of £245 a year to be secured to the petitioner, and a reference "to one of the conveyancing counsel of the Court of Chancery "to settle a proper instrument to be executed by the respondent "so as to carry out the order, and an application was after-"wards made to Malins V.-C. to restrain the husband from "dissipating his property for the purpose of putting it out of the "control of the court. It is to be observed that in that case "there was, what there is not in this case, a subsisting order for "the payment of the annuity. The application therefore to the "Vice-Chancellor was for the purpose of enforcing that order, "and it was similar to, though it was not actually, the process "in execution of the order which had already been made by this "court. In that it is distinguished from the present case." He then refers to *Noakes* v. *Noakes & Hill*,[12] and said: "I "therefore dissolve this injunction."

That case was followed by *Burmester* v. *Burmester*,[13] in which the same principle was applied to permanent maintenance.

[7] [1913] P. 76; 29 T.L.R. 323.
[8] [1926] P. 93, 102; 42 T.L.R. 413.
[9] 17 L.T.(N.S.) 9.
[10] 11 P.D. 11.
[11] Ibid. 12.
[12] (1877) 4 P.D. 60.
[13] [1913] P. 76.

In *Jagger* v. *Jagger*[14] Hill J. held, according to the headnote of the case, "That although the Divorce Court had power to "restrain a respondent husband by injunction from parting with "his own property in order to defeat the claims of the petitioning "wife to alimony or permanent maintenance which the court had "already ordered, it had no power to set aside an assignment of "his property made by him in consideration of a second marriage, "even if the result might be to defeat the claim of the petitioner "to maintenance not yet actually ordered." The Court of Appeal upheld that decision.

There is one passage in the judgment of Hill J. to which Mr. Fairweather directed attention, and that is where Hill J. says[15]: "Upon the making of the interim order on July 1, 1925, "I think an injunction might have been granted, but none was "applied for, and on July 23, 1925, the property was assigned "and the power of the court to act by injunction was gone."

The last case is *Fanshawe* v. *Fanshawe*,[16] the headnote of which reads: "The court will interfere by way of injunction to "restrain a husband from dealing with his property so as to "defeat an order for costs or alimony pendente lite when the "amount of the latter has been fixed and an instalment of it is "already due and in arrear, but will not so restrain him in respect "of instalments of alimony to become due at a future date."

In the present case the respondent wife is applying for new orders in substitution for existing orders. In order to succeed in her pending application for variation she must, it is conceded, bring herself within the proviso in section 28 (1) of the Matrimonial Causes Act, 1950, in view of the date of the original order. She may, or she may not, succeed in obtaining the variation for which she asks. In my opinion, what she is seeking to do is to preserve the status quo in regard to her husband's property until such time as the order for which she asks is made. It is quite true that she has an order of the court, but I think that whatever right to an injunction she may have is restricted to the enforcement of that order. It does not give her the right to an injunction to ensure that the husband shall still retain property which he now has, when the time comes for the determination of her rights in regard to a future order, and, in my opinion, on the authorities to which I have referred, the court has no power to grant the injunction asked for.

Summons dismissed: no order as to costs.

Solicitors: *Strong & Co.; John Bartlett & Son.*

J. B. G.

[14] [1926] P. 93.
[15] Ibid. 96.
[16] [1927] P. 238; 43 T.L.R. 666.

[CHANCERY DIVISION.]

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Mar. 1.

Wynn-Parry J.

* *In re* T. W. CONSTRUCTION LD.

[00440 of 1952.]

Company—Winding up—Disposition after commencement—Dispositions made between presentation of petition and winding-up order—Bank overdraft facilities before and after presentation of petition—Arrangement to enable company to continue its business—Principles for exercise of discretion by court—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 227.

On March 25, 1952, a company asked their bankers for a temporary overdraft of £1,000 to finance an export order, and produced documentary credits. On April 4, the bank confirmed the overdraft. On further requests by the company, the bank extended the overdraft to £1,200 over May 12.

On May 7, a petition was presented for the winding up of the company. On further representations by the company, the bank extended the overdraft until the credit in favour of the company should be met, and allowed the company to draw two cheques for wages. On May 21 £1,308 was paid to the bank in respect of the transactions by a third party. On May 22, the bank first became aware of the petition. On June 23, a winding-up order was made.

A summons having been taken out by the liquidator for the repayment to him by the bank of the sum of £1,308, the registrar made an order that the bank should repay to the liquidator the sum of £803, that being the amount standing to the debit of the account on May 3, 1952, which was the last entry before the date of the petition.

On appeal by the bank by motion against that order:—

Held, allowing the appeal, that, as the accommodation was arranged for a limited period for the express purpose of enabling the company to carry on its business, it was a transaction for the benefit of and in the interests of the company; so that it was a proper exercise of the court's discretion to permit the bank to retain the whole of the £1,308.

In re Wiltshire Iron Co. (1868) 3 Ch.App. 443; *In re Park Ward & Co. Ld.* [1926] Ch. 828; *In re Steane's (Bournemouth) Ld.* [1949] W.N. 490; 66 T.L.R. (Pt. 1) 71; [1950] 1 All E.R. 21, applied.

Dictum of Vaughan Williams J. in *In re Répertoire Opera Co.* (1895) 2 Manson 314, 316, questioned.

In re Liverpool Civil Service Association (1874) 9 Ch.App. 511; and *In re Civil Service and General Store Ld.* (1887) 57 L.J.Ch. 119; 4 T.L.R. 168, distinguished.

Motion.

In April, 1946, the company opened a current account with Barclays Bank at its branch at 8 Angel Court, in the city of London, and maintained that account until the company went into liquidation. The managing director of the company was one Weininger. On March 25, 1952, he called at the bank and produced to it certain documentary credits relating to the proposed shipment for export by the company of certain machinery, and asked for a

temporary overdraft of £1,000. On April 4, 1952, at a subsequent interview, which he had with the assistant manager of that branch of the bank, that overdraft was confirmed. On April 9, Weininger telephoned to the bank and explained that the credits in question had been extended to April 26, and requested that the overdraft facilities should be extended to that date. After a further call at the bank, and the bank having been informed that the credits had been further extended to May 5, it was arranged that the bank would provide overdraft facilities to the company to the extent of £1,200 over May 12, 1952. That was a special arrangement for a strictly limited period and was for the purpose of enabling the company to continue its business.

On May 7, 1952, a petition was presented for the winding up of the company. On May 9, 1952, the overdraft at the bank was increased by the amount of the wages cheque. On that day Weininger again called at the bank and told the assistant manager that he was going to the United States of America on business. He said that the goods, the subject of the documentary credits, would be shipped on May 14, when the bills of lading would become available, and that a firm, Leopold Joseph & Co., would be collecting £1,300 shortly afterwards, with the result that the bank agreed to extend the overdraft facilities until the receipt of the collection of that £1,300 and until the bank should have received that sum. On May 13, 1952, the petition was advertised in the London Gazette, and on the following day in *The Times*. On May 16 Mrs. Humphreys, who was a director and secretary, telephoned the bank and obtained permission to draw a further cheque for £100 for the purpose of paying wages, and on May 20, 1952, that cheque was drawn. On May 21, 1952, the sum of £1,308 6s. 10d. was paid to the credit of the account of the company at the bank by Leopold Joseph & Co.

The bank first became aware of the petition on May 22, 1952. On June 23, 1952, an order was made for the winding up of the company. On August 6, 1953, a summons was taken out by the liquidator claiming repayment by the bank of the sum of £1,308 6s. 10d. On January 27, 1954, an order was made by the registrar that the bank should repay to the liquidator the sum of £803 11s. 0d., being part of the sum of £1,308 6s. 10d. referred to in the summons.

On March 1, 1954, this motion came before the court, in which the bank sought that the order of the registrar might be "discharged or varied in manner following, that is to say, that "it may be declared that the payment to Barclays Bank Ld. "of the said sum of £1,308 6s. 10d. is or ought to be treated "as valid and that Barclays Bank Ld. is to be at liberty to "retain the whole of such sum of £1,308 6s. 10d. and that the "[liquidator] do pay to Barclays Bank Ld." [the costs of the summons and the costs of the motion].

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C. R. Richmount for the applicant bank.
Frederick Hallis for the respondent liquidator.

Cases cited in argument: *In re Steane's (Bournemouth) Ld.*[1]; *In re Répertoire Opera Co.*[2]; *In re Wiltshire Iron Co.*[3]; *In re Park Ward & Co. Ld.*[4]; *In re Liverpool Civil Service Association*[5]; *In re Civil Service and General Store (Ld.)*[6]

Wynn-Parry J. This is a motion by Barclays Bank Ld. for an order discharging an order made by the registrar on January 27, 1954, in which he ordered the bank to repay to the liquidator of the company the sum of £803 11s. 0d., being part of a sum of £1,308 6s. 10d. paid into the credit of the banking account of the company with the bank on May 21, 1952.

[His Lordship stated the facts and continued:] According to the evidence filed on behalf of the bank, the bank did not become aware of the petition before May 22, 1952, when the manager of the branch saw a reference to it in Stubbs' Gazette: that is to say, no one on behalf of the bank became aware of the presentation of the petition until after the payment into the bank of the sum of £1,308 6s. 10d. to which I have referred. On June 23, 1952, the company was ordered to be wound up. On August 6, 1952, a summons was issued by the liquidator claiming repayment by the bank of the sum of £1,308 6s. 10d. On January 27, 1954, the order was made by the registrar which comes before me under appeal. He ordered that the bank should repay to the liquidator the sum of £803 11s. 0d., that being the amount standing to the debit of the account on May 3, 1952, which is the last entry before May 7. It is for the discharge of that order that this motion has been launched.

The relevant section of the Companies Act, 1948, is section 227, which reads as follows: "In a winding up by the court, "any disposition of the property of the company, including "things in action, and any transfer of shares, or alteration in the "status of the members of the company, made after the com-"mencement of the winding up, shall, unless the court other-"wise orders, be void."

Certain authorities have been referred to. It may be convenient if I turn in the first place to the recent case of *Re Steane's (Bournemouth) Ld.*, a decision of Vaisey J.[1] In the course of his judgment in that case Vaisey J. said: "The "legislature, by omitting to indicate any particular principles "which should govern the exercise of the discretion vested in "the court, must be deemed to have left it entirely at large, "and controlled only by the general principles which apply "to every kind of judicial discretion. I have reviewed the facts

[1] [1949] W.N. 490; 66 T.L.R. (Pt. 1) 71; [1950] 1 All E.R. 21.
[2] (1895) 2 Manson 314.
[3] (1868) 3 Ch.App. 443.
[4] [1926] Ch. 828.
[5] (1874) 9 Ch.App. 511.
[6] (1887) 57 L.J.Ch. 119; 4 T.L.R. 168.

"of the present case somewhat at length because I think that "such a review must usually be necessary whenever a case of "this nature falls to be decided." In the older case of *In re Répertoire Opera Co.*,[2] Vaughan Williams J. said: "I have "an absolute discretion to validate this transaction or not. If "the transaction is one which would be valid under the pro-"tective sections of the Bankruptcy Act, that would be a very "strong reason for my validating it here. That is what Lord "Cairns means in *Ex parte Pearson, In re Wiltshire Iron Co.*[3]" With that statement I respectfully entirely agree. Vaughan Williams J. continued: "The cases on section 153"—which was the corresponding section to section 227—"are an adoption "by the court of the principle of the protective sections in "bankruptcy. It would be very unfortunate if the principles of "administration in bankruptcy and in the winding up of com-"panies were not as far as possible the same." I have some difficulty in following the reasoning in those two sentences because the protective section in the present Bankruptcy Act, 1914, s. 45, confers no discretion on the court. A transaction to be protected under that section must fulfil the conditions laid down in the section, otherwise it does not obtain the protection; whereas, as Vaughan Williams J. himself recognized, there was under the section corresponding to section 227 of the present Companies Act an absolute discretion, as was clearly stated by Vaisey J. in the passage in his judgment in the *Bournemouth* case[4] to which I have just referred.

The facts in *In re Wiltshire Iron Co.*,[5] the case to which Vaughan Williams J. refers, can be simply stated by reading a sentence from the headnote: "Where a customer of a trading "company had bona fide ordered and paid for goods, and the "company had loaded the goods on a railway to his address, "and sent him the invoices, after the presenting of the petition "but before the winding-up order:—*Held*, that the disposition "of the property was complete before the winding-up order, and "the goods ordered to be delivered to the customer." In the course of his judgment Lord Cairns said: "The 153rd section "no doubt provides that all dispositions of the property and "effects of the company made between the commencement of "the winding up (that is the presentation of the petition) and "the order for winding up, shall, unless the court otherwise "orders, be void. This is a wholesome and necessary provision, "to prevent, during the period which must elapse before a "petition can be heard, the improper alienation and dissipation "of the property of a company in extremis. But where a "company actually trading, which it is the interest of everyone "to preserve, and ultimately to sell, as a going concern, is "made the object of a winding-up petition, which may fail or "may succeed, if it were to be supposed that transactions in

[2] (1895) 2 Manson 314, 316.
[3] (1868) 3 Ch.App. 443.
[4] [1949] W.N. 490.
[5] 3 Ch.App. 443, 446.

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"the ordinary course of its current trade, bona fide entered into "and completed, would be avoided, and would not, in the "discretion given to the court, be maintained, the result would "be that the presentation of a petition, groundless or well-"founded, would, ipso facto, paralyse the trade of the company, "and great injury, without any counter-balance of advantage, "would be done to those interested in the assets of the "company."

In the later case of *In re Park Ward & Co. Ld.*[6] Romer J. applied the case of *In re Wiltshire Iron Co.*[7] After quoting the passage from the judgment of Lord Cairns which I have myself quoted, he says[8]: "If I were to adopt the view put forward "by Mr. Clayton, a company would in very few cases be able "to obtain the assistance necessary to enable it to carry on "business as a going concern. Lord Cairns evidently regarded "the power given to the court by the section as one given for "the benefit and in the interests of the company, so as to "ensure that a company which is made the subject of a "winding-up petition may nevertheless obtain money necessary "for carrying on its business and so avoid its business being "paralysed. If, therefore, I were to hold that no one who "knows of the presentation of a petition can safely enter into "any arrangement with the company, I think I should be "depriving the company of the benefit which, according to Lord "Cairns, the provision of the section was intended to secure to "it." That was a case in which, between the date of the presentation of the petition and the date of the order for its compulsory winding up, a debenture was issued by the company to secure to the debenture-holder the repayment of £1,200 advanced to enable the company to pay wages due to its staff. Apart from the circumstance that in this case the bank did not go so far as to demand a debenture, the facts appear to me to have a distinct similarity. It is true that only part of the overdraft here was applied in the payment of wages, but it is clear from the evidence, and to my mind it is the only possible inference from the facts, that the accommodation arranged was arranged for a limited period for the express purpose of enabling the company to continue to carry on its business. Therefore, to use the language of Romer J., it was a transaction for the benefit of and in the interests of the company.

In the case before Vaisey J., *In re Steane's (Bournemouth) Ld.*,[9] a debenture was issued to secure moneys which were advanced for the purpose, as stated by Vaisey J. in his judgment, of keeping the company going or of keeping things going generally. Those three authorities appear to me to govern this case and to bring it within the benefit of the section.

Against that there are said to be two cases to which reference was made. The first is *In re Liverpool Civil Service*

[6] [1926] Ch. 828, 831.
[7] 3 Ch.App. 443.
[8] [1926] Ch. 831.
[9] [1949] W.N. 490.

Association.[10] That case appears to me to be distinguishable from the present case. In the course of his judgment Mellish L.J. said: "I do not mean to express any dissatisfaction with "the cases which have been cited by Mr. North, as deciding "that all bona fide transactions in carrying on the ordinary "business of a company, which take place between the petition "and the winding-up order, and have been completed before "the winding-up order is made, should be confirmed. But here "the question is, whether the very creditor who has prosecuted "the petition should be allowed to retain money which he has "obtained by means of the petition, when the result of the "petition is that the assets of the company are to be divided "equally amongst its creditors."

The second case is *In re Civil Service and General Store Ld.*[11] Apart from the circumstance that the *Wiltshire Iron Co.* case[12] was not cited, it appears to me that that case is clearly distinguishable from the present case. There, on the same day on which the petition for winding up was being presented, the company agreed to pay a trade creditor who was ignorant of the presentation of the petition the sum of £175, being part of a debt of £320 previously due to him, on the condition that he continued to supply the company with goods for a cash payment. The £175 was paid after the presentation of the petition, and also a sum of £13 for goods supplied. The winding-up order was subsequently made, and the payment of £13 was allowed, but the £175 was ordered to be repaid. Chitty J. in his judgment states the case as put forward on behalf of the creditors in this way[13]: "The argument of the "respondents is a somewhat strange one. They say that the "part payment of their debt was a condition of their supplying "goods, and that they are therefore entitled to treat the trans-"action as a new and complete transaction." As the judge makes clear, that was the case of the creditor. Small wonder, then, that he goes on to say: "But to affirm a transaction of "that kind under the discretion conferred upon the court by "section 153, would be to exercise such discretion upon a "totally erroneous principle." He further relies on the circumstance that, as he put it, "the respondents, at the least, knew "at the date of the agreement that the company was in "embarrassed circumstances, although they do not seem then "to have had knowledge of the presentation of a petition." Then in the next sentence there is a circumstance stated which would of itself, I think, be sufficient to distinguish that case from the present case: "When, however, they actually received "the two payments of £100 and £75, they were, in my judgment, "aware of a petition having been presented. I can only treat "the transaction as an attempt to get a preference over other

[10] (1874) 9 Ch.App. 511, 512.
[11] (1887) 57 L.J.Ch. 119.
[12] 3 Ch.App. 443.
[13] 57 L.J.Ch. 119, 120.

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"creditors." Therefore it seems to me that these two cases do not in any sense govern the present case or stand in the way of the disposition in question being validated.

It appears to me, viewing the evidence as a whole and drawing the inference that I do, that this was a transaction which is directly within the passage from the judgment of Lord Cairns, which I read, and I can see no ground for distinguishing between the amount of the debit existing immediately before the presentation of the petition, namely, £803 11s. 0d., and the amount by which the overdraft became increased after the presentation of the petition.

For these reasons, therefore, I propose to allow this appeal and discharge the order of the registrar and to declare that the bank are at liberty to retain the whole of the sum of £1,308 6s. 10d.

Declaration accordingly.

Solicitors: *Durrant Cooper & Hambling; Booth & Blackwell.*

J. L. D.

[CHANCERY DIVISION.]

1954
Mar. 4, 5.

Harman J.

* *In re* BRITISH SCHOOL OF EGYPTIAN ARCHAEOLOGY. MURRAY *v.* PUBLIC TRUSTEE.

[1953 B. No. 3398.]

Charity—Education—Archaeology—Society for conducting excavations in Egypt and publishing works—Whether charitable—Supervening impracticability of objects—Whether resulting trust for subscribers. Trust and Trustee—Resulting trust.

A society was founded in 1905 by the well-known archaeologist, Sir Flinders Petrie, who became honorary director. The society's regulations provided: "3. The objects of this association shall be "any or all of the following:—A. To conduct excavations and to "pay all expenses incidental thereto. B. To discover and acquire "antiquities and to present the same to public museums. To hold "exhibitions when practicable. C. To publish works. D. To pro-"mote the training and assistance of students. All of these objects "shall be carried on in relation to Egypt, and any part of the "former Kingdom of Egypt. Exceptions may be considered. 4. "All money received by contribution, bequest or sales of books, "shall be applicable to the above purposes only. . . . 9. All con-"tributors of one guinea or two guineas annually . . . shall receive "the corresponding publication of work free. Those who contribute "a larger amount annually or at once shall receive a corresponding "value of publication when such be issued, or antiquities may be "allocated to such public museums as they desire."

The society was active in the field for many years; excavations were carried out under the supervision of the director, and a large

number of works was published. In 1939 war put an end to activities in the field. Sir Flinders Petrie died in 1942. Since then nothing was done except to publish a number of manuscripts left by him. In 1951 it was decided to publish one more work, and wind up the society. Questions then arose whether the society's funds were held on charitable trusts, whether there was a resulting trust in favour of the subscribers. The committee were desirous, if possible, to devote the funds to the foundation of a scholarship in Egyptian archaeology in memory of Sir Flinders Petrie. The Crown disclaimed any right in the funds as bona vacantia.

On the hearing of a summons taken out for the determination of these questions:—

Held, (1) that as the society's purpose was the discovery and diffusion of archaeological knowledge and the training of students, it was an educational charity; (2) that on the true construction of the regulations contributions were given for the society's purposes generally, and the contributors' rights were limited to receiving such publications as the society thought fit to publish, so that no resulting trust arose; (3) that there should be a reference to chambers to settle a scheme to found a scholarship on the lines proposed by the committee.

In re Hillier's Trusts, ante, p. 9; [1953] 2 All E.R. 1547 distinguished.

In re Welsh Hospital (Netley) Fund [1921] 1 Ch. 655 and *In re North Devon and West Somerset Relief Fund* [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032 followed.

ADJOURNED SUMMONS.

The facts are stated in the judgment.

W. J. Tonge for the plaintiffs, officials of the society.

J. P. Hunter-Brown for the donor of a lump sum.

P. C. Lucking for an annual contributor.

Denys Buckley and *N. S. Warren* for the Attorney-General.

The following cases, not cited in the judgment, were referred to in argument: *In re Wokingham Fire Brigade Trusts* *; *Royal College of Surgeons of England* v. *National Provincial Bank Ld.* †

HARMAN J. This is an originating summons issued under section 28 of the Charitable Trusts Act, 1853, by the persons responsible for the conduct of an institution known as the British School of Egyptian Archaeology, an unincorporated body, sometimes known as the British School of Archaeology in Egypt. The question before me is whether this body is or is not to be accounted a charity, and that is a matter which can be raised under the Charitable Trusts Act, in proceedings entitled "In the Matter of The Charity," as was decided in *In re Norwich Town Close Estate Charity,*[1] where the headnote reads: "On "a summons issued under the Charitable Trusts Acts the court

* [1951] Ch. 373; [1951] 1 T.L.R. 446; [1951] 1 All E.R. 454.

† [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[1] (1888) 40 Ch.D. 298; 5 T.L.R. 197.

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"has jurisdiction to decide the question whether the property "which is the subject of the summons is held upon a charitable "trust or not."

The property here in question consists of investments and cash worth about £4,000 now standing to the credit of the treasurer of this institution, of which the controlling body say that it is at the end of its useful life and that its affairs should be wound up. This body was founded in 1905 by the well-known archaeologist, the late Professor Sir Flinders Petrie, who for many years was the mainspring and inspiration of its activities. He carried out, as is well known, many remarkable excavations, particularly on the borders of Egypt and Palestine, and rendered considerable service to learning by his activities and by the publication of their results. A print of its regulations as they stood after revision in 1936 was in evidence. The only evidence that they are such regulations is a statement at the end of them in these terms: "The Regulations were passed by the meeting "of constitution of the School on July 21, 1905, and revised "and passed by Executive Committee on April 24, 1936."

At that time, for some reason, the revised regulations were registered with the Government of Palestine, then the mandatory government under British auspices. The regulations purport to be "Regulations of the British School of Archaeology in Egypt other-"wise known as the British School of Egyptian Archaeology."

Regulation 1 states the name. "2. The headquarters of the "school is in London. The office of this association"—which is the same as the school—"is at University College, London. "3. The objects of this association shall be any or all of the "following:—A. To conduct excavations and to pay all expenses "incidental thereto. B. To discover and acquire antiquities "and to present the same to public museums. To hold exhibi-"tions, when practicable. C. To publish works. D. To promote "the training and assistance of students. All of these objects "shall be carried on in relation to Egypt, and any part of the "former Kingdom of Egypt. Exceptions may be considered. "4. All money received by contribution, bequest, or sales of "books, shall be applicable to the above purposes only.

"7. Publication of results shall be as rapid as practicable; "and all drawing and writing shall be finished for this purpose "before fresh work be undertaken, unless the executive deter-"mines otherwise.

"8. Students joining the school shall devote most of their "time to such work, in such manner, as the director and "assistant director shall agree upon with them. Their notebooks "shall be inspected by the director, and shall revert to the school. "They shall report the results of their work, and prepare them "for publication, if required, before undertaking fresh subjects "of work."

Then under a new heading called "Of contributors," there is regulation 9: "All contributors of one guinea or two guineas

"annually are members of the school and shall receive the "corresponding publication of work free. Those who contribute "a larger amount annually or at once shall receive a correspond-"ing value of publications when such be issued, or antiquities "may be allocated to such public museums as they desire. "Contributors of seven or ten shillings are associates, and shall "receive the half-yearly bulletin."

It will be observed that learning in Egyptology does not connote a capacity to express oneself clearly or succinctly in English. A worse-drawn document it would be hard to find; but I have to construe it as best I can, because it is on the terms of those regulations, stating the objects of this society, that its nature must be ascertained. I shall therefore return to them later.

The school was active in the field year by year for many years, but I have no direct evidence about it for a long time and indeed until 1929. For that year I have an official report, which was presented to the contributors with the subscription list and balance sheet. By this time Flinders Petrie had become Professor Sir Flinders Petrie. He was holding the Edwards Chair of Egyptology at University College, London, and no doubt that was why the college was the headquarters of the school. The report shows that there were distinguished patrons; there was a large general committee with a smaller executive committee. Professor Sir Flinders Petrie was the honorary director and his wife was the organizing secretary. On the front page is a list of publications of the school, which amounted by that time to no less than 51 volumes. The report told of the activities of the year, and was followed by a list of subscriptions and donations during the period November, 1928, to October, 1929, which came to nearly £3,000, and ranged from £500 in one instance down to a guinea, which was the commonest figure. There were also some American subscriptions on a small scale. At the end was a statement: "Annual payments made by con-"tributors to the British School of Egyptian Archaeology: "Ordinary annual contribution to receive the volume or volumes, "2 guineas. Contribution to receive other volumes or in part "payment of annual volume, 1 guinea. Ancient Egypt and "illustrated quarterly journal, four parts, post free, 7s. Asso-"ciateship of school, journal supplied post free, 10s." There was appended a balance sheet from which it appears that at that time the financial position of the school was a comparatively flourishing one. Its expenditure was about £4,800, £500 over its income for the year; but it had investments of a value of about £8,000, and so it was better off than many other learned concerns. I have several subsequent reports, but they do not differ materially from that.

In 1935 Sir Flinders Petrie resigned his chair at University College, and removed the main activities of the school to Palestine. The war put an end to the school's activities. Its

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last active year in the field was 1938. Sir Flinders Petrie died in 1942 and the school has really never since been a going concern. He left behind him much material which was thought worthy of publication, and two volumes have been published since the war and distributed among the members. A third volume is now in the press. These are large and sumptuously illustrated volumes and their retail price is two guineas.

There is no doubt that a good many of those who subscribed two guineas a year did so on the footing that they were paying for the yearly volume, because in general no year passed without at least one volume being published by the school.

In 1950 a new committee was formed and an attempt was made to administer the remaining funds. Eventually it was decided that it was useless to continue; that, after publishing the remaining material worth publication left in the society's hands, the only thing to do was to wind it up. In December, 1951, a circular letter was written by the committee to a number of subscribers who were supplied with a balance sheet for 1950, and were informed that the amount of their subscription lying in the society's hands was in excess of the nominal value of the books with which they had been supplied; and they were asked whether they wanted their money back. Some of them said that they did; some of them said that they did not; and a certain amount of money was paid back to those who asked for it. Whether that was right or not is quite immaterial on the present application.

What I have first to decide is whether this body is charitable or not. If it be a charity, it cannot make any difference that one course or another was taken in 1951: that cannot have any effect on the question whether the funds are devoted to charitable purposes. Charitable purposes are an endless subject of discussion. To be within the intendment of the Statute of Elizabeth I, which (as Lord Morton of Henryton recently pointed out in *Royal College of Surgeons of England* v. *National Provincial Bank*[2]), was never intended to give a definition of "charity," is to be charitable in law; and every day an argument is put forward that some activity or other is charitable. Such objects include those beneficial to the public, or as benefiting the public by the spread of knowledge or the advancement of education.

Mr. Buckley, for the Attorney-General, referred to *Beaumont* v. *Oliveira*,[3] where it was said that the Royal Society and the Royal Geographical Society were charities. It is, of course, somewhat ironical to remember that in those days the aim of societies was to establish that they were not charitable, in order to escape the consequences of the Mortmain Acts. Selwyn L.J. said[4]: "The Royal Geographical Society is a corporation, and

[2] [1952] A.C. 631, 650.
[3] (1869) L.R. 4 Ch. 309.
[4] Ibid. 313.

"its objects are stated to be and are, 'the improvement and "'diffusion of geographical knowledge.' The Royal Society is "also a corporation, and its objects are 'for improving natural "'knowledge.' The objects of both these societies are public, "and they are both societies for the advancement of objects of "general public utility"; and he decided that both societies were therefore charities.

The objects of this society I have already stated. They are not stated so succinctly as in those two admirable instances, but I think that they amount to this: that this is a body whose funds and whose objects are devoted to the discovery of knowledge connected with ancient Egypt and its kingdom, to publishing works in that connexion, and, in the course of its activities, to train students in the craft or art of excavation.

Two criticisms are made against the view that this was an educational charity or a charity for the promotion of knowledge:—first, that there was no obligation to diffuse the knowledge outside the ranks of the members of the society itself. It was said that a body merely established for study and for the discussion of the subjects of study among its members, does not necessarily confer any benefit on the public. In my view that would be quite a valid criticism if it were not that I read the objects as clearly showing an intention of making the knowledge public; the antiquities acquired are to be presented to public museums, and it is an object to hold exhibitions when practicable and to publish works.

The second criticism was directed to the words "to publish "works." Apart from the fact that it is an inelegant phrase, and that in other contexts it might be too vague to mean anything in particular, a work is something done, something worked upon in relation to the object of study. It was contended that the "works" might include novels about modern Egypt. But here "works" are plainly works in relation to Egypt and the kingdom of Egypt, and when read in connexion with the provisions regarding excavations, the expression can only have reference to ancient Egypt and the former kingdom of Egypt; so that the "works" to be published are works which are to disclose to the public the results of the excavations which it is the society's object to carry out. I cannot doubt that this was a society for the diffusion of a certain branch of knowledge, namely, knowledge of the ancient past of Egypt; and that it also had a direct educational purpose, namely, to train students in that complicated branch of knowledge known as Egyptology. In my view this is clearly a charity from the educational aspect, and it will be observed that "All money received by contribution "bequest, or sales of books, shall be applicable to the above "purposes only." It is in connexion with that, in my judgment, that one must read the 9th regulation about contributors.

The correspondence of 1951 showed that many contributors supposed that they contributed their two guineas a year as the

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price of the book they would receive or usually did receive during the year. It was said that that showed that the relationship between the society and the contributors was merely contractual, and that the society held itself out to be willing to supply a book at a retail price of two guineas in return for a subscription of that amount; and that if the subscription was one guinea, the contributor would have to wait two years before getting a book; that that was the nature of the society's relation with many of the contributors, who were museums and places of learning in other branches. But that in my judgment cannot override the regulation, which is that the contributions are to be devoted to the objects. One of the objects, of course, is the publication of these very works. In my view, what the contributors do is to contribute towards the objects of the society; and the society in return, as it is entitled to do, lets them have for nothing what otherwise would cost them two guineas, namely, the annual or it may be biennial volume of what might be called the transactions of the society.

I think that that has a bearing on the other part of the case, because, even though this be a charity, there remains this question: when people contributed to this charity one guinea, or two guineas, or £500, did they do it on the footing that they should receive in return so much published work regarding the society's activities, with the added implication that if the society's objects were stopped or ceased to be possible or practicable, the money should come back as on a failure of consideration; or did they pay their money out and out as contributions to a learned society? If the former, then there may well be a resulting trust in favour of the donors or subscribers so far as they have subscribed; if the latter, then the money was devoted once and for all to a charitable purpose, and the fact that the charity has come to an end and its affairs must be wound up entitles no one to have any money back.

The well-known case of *In re Slevin*[5] was concerned with a gift by will; it indicated that if money once be given by will to a charity, it matters not that the charity comes to an end shortly after the death of the testator and before the bequest is given effect to by the executors; it showed that once the testator is dead, his money is devoted to the charity, subject, of course, to the rights of creditors; and that it makes no difference if the charity is thereafter dissolved.

That principle, of course, is not easy to apply to subscriptions and gifts inter vivos. In my judgment the subscriptions here were given on a contractual basis to this extent; that the subscriber had a right to say to the society: "To the extent of the "value of my contribution you have promised to supply me with "copies of your transactions"; but further or otherwise I think that there was no contract. I think that there was no obligation

[5] [1891] 2 Ch. 236; 7 T.L.R. 394.

on the society either to continue to publish works up to the value of the subscriptions, or, alternatively, to pay them back. I think that the only contract was to supply contributors with copies of such works as the society decided to publish. That is made clear in the rules in respect of those who contribute a larger amount than two guineas; such contributors are to receive a corresponding value of publications when such shall be issued, or they can take their money out by directing antiquities to be sent by the society to museums of their choice. At this time there are no more antiquities, which means objects of art or virtu, in the society's hands; there will be no more publications after the one now in the press; and therefore it is clear that those who contribute a larger amount have no further right. In my judgment, the contributors of one and two guineas are in no stronger position. These rules are very loosely drawn, but I cannot think that such contributors have any right by contract to have their money back.

Have the contributors any other right? In my judgment, on the true view of the whole transaction, they must be taken to have parted with their money once and for all. It is, of course, possible to give or to offer money for a purpose which fails at some time or fails ab initio, and thereafter to get it back. That was recently decided by Upjohn J. in *In re Hillier's Trusts.*[6] That was a case where the project was never started: money was collected for erecting a hospital which became impracticable, and the judge held that the contributions specially earmarked for that hospital must be paid back to the subscribers. There are other cases, notably *In re Welsh Hospital (Netley) Fund,*[7] and *In re North Devon and West Somerset Relief Fund Trusts,*[8] where it was decided that the money had been given out and out and could not be paid back. In my judgment, this case is more in line with those two than with Upjohn J.'s recent decision [9]; but no case of this sort is binding in any other case. I can only decide this case on its own merits.

I am told that if the court decides that a subscriber did not intend to have his money back in any event, he must be taken to have had a general charitable intent. I am not sure that the two things are synonymous. I do not think that follows. I think that a man may well say: "I parted with my money to "this society; I do not reserve any right to have it back," without having any positive intention that it should go to an analogous society or, indeed, to something to which the court might think proper to devote the money. In my judgment, all that is necessary is that the inference to be drawn should be that a subscriber, or donor or testator, cannot be supposed to have expected, or to have impliedly contracted, to have his money back.

[6] [1954] 1 W.L.R. 9; [1953] 2 All E.R. 1547.

[7] [1921] 1 Ch. 655.

[8] [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032.

[9] [1954] 1 W.L.R. 9.

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There is something like £4,000 worth of assets, and it has been proposed to establish with that a Flinders Petrie scholarship in Egyptian Archaeology at University College. There could be no better memorial to a great man, and, though the scheme is still tentative, it is, I doubt not, one of which something can be made; and I propose to refer to chambers to settle a scheme for the devotion of these assets to the creation of a Flinders Petrie scholarship for the study of Egyptian archaeology.

There will be a declaration that the funds, investments, and future receipts from publications are held on valid charitable trusts; and I will direct that it be referred to chambers to settle a scheme generally; but I would have it known that I should not be willing to sanction a scheme other than one for the promotion of knowledge of Egyptian archaeology, commemorating the name of the founder of this school.

Declaration accordingly.

Solicitors: *Pyke, Middleton & Brown; Powell, Skues & Graham Smith; Treasury Solicitor.*

F. R. D.

[HOUSE OF LORDS.]

H. L. (E.)† 1954 *Feb.* 25

* YORKSHIRE COPPER WORKS LD. . . Appellant;

AND

REGISTRAR OF TRADE MARKS . . . Respondent.

Trade Mark — Registration — Distinctiveness — Geographical name — Whether inherently adapted to distinguish—"Yorkshire" copper tubes—Trade Marks Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 22), *s.* 9.

A company which manufactured most of its products in Yorkshire applied for registration of the word "Yorkshire" as a trade mark for goods specified as "solid drawn tubes and capillary "fittings, all being made of copper or non-ferrous copper alloys." There was no other manufacturer of such goods in Yorkshire. Evidence was filed that the mark had acquired "100 per cent. "distinctiveness":—

Held that, even though the mark might have acquired "100 per "cent. distinctiveness," the Registrar of Trade Marks, in considering whether it fell within section 9 (1) (*e*) of the Trade Marks Act, 1938, was still bound under subsection (3) to have regard to the extent to which it was "inherently adapted to distinguish" the goods in question, and, inasmuch as it was not so adapted and, further, did not fall within section 9 (1) (*a*), (*b*), (*c*) or (*d*), it should not be registered.

A. Baily & Co. Ld. v. *Clark, Son & Morland* [1938] A.C. 557; 54 T.L.R. 688; [1938] 2 All E.R. 377 applied.

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† *Present*: Lord Simonds L.C., Lord Oaksey, Lord Morton of Henryton, Lord Asquith of Bishopstone and Lord Cohen.

Per Lord Simonds L.C.: A geographical name can only be inherently adapted to distinguish the goods of A when it is such a name as would never occur to B to use in respect of his similar goods.

Decision of the Court of Appeal (sub nom. *Yorkshire Copper Works Ld.'s Application*) (1952) 70 R.P.C. 1 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Denning and Romer L.JJ.).

This was an appeal from a judgment and order of the Court of Appeal, affirming the judgment and order of Lloyd-Jacob J. which affirmed the decision of the Assistant Comptroller, acting for the respondent, the Registrar of Trade Marks, who refused an application by the appellants, Yorkshire Copper Works Ld., to register the mark "Yorkshire" in respect of "solid drawn tubes "and capillary fittings, all being made of copper or non-ferrous "copper alloys." The appellant company submitted that the registrar should be directed to proceed with the application.

The facts are stated by Lord Simonds L.C.

K. E. Shelley Q.C. and *J. B. Shelley* for the appellant company.

Sir Lionel Heald A.-G. and *P. Stuart Bevan* for the respondent.

The following cases, besides those referred to in their Lordships' opinions, were cited in argument: *In re R. J. Lea Ld.'s Application* [1]; *In re J. & P. Coats Ld.'s Application* [2]; *In re Boots Pure Drug Co. Ld.'s Trade Mark*,[3] and *In re Alexander Pirie & Sons Ld.'s Application*.[4]

Their Lordships took time for consideration.

Feb. 25. LORD SIMONDS L.C. My Lords, in my opinion this appeal should be dismissed, and as the facts are not in dispute and the law applicable to those facts appears to me to be clearly settled by the authority of this House, I shall not detain your Lordships for long.

In March, 1950, the appellants applied for registration of a trade mark consisting of "Yorkshire," represented in special type and between inverted commas, for goods which were eventually specified as "Solid drawn tubes and capillary fittings, all being "made of copper or non-ferrous copper alloys." Nothing turns on the special type or the inverted commas.

The appellants supported their application by cogent evidence that in fact the mark "Yorkshire" was distinctive of their goods. I am content to accept the statement reiterated by their counsel that the mark had acquired 100 per cent. distinctiveness. In

[1] [1913] 1 Ch. 446.
[2] (1936) 155 L.T. 127; 53 R.P.C. 355.
[3] [1938] Ch. 54; 53 T.L.R. 1005; [1937] 4 All E.R. 23.
[4] (1933) 149 L.T. 199; 50 R.P.C. 147.

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spite of this fact the registrar refused registration and has been upheld in his refusal by Lloyd-Jacob J. and the unanimous opinion of the Court of Appeal. It becomes necessary, then, to examine the grounds of this decision, and I will at once refer to the relevant provisions of the Trade Marks Act, 1938.

It is convenient to set out verbatim the terms of section 9 of the Act, which provides as follows:—" (1) In order for a trade " mark (other than a certification trade mark) to be registrable in " Part A of the register, it must contain or consist of at least one " of the following essential particulars:—(*a*) the name of a com- " pany, individual, or firm, represented in a special or particular " manner; (*b*) the signature of the applicant for registration or " some predecessor in his business; (*c*) an invented word or " invented words; (*d*) a word or words having no direct reference " to the character or quality of the goods, and not being accord- " ing to its ordinary signification a geographical name or a sur- " name; (*e*) any other distinctive mark, but a name, signature, or " word or words, other than such as fall within the descriptions " in the foregoing paragraphs (*a*), (*b*), (*c*) and (*d*), shall not be " registrable under the provisions of this paragraph except upon " evidence of its distinctiveness. (2) For the purposes of this " section ' distinctive ' means adapted, in relation to the goods in " respect of which a trade mark is registered or proposed to be " registered, to distinguish goods with which the proprietor of " the trade mark is or may be connected in the course of trade " from goods in the case of which no such connection subsists, " either generally or, where the trade mark is registered or pro- " posed to be registered subject to limitations, in relation to use " within the extent of the registration. (3) In determining " whether a trade mark is adapted to distinguish as aforesaid the " tribunal may have regard to the extent to which—(*a*) the trade " mark is inherently adapted to distinguish as aforesaid; and (*b*) " by reason of the use of the trade mark or of any other circum- " stances, the trade mark is in fact adapted to distinguish as " aforesaid."

As we are dealing with a mark, which is beyond question a geographical name, I point out that under section 9 (1) (*d*) a word, even though it has no direct reference to the character or quality of the goods, cannot be registered if it is according to its ordinary signification a geographical name. A special warning appears to be given against such a name. But under section 9 (1) (*e*) it may yet qualify for registration if it satisfies certain conditions, i.e., if there is such evidence of its distinctiveness as the section by the later subsections postulates. These I have set out and I only make this comment that, though I can think of no other factor relevant to distinctiveness than those set out in subsection (3), yet if there is such a factor it would be the right and duty of the registrar to take it into consideration. I do not think it necessary to discuss whether the word " may " means " must," for I cannot conceive

that as a practical matter the registrar could ignore either of the factors (*a*) or (*b*).

The position, then, is this, that the registrar will have to consider both the inherent adaptability and the distinctiveness in fact of a geographical name before he makes his decision. Here I must express my emphatic dissent from the proposition which was strenuously urged by counsel for the appellants that distinctiveness in fact is conclusive—at any rate, if there is what he called 100 per cent. distinctiveness. In my opinion the decisions of this House in *Trade Marks Registrar* v. *W. & G. du Cros. Ld.*[1] and *A. Baily & Co. Ld.* v. *Clark, Son & Morland*[2] (the *Glastonbury* case) are fatal to this proposition and I am content to accept as accurate the clear exposition of those cases given by the learned Master of the Rolls in the present case. He took the view which I share that the Court of Appeal had in *In re Liverpool Electric Cable Co. Ld.'s Applications*[3] rightly interpreted the opinion of Lord Parker in the *W. & G.* case[4] and that this House, in its turn, in the *Glastonbury* case[5] endorsed that interpretation. Accepting that view of the law, which indeed, if the matter were res integra, I should not hesitate to commend to your Lordships, I do not see how the registrar could have come to any other conclusion. Unless, having found distinctiveness in fact, he needed to pay no regard to the other factor of inherent adaptability, he was faced by the fact that there could not well be a geographical name less "inherently adapted" than Yorkshire to distinguish the goods of the appellants. I do not propose to try to define this expression. But I would say that, paradoxically perhaps, the more apt a word is to describe the goods of a manufacturer, the less apt it is to distinguish them: for a word that is apt to describe the goods of A, is likely to be apt to describe the similar goods of B. It is, I think, for this very reason that a geographical name is prima facie denied registrability. For, just as a manufacturer is not entitled to a monopoly of a laudatory or descriptive epithet, so he is not to claim for his own a territory, whether country, county or town, which may be in the future, if it is not now, the seat of manufacture of goods similar to his own. I do not ignore that some protection is given by section 8 of the Act, but I accept the view frequently expressed in regard to this section and to section 44 of the earlier Act which it replaced and in particular by Lord Maugham, Lord Atkin and Lord Russell of Killowen in the *Glastonbury* case,[5] that it should not afford a guide as to whether a name should be registered or not.

I am led to suggest that it is perhaps easier to define "inherent "adaptability" in negative than in positive terms: in other words, I would say that a geographical name can only be

[1] [1913] A.C. 624; 29 T.L.R. 772; sub nom. *Re Du Cros' Application*, 30 R.P.C. 660; 57 S.J. 728.

[2] [1938] A.C. 557; 54 T.L.R. 688; [1938] 2 All E.R. 377.

[3] (1928) 46 R.P.C. 99.

[4] [1913] A.C. 624.

[5] [1938] A.C. 557.

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inherently adapted to distinguish the goods of A when you can predicate of it that it is such a name as it would never occur to B to use in respect of his similar goods. Of such names the classic examples are "Monte Rosa" for cigarettes or "Teneriffe" for boiler plates. There will probably be border-line cases, but there is, in my opinion, no doubt on which side of the border lies Yorkshire, a county not only of broad acres but of great manufacturing cities. If the *Liverpool Cable* case [6] was rightly decided, as I think it clearly was, a fortiori the registrar was right in refusing registration to "Yorkshire." And if it were a border-line case, which it is not, I think that a court, to which an appeal is brought from the registrar, though, no doubt, it must exercise its own discretion in the matter, should be slow to differ from the experienced official whose constant duty it is to protect the interests of the public not only of today but of tomorrow and the day after. In uttering that warning I only repeat what has been said more than once in this House. But, as I have already said, the present case is one in which there can be no doubt that the registrar came to a proper conclusion, and I move that the appeal be dismissed with costs.

Lord Oaksey. My Lords, I had prepared an opinion in this case, but, as I entirely agree with the opinion which has just been delivered by the Lord Chancellor, I withdraw it.

Lord Morton of Henryton. My Lords, I have had the advantage of reading the opinion which is about to be delivered by my noble and learned friend Lord Asquith of Bishopstone. I agree with his views as to the construction and effect of section 9 of the Trade Marks Act, 1938, and the principles which should be followed in applying that section to any trade mark whereof registration is sought.

If there had been no authority to guide me, I should have found it a difficult task to arrive at a decision by applying these principles to the facts of the present case, but in my view the present case cannot be distinguished on its facts or on any other ground from the decision of the Court of Appeal in *In re Liverpool Electric Cable Co. Ld.'s Applications.*[7] The decision in that case, and the reasoning upon which it was founded, were clearly approved by this House in *A. Baily & Co. Ld.* v. *Clark, Son & Morland* [8] (the *Glastonbury* case), and I entirely agree with the following passages from the judgment of the Master of the Rolls in the present case. Dealing with the *Liverpool* case [9] he said [10]: "As in the present case, the name of the applicant company had "as its first word the very geographical name which they sought "to register. The name was the Liverpool Electric Cable Co. Ld.

[6] 46 R.P.C. 99.
[7] Ibid.
[8] [1938] A.C. 557.
[9] 46 R.P.C. 99.
[10] (1952) 70 R.P.C. 1, 6.

"In that case, as in the present, the applicant company appeared "to be the only company making articles of the kind in question "within the ambit of the place, the geographical name of which "was sought to be registered. There was in the *Liverpool* case [11] "no evidence of any other company making electric cables in or "around Liverpool, just as here (though there appeared to be other "persons making copper tubes) there are no other manufacturers "of goods of the somewhat specialized character with which we "are concerned. In the *Liverpool* case,[11] as in the present, a body "of evidence had been submitted so that the learned judge, "Romer J., could say of it [12]: 'I arrive . . . at this conclusion "'that the words "Liverpool cables" do in fact now serve, and "'have for some time past in fact served, to distinguish the appli-"'cants' goods from those of the rest of the world.' So in this "case I assume (and I am not hinting in any way to the contrary) "that the evidence filed in this case established that the word "'Yorkshire' as applied to these drawn copper tubes, etc., does "in fact now serve, and has for some time in fact served, to dis-"tinguish the applicants' goods from those of the rest of the "world." Later, the Master of the Rolls observed [13] "Without "attempting any exhaustive exposition, it seems to me that no "valid distinction in this case can be drawn between the applica-"tion of Liverpool to a particular industrial product and the "application of Yorkshire to a particular industrial product. If "a point of difference could be found, I think the result would be "only to introduce into the law refinements which could not "advantage either the law or those whom the law serves. "Although some reference was naturally made in the *Liverpool* "case [14] to the fact that Liverpool is a very large city, the "emphasis was upon the circumstance that it is a centre of "industry. As I have already indicated, as regards a substantial "part of it, so is Yorkshire—certainly the part of Yorkshire which "includes Leeds where this company has its main place of "business. I therefore think we should not be justified upon "principle or otherwise in drawing a distinction between the use "of this county name in the present case and the use of the name "of the city of Liverpool in the earlier case." These passages exactly express my own view, and I would dismiss this appeal.

LORD ASQUITH OF BISHOPSTONE. My Lords, the decision in the present case turns primarily on section 9 of the Trade Marks Act, 1938. The mark proposed for the goods in question—in substance solid drawn copper and copper alloy tubes—is simply the word "Yorkshire" in inverted commas, the presence of which last is admitted to be immaterial for purposes of a decision.

It is plain that the mark "Yorkshire" does not fall within section 9 (1) (*a*), (*b*), (*c*) or (*d*) of the Act of 1938. Therefore,

[11] 46 R.P.C. 99.
[12] Ibid. 104.
[13] 70 R.P.C. 1, 8.
[14] 46 R.P.C. 99.

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unless it falls within section 9 (1) (*e*), it does not qualify for registration. It only falls within section 9 (1) (*e*) if there is what that sub-paragraph calls "evidence of distinctiveness." "Distinctive-"ness" is defined in subsection (2) as meaning some quality in the trade mark (if I may paraphrase) which earmarks the goods so marked as distinct from those of other producers of such goods. It is not enough that it should earmark the goods as complying with a particular description, or as originating from a particular geographical area, or having claims to a peculiar excellence.

Subsection (3) is designed to help the registrar to determine when the requirements of subsection (2) are satisfied. It provides that in so determining the registrar "may"—and I think "may" here means "must" or the subsection is nugatory—must have regard to two factors and to their "extent": the extent, namely, to which "(*a*) the trade mark is inherently "adapted to distinguish as aforesaid; and (*b*) by reason of the "use of the trade mark or of any other circumstances, the trade "mark is in fact adapted to distinguish as aforesaid."

I think "have regard to" and "extent" are important words. They indicate that (*a*) and (*b*) are not cast iron "require-"ments" each of which must be satisfied to the extent of 100 per cent. Touching these two factors (*a*) "inherent" distinctiveness; (*b*) distinctiveness "in fact," there is no doubt that the registrar "had regard to" (*b*) and has held, rightly or admittedly, that the factor is present "to the extent"—I am using the words of the subsection—of 100 per cent. There is equally little doubt, on the authorities, that this does not dispose of the matter: viz., it does not dispense the registrar from considering to what extent factor (*a*) is present. On the decisions, which I do not need to cite, the contrary is unarguable.

As to factor (*a*), your Lordships have to consider to what extent this factor is present in the particular case in which the mark proposed for registration is a geographical term, e.g., "Yorkshire." I prefer to envisage this problem in the first instance in abstraction from authority. So considered, a geographical area, unless extremely small, seems to me inherently unadapted to distinguish the products of one producer in that area from those of another in the same area. When the area is as large as Yorkshire, it seems to me fanciful to dispute this proposition. Indeed, when the trade mark is geographical, it follows, paradoxical as it may sound, that it can only satisfy factor (*a*) where its significance, in the particular context, is non-geographical. For only so can it serve to distinguish the goods of one producer from the goods of others. Good imaginary instances of this paradox are "North Pole Bananas," "Monte Rosa Cigarettes," and so on. In these instances the geographical term is clearly not applied in any geographical sense, and pro tanto may—I will not say must—be a sufficient compliance with section 9 (3) (*d*). If it were applied in a purely geographical sense, it could not so comply, because it would simply indicate that the goods in question were

supplied within a particular locality, not that they were supplied only by a specific supplier, and the last consideration is the only one which, for this purpose, counts.

I would only add that the primary question posed by section 9 (1) and (2) is whether there is evidence of "distinctiveness": and that subsection (3), in supplying pointers to the solution of this question, itself raises questions of degree under both limb (*a*) and limb (*b*). This question of degree as applied to (*b*) of subsection (3) is assumed to be answered in the sense that that factor is fully present. As regards subsection (3) (*a*), the factor involved, viz., "inherent" adaptedness, may be present or satisfied to the extent of 1 per cent. or 100 per cent.: and the question posed by subsection (2)—distinctiveness as a whole vel non—depends on the combined answers to subsection (3) (*a*) and (*b*). In the present case the answer to subsection (3) (*a*) seems to me almost wholly negative and the addition of (*a*) to (*b*) inadequate to justify registration. If, as so many of the cases state or imply, the registrar has a discretion in regard to the summation of these factors, I think he has on these materials either exercised it rightly, or has exercised it in a sense which appellate courts cannot properly dispute.

But apart from these general considerations of principle, the immediately relevant question in the present case seems to me to be concluded in a manner binding on this House by its own decision in the *Glastonbury* case [15] affirming that of the Court of Appeal in the *Liverpool* case.[16]

I would accordingly dismiss the appeal.

LORD COHEN. My Lords, I am of the same opinion. I need not re-read the provisions of the Act or repeat the statement of facts. It is sufficient for my purpose to say that I am prepared to accept that the evidence in this case establishes what Mr. Shelley called 100 per cent., or universal distinctiveness in fact of the appellants' mark. On this basis Mr. Shelley contended that it was unnecessary to consider whether the trade mark "Yorkshire" was inherently adapted to distinguish the appellants' goods and that the respondent was bound to proceed with their application for registration.

This argument is not supported by authority. Indeed, as Mr. Shelley admitted, it is in conflict with the decision of the Court of Appeal in the *Liverpool* case.[17] Mr. Shelley submitted that that case was wrongly decided and that it was open to your Lordships to overrule it. I am unable to agree. As I read the judgment of Lord Russell of Killowen in the *Glastonbury* case [18] (a judgment with which all their Lordships expressed their agreement) this House expressly approved the ratio decidendi of and the decision

[15] [1938] A.C. 557.
[16] 46 R.P.C. 99.
[17] Ibid.
[18] [1938] A.C. 557.

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in the *Liverpool* case.[19] But even if the matter were open, I should reach the same conclusion. I agree with Lord Russell of Killowen that the *Liverpool* case [19] laid down no new law but was correctly applying the observations of Lord Parker in the *W. & G.* case [20]: "But the tribunal is not bound to allow registration even "if the mark be in fact distinctive. A common law mark is still "not necessarily registrable. If the tribunal finds that a mark is "anywhere, or among any class of people, in fact, distinctive of "the goods of the applicant, it may be influenced by this fact "in determining whether it is adapted to distinguish these goods "from those of other persons, but distinctiveness in fact is not "conclusive."

In my opinion, on the true construction of section 9 of the Trade Marks Act, 1938 (which for present purposes may be regarded as indistinguishable from section 9 of the Trade Marks Act, 1905, as amended by the Trade Marks Act, 1919), the tribunal, in considering whether a trade mark is adapted to distinguish goods with which the proprietor of the mark is or might be connected in the course of trade from goods in the case of which no such connexion exists, should take into account both the factors referred to in section 9 (3). It is the duty of the tribunal to weigh all relevant factors in reaching its conclusion. A geographical word may be inherently "adapted to distinguish as "aforesaid," as in the instances given by Fletcher Moulton L.J. in *In re Joseph Crosfield & Sons Ld.*[21] (the *Perfection Soap* case) of "Monte Rosa" cigarettes or "Teneriffe" boiler plates. At the other end of the scale would be such a word as "British." Words such as "Yorkshire" and "Liverpool," associated as they are with large manufacturing centres, are, in my opinion, much nearer the "British" end of the scale than the opposite end. I agree with the Master of the Rolls in the present case where, after saying that geographical names might in some cases be allowed, he continued [22]: ". . . there seems to me to be one principle applic- "able to them all, a principle which is stated in the *Perfection* "*Soap* case [23] by Sir Herbert Cozens-Hardy, then the Master of "the Rolls, and by Farwell L.J. The principle is thus put by Sir "Herbert Cozens-Hardy [24]: 'Wealthy traders are habitually "'eager to enclose part of the great common of the English "'language and to exclude the general public of the present day "'and of the future from access to the inclosure.' Farwell L.J. "observes [25] 'The court is careful not to interfere with other "'persons' rights further than is necessary for the protection of "'the claimant, and not to allow any claimant to obtain a mono- "'poly further than is consistent with reason and fair dealing.'"

[19] 46 R.P.C. 99.
[20] [1913] A.C. 624, 637.
[21] [1910] 1 Ch. 130, 144; 26 T.L.R. 100.
[22] 70 R.P.C. 1, 4–5.
[23] [1910] 1 Ch. 130.
[24] Ibid. 141.
[25] Ibid. 150–1.

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Applying this principle to the present case, I think the Assistant Comptroller came to the right conclusion, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile & Martin; Solicitor to the Board of Trade.*

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (COMPANIES COURT).

1954
Mar. 12.

Company—Investigation of affairs—Motion—Notice—Board of Trade, how notified—R.S.C., Ord. 53B, *r.* 7 (*c*)—*Companies Act,* 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 165.

IN the case of an application by originating motion under Order 53B, r. 7 (*c*) of the Rules of the Supreme Court for a declaration that the affairs of a company ought to be investigated under section 165 of the Companies Act, 1948, the notice of motion need not be served on the Board of Trade, but notice of the intended application should be sent to the Solicitor of the Board of Trade together with copies of any affidavits intended to be used at the hearing. Evidence should be filed proving that this direction has been complied with.

J. T. WILSON,
Registrar.

By direction of the judges. March 12, 1954.

[COURT OF APPEAL.]

* KNIGHT *v.* DEMOLITION AND CONSTRUCTION CO. LD. RANSOME *v.* THE SAME.

C. A.
1954
Feb. 2, 3, 24.
Somervell, Birkett and Romer L.JJ.

Building—Safety regulations—Demolition—Gas retorts surrounded by brick arches—Archways demolished—Collapse of adjoining wall—Fatal accident.

Decision of Parker J. [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508, affirmed.

APPEAL from a decision of Parker J.[1]

In the course of demolition of blocks of gas retorts housed in vertical columns, surrounded by brickwork and surmounted

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[Reported by Miss ELAINE JONES, Barrister-at-Law.]

[1] [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508.

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by heavy brick arches, demolition contractors had adopted a system of work in use in the trade and had provided adequate supervision and visual inspections by a competent person. While two workmen were employed in clearing away debris from under an arch, the outer wall of which had been demolished, the adjoining wall fell and both were killed. On the trial of actions by their widows under the Fatal Accidents Act, 1864, and the Law Reform (Miscellaneous Provisions) Act, 1934, in June, 1953, Parker J. negatived allegations of lack of supervision and failure to inspect the wall by a person competent to do so, but held that the defendants were, nevertheless, in breach of their common law duty to their employees. In case he should be held to be wrong as to breach of common law duty, the judge held that the defendants were also in breach of the Building (Safety, Health and Welfare) Regulations, 1948, reg. 79. The case was reported only on the latter point before Parker J.

F. W. Beney Q.C. and *Martin Jukes* for the appellants.

C. N. Shawcross Q.C. and *R. Castle-Miller* for the respondent Knight.

Gerald Gardiner Q.C. and *Gilbert Dare* for the respondent Ransome.

The Court of Appeal held that the demolition contractors, having failed to direct their minds to foreseeable and special dangers, which ought to and could have been guarded against, were in breach of their common law duty to their employees. The judgment of Parker J. being affirmed on this point, the court did not consider the construction of regulation 79 of the Building (Safety, Health and Welfare) Regulations, 1948.

Solicitors: *J. F. Coules & Co.; Darracotts & Emtringham; Hepburns.*

[COURT OF APPEAL.]

C. A.

1954
Mar. 1.

Evershed M.R., Denning and Romer L.JJ.

**In re* YATES' SETTLEMENT TRUSTS. YATES and Another *v.* YATES and Others.

[1954 Y. 65.]

Practice and Procedure—Adjournment—Discretion of court—Jurisdiction of Court of Appeal to review judge's decision—Settlement—Tax avoidance scheme—Appeal in similar case pending in House of Lords—Risk of death of settlor meanwhile.

Judicial Precedent—Court of Appeal decision—Effect pending appeal to House of Lords—Similar decision only under appeal.

An application for the approval of the court to a scheme of family arrangement was adjourned by the judge, pending the decision of the House of Lords in *In re Chapman's Settlement*

Trusts [1953] Ch. 218, 225; [1953] 1 All E.R. 103, which was then before them. On appeal to the Court of Appeal it was shown that injustice might result to the parties if the adjournment was continued, because the proposed compromise could never be effective, even if approved, unless the settlor, whose health was precarious, was alive when the court's approval was obtained. The appellants argued that the case was governed not by *In re Chapman* but by *In re Downshire Settled Estates* [1953] Ch. 218; [1953] 1 All E.R. 103, a similar decision not under appeal:—

Held, (1) that the Court of Appeal had jurisdiction to review the judge's decision to adjourn a case or to refuse an adjournment, although the court would be reluctant to interfere with his decision since this was a matter within his judicial discretion; (2) that, in the circumstances, having regard to the injustice which might result from a continued adjournment, the case should be heard and determined by the judge without waiting for the opinion of the House of Lords.

Hinckley and South Leicestershire Permanent Benefit Building Society v. *Freeman* [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212 approved.

Decision of Harman J. reversed.

APPEAL from Harman J.

On February 8, 1954, Harman J. adjourned an application for the approval of the court to a scheme of family arrangement or compromise on matters relating to the trusts of a settlement made by H. J. Yates on November 29, 1938. The ground for the adjournment was that Harman J. considered that the case appeared to be similar to *In re Chapman's Settlement Trusts*,[1] which had about that time come before the House of Lords on appeal; and he, accordingly, adjourned the case pending the giving of the opinion of the House of Lords in *In re Chapman's Settlement Trusts*.[1] The settlor's two sons appealed against the adjournment, contending first that the case was not analogous to *In re Chapman's Settlement Trusts*[1]; and, secondly, that the law should be applied as it was at present and without waiting for the opinion of the House of Lords to be given. If the scheme was to be effective, it was necessary for the settlor to be alive at the date when the scheme was approved, if it was approved; and evidence was adduced showing that he was in a precarious state of health. It was submitted that injustice might result if the adjournment was continued.

Raymond Jennings Q.C. and *J. A. Brightman* for the two sons of the settlor, the plaintiffs.

Harold Lightman for the first four defendants, the four children of one of the settlor's sons.

John Plowman for the brothers and sisters of the settlor and their children.

J. A. Wolfe for the trustees of the settlement.

The settlor was not represented and did not appear.

[1] [1953] Ch. 218, 225; [1953] 1 All E.R. 103.

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No cases other than those referred to in the judgments were cited in argument.

Evershed M.R. This is a curious and unusual appeal, arising out of a matter which came before Harman J. on February 8, 1954. Application was made for the approval of the court to be given to a proposed scheme of compromise or family arrangement.

Mr. Jennings, for the two plaintiffs, has contended and contends that the particular type of arrangement or compromise falls within the scope of *In re Downshire Settled Estates*,[1] which was decided by the Court of Appeal, together with two other cases, in December, 1952. The third of those cases, *In re Chapman's Settlement Trusts*,[2] was before the House of Lords on appeal when the present matter came before Harman J. on February 8, 1954. The appeal in *In re Chapman's Settlement Trusts* [2] has now been heard, but the decision of the House has not yet been given. From what I have said, it will be noted that only *In re Chapman's Settlement Trusts*,[2] and not *In re Downshire Settled Estates*,[1] was the subject of appeal, but I think that it must be taken that the decision of the House in *In re Chapman's Settlement Trusts* [2] might well have a bearing on the grounds on which this court based its decision in *In re Downshire Settled Estates*.[1]

Subject, however, to any such pronouncement, the law has been stated by the Court of Appeal in *In re Downshire Settled Estates*,[1] which case is not subject to appeal. The result is that prima facie any case falling completely within the scope of *In re Downshire Settled Estates* [1] would, by the authority of that case, be held to be within the jurisdiction of the Chancery Judge to determine; but whether, for the reasons which I have indicated (namely, the measure of uncertainty which necessarily surrounds this class of application until the House has delivered its opinion), or whether because the hearing of *In re Chapman's Settlement Trusts* [2] had begun on the very day when this matter came before Harman J., the judge came to the conclusion that he would adjourn the hearing until after the result of the appeal in *In re Chapman's Settlement Trusts*.[2] The order drawn up was, accordingly, one which simply ordered that "the said application "do stand over"; and it thereafter stated that the judge did not require further argument, but gave leave to appeal.

There is, I think, no doubt that if a judge adjourns or refuses to adjourn a case, he has performed a judicial act which can be reviewed by the Court of Appeal; although I need not say that an adjournment or a refusal of an adjournment is a matter which prima facie is entirely within the discretion of the judge. The Court of Appeal would, therefore, be very slow to interfere with any such order, but there is no doubt that the Court of Appeal has jurisdiction to entertain appeals in such matters. As authority

[1] [1953] Ch. 218; [1953] 1 All E.R. 103. [2] [1953] Ch. 225.

for what I have said, Mr. Jennings referred to *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman* [3] and *Maxwell* v. *Keun.*[4]

It may well be that if an important case is known to be subject to appeal to the House of Lords, or to appeal from a judge of first instance to the Court of Appeal, a judge may reasonably and properly think that it is in the public interest not to decide another similar case until the result of the case under appeal has become known: whether he should so decide depends very much on all the circumstances of the particular cases; and if the judges of the Chancery Division have reached the conclusion that it would be in the public interest, generally speaking, to postpone considering applications of this kind until the decision in *In re Chapman's Settlement Trusts* [5] is known, then I should feel that it was, prima facie at any rate, a matter for the Chancery judges to decide. Whether the judges have made any such decision I do not, of course, know. I have said this because I desire to confine my judgment to the particular case before the court.

Mr. Jennings stressed most strongly that it was essential, in order that the proposed compromise should be effective, that the settlor should live until the date when the court approves, if it did approve, the present scheme. There is evidence before the court to show that this settlor, who is of the ripe age of 80 years, is also in a very delicate, not to say precarious, state of health; and, indeed, it is said that although it is impossible to say how long he is likely to live, his health is such that he might die within a very short space of time.

Whatever might be the right answer to a case not affected by a consideration of that kind, it seems to me that a real injustice might result if this case were adjourned, perhaps for some months, and if during that period Mr. Yates were to die. I have, therefore, come to the conclusion that the Court of Appeal ought to intervene, and that the fact that *In re Chapman's Settlement Trusts* [5] is pending before the House of Lords is not a sufficient justification for the judge's decision to adjourn this case. It may be that the judge will wish to have further elaboration of the medical evidence; the affidavit seems to support what I have stated about Mr. Yates' health, and in those circumstances I think that Harman J. should not have adjourned the hearing, but should have heard and determined this case. The judge may, of course, decide that it is not within the scope of *In re Downshire Settled Estates* [6]; or he may decide that it is, but that in the exercise of his discretion he will not affirm it; or, on the other hand, he may think that it is within *In re Downshire Settled Estates* [6] and that he should sanction the scheme. These are matters which are exclusively for the judge at this stage.

[3] [1941] Ch. 32; 57 T.L.R. 71; [1940] 4 All E.R. 212.
[4] [1928] 1 K.B. 645; 44 T.L.R. 100.
[5] [1953] Ch. 218, 225.
[6] [1953] Ch. 218.

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In my judgment the result is that we should allow this appeal and order that the judge should hear and determine the summons. I add two things: first, I am the less discouraged from making the order in this case by the circumstance that Harman J. expressly gave leave to appeal, and obviously felt, therefore, some doubt whether in all the circumstances it was right to adjourn it. Secondly, it is said that the adjournment has indicated a certain reluctance on his part to determine the case, and that it would be desirable that we should order the case to go back to be heard and determined by some other judge of the Chancery Division. For myself, I cannot see any good ground for a step of that kind, for I feel no doubt whatever that if Harman J. hears this matter he will hear it with all the attention that he invariably gives to the cases which come before him. I hope, therefore, that the parties will not feel any want of confidence on that account, because Harman J. had made up his mind on this occasion that the proper thing to do was to adjourn the case, which he did. This appeal should be allowed and the court should make the order which I have indicated.

Denning L.J. The law has been stated by the Court of Appeal in *In re Downshire Settled Estates,*[7] and Harman J. should have applied the law as there laid down, without any misgivings about what the House of Lords might hereafter say. I do not think that the plaintiffs should be sent away for an indefinite period, especially when it is not known whether the settlor will live so long. I agree with the order proposed by the Master of the Rolls.

Romer L.J. I also agree, and I should like to make it clear that, so far as I am concerned, and I think so far as the court as a whole is concerned, we are not casting any doubt on the general principles laid down by Farwell J. in *Hinckley and South Leicestershire Permanent Benefit Building Society* v. *Freeman.*[8] Farwell J. said[9]: "It is a novel proposition to me that this court "has not power to adjourn any matter on any proper ground. "No doubt the court would not arbitrarily postpone the hearing "of a matter indefinitely, because to do so might lead to defeating "justice altogether; and a mere arbitrary refusal to hear a "particular case is not a course which any judge would take or "which would ever become a recognized thing. But to say that "the court has not inherent power to direct that any matter "which comes before it should stand over for a period if the "court thinks that that is the proper way to deal with the matter, "is an entirely novel proposition to me." He then points out that if the judge takes the course of adjourning a particular case, that decision would be subject to appeal in the Court of Appeal.

[7] [1953] Ch. 218.
[8] [1941] Ch. 32.
[9] Ibid. 38.

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I think that that is a correct statement of procedural law, and I do not think that anything has been said to cast any doubt upon it.

This is, however, a special case, for the reasons that my Lord, the Master of the Rolls, has indicated, because it is a case where the gentleman whose life is of considerable importance in the proposed scheme is some 80 years of age, and an affidavit has been put in before the Court of Appeal, which was not in evidence before Harman J., showing that his state of health is serious. He may not live very long, and in those circumstances, which are rather special, I agree that this is a matter which might properly be dealt with by the judge of the Chancery Division, having regard to the fact that *In re Downshire Settled Estates*,[10] which was before this court and which has not been appealed from, may apply to this case (a point on which I express no opinion); and if *In re Downshire Settled Estates*[10] applies there seems to me to be no reason why this case should not be decided and determined in the light of the decision in that case. I agree with the order proposed.

Appeal allowed, costs of all parties of the appeal as between solicitor and client to be paid out the trust fund.

Solicitors: *Bulcraig & Davis.*

E. D.

[10] [1953] Ch. 218.

[COURT OF CRIMINAL APPEAL.]

* REGINA *v.* DAVENPORT.

C. C. A.
1954
Feb. 8, 22.
Lord Goddard C.J., Cassels and Slade JJ.

Criminal Law—Larceny—Larceny by servant—Cheques signed by master in blank—Servant paying master's cheques to his own creditors—Indictment charging larceny of moneys—Whether correct offence charged. Embezzlement—Servant paying master's cheques to friend—Money received in exchange—Indictment charging larceny. Fraudulent conversion.

Banking—Current account—Relationship between banker and customer.

The appellant, the secretary of a company, received blank cheques signed by the directors of the company, and it was his duty to fill in the names of the payees. On a number of occasions the appellant paid the cheques to his own creditors by filling in as payee the name of the creditor's bank. In three other instances he gave cheques to one S., having filled in the name of S.'s bank as payee, and S. cashed the cheques by giving the appellant either cash or open cheques. The appellant was convicted on an indictment containing 14 counts, charging him with larceny as a servant of moneys (the proceeds of the cheques). On appeal:—

Held, first, that in respect of the cheques which the appellant paid to his creditors, the appellant had not been guilty of larceny

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because there was no asportation; he did not steal the company's money but caused their bank account to be debited with the amounts received by his creditors. Had the appellant been charged with fraudulent conversion there could have been no answer to the charges.

Held, secondly, that in respect of the cheques for which the appellant received cash, that amounted to embezzlement, and applying the provisions of section 5 (2) of the Criminal Appeal Act, 1907, the court could substitute a verdict of embezzlement for that of larceny.

Regina v. *Gale* (1876) 2 Q.B.D. 141 followed.

Appeal against conviction.

The appellant, Laurence Henry Christopher Davenport, was charged on an indictment containing 14 counts, with larceny as a servant of moneys.

The appellant was the secretary of a company. He received blank cheques signed by two directors of the company which he had to counter-sign and pay to those persons to whom the company wished to make payments. The names of the payees were left blank and the appellant's duty was to fill them in to the proper payees. In respect of four cheques amounting to £2,250 referred to in the first four counts in the indictment, the appellant paid them to one Lawrence, to whom he owed money, by filling in the name of the payee as Lloyds Bank Ld., of which Lawrence was a customer. Lawrence paid the cheques into Lloyds Bank, the cheques were presented and the company's account was debited. The appellant used seven other cheques in a similar manner. In respect of three other cheques he approached one Samuel, and handed him the cheques made out to Samuel's bank. Samuel cashed the cheques and handed to the appellant their value partly in money and partly in open cheques, which the appellant cashed.

The appellant was convicted on all the counts in the indictment and sentenced to 18 months' imprisonment. He appealed against conviction.

Eric Myers for the appellant.
Maxwell Turner for the Crown.

The following cases were referred to in argument: *Joachimson* v. *Swiss Bank Corporation*[1]; *Regina* v. *Gale*[2]; *Regina* v. *Cullum*[3]; *Regina* v. *Wilson*.[4]

Lord Goddard C.J., delivering the judgment of the court, stated the facts and continued: The indictment charged the appellant with larceny. That could only have been done because everyone, from the recorder downwards, seems to have been under a misapprehension with regard to the more or less elementary principles of the laws of banking and larceny. There was no

[1] [1921] 3 K.B. 110; 37 T.L.R. 534.
[2] (1876) 2 Q.B.D. 141.
[3] (1873) L.R. 2 C.C.R. 28.
[4] (1839) 9 C. & P. 27.

larceny here because in larceny there must be an asportation—a taking and carrying away. The fallacy that led to this charge of stealing money was that it was thought that because the master's account got debited that that was enough to make a theft. But although one talks about people having money in a bank, it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee; the leading case of *Foley* v. *Hill*[1] exploded that idea. Directly the money is paid into the bank it becomes the banker's money, and the contract between the banker and the customer is that the banker receives a loan of money from the customer against his promise to honour the customer's cheques on demand. When the banker is paying out, whether he pays in cash over the counter or whether he is crediting the bank account of somebody else, he is paying out his own money, not the customer's money; but he is debiting the customer's account. The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque. Therefore, in the present case, the money paid on these cheques was the banker's money, but it led to the customer's account being debited. If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer; but it is obvious that he could not be convicted of larceny because he did not steal the company's money. He merely caused their account to be debited.

The question is, therefore, whether the court has to quash the whole of this indictment. I think that it ought to quash all the counts except those which relate to the transactions with Samuel. There, the appellant got Samuel to cash his master's cheque and he obtained cash in his hands, bank notes. It follows that that money, as it was the proceeds of his master's cheque, was received for and on behalf of his master and, therefore, he embezzled that money because he applied it to his own uses instead of handing it over. On that part of the case it is only necessary to refer to *Regina* v. *Gale*,[2] where the facts as set out in the headnote read: "The prisoner was the clerk and servant "of an insurance company, and head manager at their chief "office at L. In the ordinary course of business he received "several cheques payable to his order from the managers of "branch offices, and it was his duty to indorse these cheques and "hand them over to the company's cashier. Instead of doing "so, he indorsed the cheques and obtained money for them from "friends of his own, who paid the cheques into their own banks. "He then took the amount so received to the cashier and handed "it over to him, saying he wished it to go against his salary,

[1] (1848) 2 H.L.Cas. 28. [2] (1876) 2 Q.B.D. 141.

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"which was overdrawn to a like amount; and he got back from "the cashier I.O.U.s, which he had previously given for the "amount of the overdraft." In other words, what he did was to use cheques for the purpose of reducing his own overdraft. The court held that he could have been convicted of the embezzlement of the cheques or the proceeds of the cheques and, in principle, I cannot see any difference between that case and the present. In that case the cheques were made out payable to his master. In the present case the appellant received the cheques drawn by his master. He used those cheques to get cash and apply that cash for his own uses, and therefore he was guilty of embezzlement. I think that case entirely covers the present case so far as the cheques given to Samuel are concerned. Therefore, the court can apply the provisions of the Criminal Appeal Act, 1907, and say that the appellant ought to have been convicted on those counts of embezzlement and not larceny. Section 44 (2) of the Larceny Act, 1916, provides that a person who is charged with larceny may be convicted of embezzlement if the facts show embezzlement.

Section 5 (2) of the Criminal Appeal Act, 1907. provides: "Where an appellant has been convicted of an offence and the "jury could on the indictment have found him guilty of some "other offence, and on the finding of the jury it appears to "the Court of Criminal Appeal that the jury must have been "satisfied of facts which proved him guilty of that other offence, "the court may, instead of allowing or dismissing the appeal, "substitute for the verdict found by the jury a verdict of guilty "of that other offence. . . ." The jury must have been satisfied that there was a fraudulent act of the appellant, because they convicted him of stealing. They must also have been satisfied that Samuel did hand this money to the appellant, and that he received it as a clerk or servant and applied it to his own use.

The consequence is that the convictions on all the counts except the three referring to the cheques cashed by Samuel will be quashed; but he only received a sentence of 18 months' imprisonment on each count to run concurrently, and the court is not going to interfere in a case where the appellant has been guilty of the most atrociously dishonest conduct and has received thousands of pounds. As there is no appeal against sentence the court cannot increase the sentence, but we shall not alter the sentence in view of the quashing of the other counts. The appeal succeeds as to those counts.

Appeal allowed in part.

Solicitors: *Beach & Beach; Director of Public Prosecutions.*

C. J. E.

[CHANCERY DIVISION.]

* *In re* LYBBE, DECD.
KILDAHL AND ANOTHER *v.* BOWKER AND OTHERS.

1954
Jan. 22, 26.

Roxburgh J.

[1953 L. 1937.]

Will—Construction — "Children" — Whether including issue — Trusts for "children . . . and . . . issue"—Ultimate trusts for "children "... similar to the trusts hereinbefore declared so far as may be "and the law will allow"—Whether "issue" included in ultimate trusts. "Similar" trusts.

Accruer—Clause—Second accruer—"Share"—Accruing share not prima facie included in word "share"—No words in clause permitting other than natural construction of "share."

By his will a testator left his residuary estate to A for life and after her death in trust for such of her children living at his death and attaining the age of 21 years or if female marrying as she should appoint and in default of appointment in equal shares. In 1883 he settled property on trust to pay the income of it as in the settlement provided during the lives of A, himself and the survivor of them and thereafter in trust for such of A's children B C and D and of such other persons if any as the testator should by deed, will or codicil appoint and in default of appointment in trust for such of B C and D as should attain 21 years of age or marry if more than one in equal shares. By a codicil made in 1887 reciting that C had recently married, the testator appointed the settled property to be held after A's and his own death on trust for such of B C and D as should be living at his death in equal shares, on trust to pay the income of one such equal share to each of B C and D for life or until forfeiture: and he directed the trustees, after the decease of any of B C and D, to "stand possessed of the "share of the person so dying . . . upon trust in equal shares for "... the children of such person living at the time of such person's "decease who . . . attain the age of 21 years or being female . . . "marry . . . and for all or any of the issue living at that time "on attaining 21 or marrying of any child of the person so dying "who dies in the lifetime of such person leaving issue living at "the time of such person's death . . . and . . . if there shall be no "child or other issue of the person so dying . . . who attains a "vested interest under the trusts lastly hereinbefore contained . . . "the share of the person so dying shall be held on trust for the "benefit of B C and D or the survivor or survivors of them or of "their children on trusts similar to the trusts hereinbefore declared "with regard to [the settled fund] so far as may be and the law "will allow." In 1897 the testator died, in 1919 A died and in 1922 B died without having been married. In 1945 C died, predeceased by her only child, a son, and survived by 5 grandchildren, all 21 years old at the date of this summons. In 1953 D died leaving a will, without having been married.

A summons was issued to determine whether the property subject to the trusts of the settlement was held in trust for C's grandchildren or for residuary legatees under D's will or how otherwise:—

Held, (1) that, as the gift to the children and issue was to a single composite class, the word "similar" in the codicil meant that the testator intended the preceding trusts to prevail, with the result that issue would take under the ultimate trust in the codicil although that trust did not contain the word "issue": (2) that

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the word "share" in the accruer clause meant the original share and prima facie did not include an accruing share, and that nothing in the accruer clause enabled the court to give it a construction which it did not naturally bear; and that there was therefore no second accruer, with the result that D's accrued share went in default of appointment.

In re Allan [1903] 1 Ch. 276 considered.

Adjourned summons.

By his will dated April 23, 1870, Philip Lybbe Powys Lybbe (hereinafter called "the testator") directed his trustees to stand possessed of his residuary estate on trust to pay the income thereof to Fanny Worth for her life and after her death in trust for such one or more of Fanny Worth's children living at the time of his decease as should attain 21 or being female marry under that age and if more than one in such shares and proportions as Fanny Worth should appoint and in default of appointment in trust for Fanny Worth's said children in equal shares. By a settlement made by the testator in 1883 it was declared that the settled property should be held on trust to pay or apply the income thereof as therein mentioned during the lives of Fanny Worth and the testator and the survivor of them and after the survivor's death in trust for such of Fanny Worth's children, Amy, Mabel and Helen Lybbe and of such other person or persons if any in such shares and proportions and generally in such manner as the testator should by deed or will or codicil appoint and in default of appointment in trust for such of them the said Amy, Mabel and Helen Lybbe as should attain the age of 21 years or marry under that age and if more than one in equal shares. The testator made two codicils to his will not material to this report and by a third codicil, dated November 16, 1887, after reciting inter alia that Mabel Lybbe had recently married Herbert Bowker the testator appointed that after the decease of Fanny Worth and himself the trustees of the settlement should stand possessed of all the trust funds and premises on trust for such of them the said Amy Lybbe Mabel Bowker and Helen Lybbe as should be living at the time of his decease and should as regarded the said Helen Lybbe attain the age of 21 years or marry with the consent therein mentioned in equal shares as tenants in common in manner following that was to say upon trust to pay the income of one such equal share to each of them the said Amy Lybbe Mabel Bowker and Helen Lybbe during her life or until forfeiture as therein mentioned, and that after the decease of any of them the trustees of the settlement should stand possessed of the share of the person so dying on trust in equal shares for all or any of the children of such person living at the time of such person's decease who should attain the age of 21 years or being female marry with the consent therein mentioned and for all or any the issue living at that time who should attain the age of 21 years or being female marry with such consent as aforesaid of any child of the

person so dying who died in the lifetime of such person leaving issue living at the time of such person's death, and so that such issue should take per stirpes according to their stocks in equal shares the share which the parent of such issue would have taken if living at the time aforesaid. The testator continued as follows: "And I hereby declare that if there shall be no child or other "issue of the person so dying as aforesaid who attains a vested "interest under the trusts lastly hereinbefore contained then the "share of the person so dying shall be held upon trust for the "benefit of the said Amy Lybbe Mabel Bowker and Helen Lybbe "or the survivor or survivors of them or of their children similar "to the trusts hereinbefore declared with regard to [the sum "over which the testator was exercising the power] so far as "may be and the law will allow." On September 12, 1897, the testator died, on August 5, 1919, Fanny Worth died and on April 1, 1922, Amy Lybbe died without having been married.

Mabel Bowker subsequently married Lewis Vinall. By her first marriage she had one child only, Claude Herbert Bowker, who predeceased her on August 16, 1939, having had five children, all of whom had attained the age of 21 years at the date of this summons, to which they were defendants. On January 29, 1945, Mabel Bowker died. On April 17, 1953, Helen Lybbe died without having been married: and by this summons, taken out on August 5, 1953, the trustees of the settlement, who were also trustees of the will and codicils so far as regarded the trust funds subject to or held on the trusts of the settlement, asked, inter alia, whether, on the true construction of the settlement, will and codicils and in the events which had happened, the whole, or, if not the whole some and if so what part, of the trust funds held by the trustees were held (*a*) in trust for the children of Claude Herbert Bowker in equal shares or (*b*) in trust for the residuary legatees under Helen Lybbe's will.

J. V. Nesbitt for the trustees.
W. A. Bagnall for Claude Herbert Bowker's children.
M. J. Albery for the residuary legatees.

His Lordship dealt first with the question whether issue were able to take under the ultimate trust in the codicil in which only the word "children" and not the word "issue" was used.

ROXBURGH J. This very difficult point must be one, not of first or last impression, but just impression.

The testator in his codicil appointed interests to Amy Lybbe, Mabel Bowker and Helen Lybbe, and provided: "After the "decease of any of them the said Amy Lybbe Mabel Bowker "and Helen Lybbe the trustees or trustee shall stand possessed "of the share of the person so dying as aforesaid upon trust "in equal shares for all or any of the children of such person

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"living at the time of such person's decease who being male "attain the age of 21 years or being female attain that age or "marry with the consent of her guardian or guardians and for "all or any of the issue living at that time who being male "attain the age of 21 years or being female attain that age or "marry with such consent as aforesaid of any child of the "person so dying who dies in the lifetime of such person leaving "issue living at the time of such person's death and so that such "issue shall take per stirpes according to their stocks and in "equal shares the share which the parent of such issue would "have taken if living at the time aforesaid."

The testator proceeded: "And I hereby declare that if there "shall be no child or other issue of the person so dying as "aforesaid who attains a vested interest under the trusts lastly "hereinbefore contained"—that has happened with regard to Helen's original share and Helen's accrued share, but for the moment I am only dealing with Helen's original share—"then "the share of the person so dying shall be held upon trust for "the benefit of the said Amy Lybbe Mabel Bowker and Helen "Lybbe or the survivor or survivors of them or of their children" —not "issue"—"similar to the trusts hereinbefore declared "with regard to" [the sum in question] so far as may be and "the law will allow." The question is: can issue come in under that ultimate trust in which only the word "children" is used?

First, the word "similar" caused me more trouble than it should have done, because really the testator has, I think, himself defined the meaning of the word. It means that the trusts are to be the same so far as may be and the law will allow, or, putting it the other way round, are to be modified only so far as the circumstances or the law require. Had the meaning been different the disposition would probably have been void for uncertainty; but I need not pursue that, because, in my judgment, that is what the testator meant, and so there is no question of being void for uncertainty.

The crux of the case is whether the word "similar" is pregnant in meaning or not. Does it mean that the trusts which have been declared in favour of children and issue have to be modified so as to exclude issue—in which case it is clearly very pregnant, because it imports all that—or does it mean merely that the testator intends the preceding trusts, which he has not accurately set out again, to prevail so far as the circumstances and the law will allow?

I think that the determining factor in this very doubtful case is the circumstance that the gift to the children and the issue is a gift to a single composite class. If the gift had taken a somewhat similar but different form, namely, had been a gift to children with substitution of "the issue of deceased children" for "children deceased at the time of distribution," my decision would have been the other way, I think; because prima facie

"children" does not include issue, and it will not include issue unless the context requires or unless such a construction is required under the doctrine of ut res magis valeat quam pereat, and, had it been possible to segregate the two trusts so as to say that in the preceding trusts was a trust for children separate and independent from the trust for issue, as would have been the case had the gift been a true substitutional gift, I should, I think, have said that by these words the testator had reintroduced only those trusts which referred to the propositae and their children; but as it is a class gift, issue and children being combined in one single class, it seems to me that it is impossible to give effect to the gift for children in the ultimate gift without at the same time giving effect to the gift for issue, unless I am prepared to treat these words, "similar" and so on, as a positive direction to re-write the trusts in such a manner as will benefit the children and exclude their issue.

I cannot give such strong effect to the words "similar "so far as may be and the law will allow." On balance, I think that these words are intended to be referential and that when the testator did not set out the issue in the referential trust he left it out merely because he thought he had sufficiently described the trusts to which he intended to refer. Therefore, with considerable doubt, I hold that with regard to the original share the issue can take under the ultimate trust.

[His Lordship then heard argument on the question whether the word "share" in the accruer clause included an accruing share as well as an original share.]

ROXBURGH J. This point is one of the most difficult that I have ever had to decide. The rules of construction on these matters have attained such a degree of artificiality that it is really difficult to be certain about a problem of this kind.

This is actually the exercise of a power of appointment, but I do not think that that affects the principle in any way. The testator, making this appointment by a codicil, appointed the fund over which he has a special power "upon trust for the "benefit of such of them the said Amy Lybbe Mabel Bowker "and Helen Lybbe as shall be living at the time of my decease "and shall as regards the said Helen Lybbe attain the age of "21 years or marry with the consent of the said Fanny Worth "and myself or of the survivor of us in equal shares as tenants "in common in manner following . . . upon trust to pay the "income of one such equal share to each of them the said Amy "Lybbe Mabel Bowker and Helen Lybbe during her life. . . ." It is a protected life interest. The testator continued: "After "the decease of any of them the said Amy Lybbe Mabel Bowker "and Helen Lybbe the trustees or trustee shall stand possessed "of the share of the person so dying as aforesaid upon trust in "equal shares for all or any of the children of such person"

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therein mentioned and the issue of any who are dead. He continued: "And I hereby declare that if there shall be no "child or other issue of the person so dying as aforesaid who "attains a vested interest under the trusts lastly hereinbefore "contained then the share of the person so dying shall be held "upon trust for the benefit of the said Amy Lybbe Mabel Bowker "and Helen Lybbe or the survivor or survivors of them or of "their children similar to the trusts hereinbefore declared with "regard to [the fund over which the power of appointment was "exercisable] so far as may be and the law will allow."

I am dealing with an alleged second accruer. There was a first accruer by reason of the death of one of the propositae without issue, and no doubt therefore the share of the other two was augmented, not because the word "share" included an accruing share, but because the accruer clause operated to carry over to the others' shares an aliquot part of the share which failed.

I feel no doubt that where the word "share" comes first it means "original share" and that it is the accruer clause and not the word "share" which augmented that share. In *In re Allan*,[1] which has caused me so much difficulty and uncertainty, Stirling L.J. recognizes that prima facie such a word does not include an accruing share. Therefore, as a matter of construction, my conclusion would be straightforward, namely, that there is no second accruer for the simple reason that there are no words in the will to bring one about, but I recognize, however, several considerations. The first is that that is unlikely to be the intention of the donee of the power. That does not help me much because my answer would be that he did not think of a second accruer, and that if anything does go in default of appointment it is certainly not because he intended it so to go but possibly because he forgot to provide for that eventuality, and I should expect that that was the reason; but, of course, as an old saying has it, a person is not likely to be thought to intend to die partially intestate, and the same kind of reasoning might (though not perhaps so strongly) be applied to the exercise of a power of appointment. What causes much more difficulty is the existence of a kind of rule which has been evolved and which is stated in the decision of the Court of Appeal in *In re Allan*,[1] and I am most anxious to give effect to it: but I have certainly experienced some little difficulty in ascertaining precisely what the rule is.

In *In re Allan*[1] there was an undoubted division in shares, and the accruer clause read as follows[2]: "'I declare that if any "'one or more of my said daughters, Marion Harriett, Charlotte, "'and Sophia Henrietta, shall die without leaving any child, or "'the issue of a child lawfully begotten, living at their respective "'deceases, or if my said daughter Eleanor shall die without "'leaving any child or issue of a child by any husband other

[1] [1903] 1 Ch. 276. [2] Ibid. 277.

" ' than the said George Mence, the shares or share of my said " ' daughters or daughter so dying shall fall into and become part " ' of my residuary estate, and be held and disposed of on the " ' same trusts as are hereinbefore declared thereof.' "

In those circumstances, the Court of Appeal, reversing Buckley J., held that there was a second accruer. Vaughan Williams L.J. says this [3]: " Mr. Medd "—that was counsel—" says that the closing words, ' hereinbefore declared thereof,' " cannot mean to include that which is included in this clause " itself, but that ' hereinbefore ' must mean that which appears " in this will antecedently to this clause. I do not at all mean " to say that that is not a possible, and even a natural, con- " struction of these words; but, in my opinion, we ought not so " to deal with this case."

I understand that to mean that there is a rule which the court thought precluded them from giving the natural construction to those words. Then, when I come to look for the rule, my difficulty arises. Vaughan Williams L.J. continues [4]: " This " is a case in which, although there are both original shares and " accrued shares, which in a testamentary instrument may very " often be dealt with in different ways, it is obvious that the " intention of the testator was to create one aggregate fund, and " to dispose of that absolutely." To what is he referring? I am not quite sure, I must confess; but it is quite certain that the testator did intend the fund which was settled to be split up and divided into parts. Therefore, I think that Vaughan Williams L.J. must have been referring to the concluding words of the gift over, namely, to the words in which the testator said " shall fall into and become part of my residuary estate, and " be held and disposed of on the same trusts as are hereinbefore " declared thereof."

Then he reads a passage from a judgment of Sir Thomas Plumer in *Barker* v. *Lea*,[5] and, having read it, says [6]: " Here " it seems to me to be manifest, following the words of Sir " T. Plumer,"—I may say that *Barker* v. *Lea* [7] was an entirely different case on its language—" that the disposition is of one " aggregate fund which the testator meant should remain an " aggregate fund, and should not be broken into fragments if " some person to whom interests in it were given happened to " die." What does that mean? Again, I am not sure; but I think that it means that, again regarding the words to which I have referred, it is plain that the testator did not mean to die intestate as to any part of this fund. Stirling L.J.[8] adopts the reasoning of Vaughan Williams L.J. and adds nothing of his own. Therefore, I need say nothing more about his judgment. Cozens-Hardy L.J. bases his conclusion on what I think is really the same ground as the other Lords Justices, if I have

[3] Ibid. 284.
[4] Ibid. 284.
[5] (1823) T. & R. 413, 415.
[6] [1903] 1 Ch. 276, 285.
[7] T. & R. 413.
[8] [1903] 1 Ch. 276, 285, 286.

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rightly construed their language. He says[9]: "The subsidiary "point"—that is the one with which I am dealing—"raised "by Mr. Medd created for a moment, I thought, a little more "difficulty; but, on consideration, I am satisfied that there is "sufficient in this will to shew that the testator was dealing with "his residue as a whole, and disposing of it as a whole. . . ." I understand that, however, to mean that there is sufficient context—it must not, I think, be a mere matter of guessing—to show that the testator did not intend to die intestate as to any part of his residue, and I think that the context to which he was referring consisted of the words which I have already read.

If that be so, it seems to me that there are no words in this case enabling me to depart from the natural meaning of the language used. True, the testator did, I think, intend to exhaust his power of appointment. That, however, is certainly not enough. I must not merely guess: I must find a context—especially as it seems to me most likely that he overlooked the possibility of a second accruer, and for that reason alone failed to deal with that possibility. I cannot find any context. There are no words at all resembling the words which I have stressed in *In re Allan.*[10] There is certainly no re-amalgamation of a secondly accruing share with the original trust fund as there was in *In re Allan,*[10] because the words are "to be held" not "upon the same trusts" but "upon similar trusts so far "as may be and the law will allow," which seem to me to point to the view that the testator did not contemplate that there would necessarily be any complete re-amalgamation.

On the whole, I can see nothing in those words enabling me to put on the word "share" a construction which it does not naturally bear, and there will be no second accruer unless the word "share" includes "an accrued share." With doubt, because I am not at all sure that I fully understand the decision in *In re Allan,*[10] I feel bound to hold that there is no second accruer.

Declaration accordingly.

Solicitors: *Field, Roscoe & Co. for Pye-Smith, Hulbert & Kildahl, Salisbury; Blyth, Dutton, Wright & Bennett; Robbins, Olivey & Lake.*

K. R. A. H.

[9] Ibid. 276, 286, 287.

[10] Ibid. 276.

[COURT OF APPEAL.]

* FRANCE v. PARKINSON.

C. A.

1954
Mar. 5.

Somervell, Birkett and Morris L.JJ.

[1951 F. 1205.]

Road Traffic—Negligence—Collision—Inference from facts—Collision in centre of cross-roads of equal status—Plaintiff's car driven by hirer—Disappearance of hirer—Submission of no case to answer by defendant's counsel—No evidence called by defendant.

Negligence.

Two motor-cars proceeding along cross-roads of equal status were in collision in about the centre of the crossing. The plaintiff's car was being driven by a man who had hired it and who, having apparently given a false name, disappeared after the collision. The other car was being driven by a servant of the defendant. In proceedings in an action for damages the plaintiff, being unable to call the hirer of his car, had to rely on the evidence of the police as to the position of the cars after the collision and as to a statement by the defendant's driver to the police that "I was going along the road "and we met in the middle." Counsel for the defendant submitted that he had no case to answer and did not call any evidence. The trial judge held that the plaintiff had not proved his case and dismissed the action. On appeal:—

Held, that on the facts both drivers had prima facie been negligent; that there was a prima facie case against the defendant on which, in the absence of any evidence given by him, the judge should have found him negligent; and that the plaintiff, being in the same position as an innocent passenger, was entitled to recover his whole damages.

Baker v. *Market Harborough Industrial Co-operative Society Ld.* [1953] 1 W.L.R. 1472 followed.

Decision of Croom-Johnson J. reversed.

APPEAL from Croom-Johnson J.

The plaintiff, France, was the owner of a motor-car which he had let out on hire to a man who gave the name of Fitzgerald. On May 19, 1953, the plaintiff's car, while being driven by Fitzgerald, was in collision with another car driven by a servant of the defendant Parkinson. The collision took place in about the middle of the crossing of Tower Bridge Road and Abbey Street, roads of equal status. There was therefore no question of which car was on the major road. After the collision Fitzgerald disappeared, and therefore, at the trial of the action, the plaintiff was unable to produce him as a witness and had to rely on the police evidence. At the close of the plaintiff's case counsel for the defendant submitted there was no case to answer. He repeated that submission at the conclusion of argument by plaintiff's counsel, and the driver of the defendant's car was therefore not called.

In these circumstances the judge held that the plaintiff had not proved his case and dismissed the action.

The plaintiff appealed.

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P. M. O'Connor and *E. W. Eveleigh* for the plaintiff. He was in the same position as an innocent passenger: as the driver of his car had disappeared and the driver of the defendant's car had refused to go into the witness-box, or had not been called as a witness, the court should draw the inference that both drivers were in fault and the plaintiff was entitled to judgment for 100 per cent. of his damages. *Baker* v. *Market Harborough Industrial Co-operative Society Ld.*[1] is relied on.

D. P. Croom-Johnson for the defendant.

Somervell L.J. The plaintiff claimed for damage to his motor-car, which was involved in a collision with the defendant's motor-car in the early hours of May 19, 1951, at the cross-roads where Tower Bridge Road crosses Abbey Street. The crossing is some 20 yards across from east to west and less from north to south. The roads were of the same status; there was not a "Slow down" or "Halt" sign on either of them. The plaintiff had hired out his car to a man whose name we do not know. He called himself Fitzgerald, but it is said that that was not his real name. He kept the car a day over the hire contract, which provided that for that he would have to pay double. After the accident he disappeared. At the trial, therefore, the plaintiff was unable to call him. He put in certain answers to interrogatories, which I do not think add very much. He called a police officer who was at the spot after the accident happened, and from whose evidence it is reasonably plain that the plaintiff's car was on its right side of the road and that the defendant's car was on its right side of the road. They collided somewhere where the two cross-roads meet. There was an island and the plaintiff's car damaged a bollard on the island after the collision. The policeman was asked whether the defendant's driver made a statement to him, and he said "Yes, the defendant said, 'I was going along "'the road and we met in the middle'."" The defendant elected to call no evidence and in those circumstances the judge dismissed the plaintiff's claim. The plaintiff appeals.

The sort of problem which arises here arose in the recent case of *Baker* v. *Market Harborough Industrial Co-operative Society Ld.*[1] That was a case where there had been a head-on collision between two vehicles and both drivers had been killed. The two widows sued the employers of the deceased drivers. It is fair to the parties to say that they did make application to consolidate the actions, but for some reason that application was not acceded to. One case came on before Ormerod J., who held that the plaintiff had not proved her case. The other case came on before Sellers J., who held (and his decision was upheld by this court) that in the circumstances of that accident the balance of probabilities was that both were to blame. He therefore awarded the widow 50 per cent. of her damages. We held that that was right, reversing on that point Ormerod J.

[1] [1953] 1 W.L.R. 1472.

Each case turns on its own facts, but I would have said that a collision at cross-roads, where both roads were of equal status, was, in the absence of special circumstances, a case where the balance of probabilities was in favour of both drivers having been negligent, particularly having regard to the place of collision, and also the statement made to the police officer by the defendant. It is possible, of course, that a man may be going very slowly, keeping a careful look-out, and suddenly find himself run into by a car going at, say, 70 miles an hour. If that had happened the statement made to the police officer would have been on different lines.

Mr. Croom-Johnson sought to raise in this court a question whether it was this hirer who was driving the plaintiff's car, and whether the car might not have been delivered back to the plaintiff and been driven at the time of the collision by one of his servants. We ruled that that point could not be taken. The case, therefore, proceeded on the basis that the car was being driven by the hirer. In those circumstances, it is not disputed that the plaintiff was in the same position as a passenger and, therefore, even if the driver of the car had been negligent, so long as the plaintiff can establish some negligence on the defendant's part he could claim his whole damages. I think, therefore, that there was here a prima facie case against the defendant on which the court should have found him negligent in the absence of any evidence given by him. The damages I think have been agreed. Therefore, in my opinion, the appeal should be allowed and judgment entered for the agreed amount, £236 7s. 4d.

BIRKETT L.J. I agree. Each of such cases as these must, of course, be decided on its own facts. That is particularly important when dealing with this class of case because the variety of circumstances in which road accidents happen is really quite infinite. The facts as we know them, although the evidence is extremely meagre, have been detailed by my Lord in outline. The principal feature of the facts is that, at the time of night when this accident happened, these two roads, though unequal in width, could be regarded as of equal status. The cross-road, as shown on the plan, is a very spacious cross-road, and in the ordinary way one would think that with people exercising ordinary care an accident would not take place there. We merely know that a collision did take place at that wide and spacious cross-road between two motor-cars, and I should have thought that on those facts there was a prima facie case that both the drivers were negligent in the circumstances. In any event, I am quite satisfied that here there was a prima facie case of negligence against the defendant.

We have had evidence about the position of the cars, and I attach very considerable importance indeed to the fact that the police constable gave evidence that the defendant driver, after the

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accident said: "I was coming along the road and we met in the "middle." The ordinary kind of expression used by a defendant immediately after an accident, where he has suffered some wrong at the hands of another driver, is usually very different from that. The customary thing one hears is: "The man came at a furious "rate across and gave me no chance." But all this defendant says is: "I was coming along the road and we met in the "middle." The defendant driver was available to give evidence and did not do so, and I think an adverse inference may be drawn against him from that fact. If there was, as I think there was, prima facie evidence of negligence on the part of the defendant, and he chooses to make no attempt to show that he was not negligent, I think that an adverse inference must be drawn against him. The plaintiff was strictly in the position of a passenger in the car, and it was enough for him to prove negligence against the defendant even if it were not the whole of the negligence. In those circumstances I think that the plaintiff was entitled to recover the agreed damages against the defendant, and the appeal ought to be allowed.

Morris L.J. I also agree. The car belonging to the plaintiff was involved in a collision at cross-roads and it was established that whoever was driving the plaintiff's car was not driving as the servant or agent of the plaintiff. The facts that were before the court, in my judgment, amounted to very much more than the mere fact that there had been a collision between the two motor-vehicles. My Lords have referred to the evidence which was before the court. There was all the evidence with regard to the plan and as to the nature of the cross-roads. There was evidence as to the damage done to the two motor-cars, and there was evidence of the statement made by the defendant. Although the interrogatories do not help very much it might perhaps be worth while referring to the eighth interrogatory and the answer to it which was put in. "Identify the position of your Rover "motor-car in relation to the said road junction at the moment "when you first saw the said Ford motor-car." The answer was: "I say that the Rover motor-car"—that is the defendant's car—"was very slightly upon the junction." In my judgment the evidence which was before the court was sufficient to establish a prima facie case that there was negligence in the defendant, and that was sufficient to avail the plaintiff if that prima facie case was never displaced. I agree, therefore, that the appeal should be allowed.

Appeal allowed.

Solicitors: *Hewitt, Woollacott & Chown; Barlow, Lyde & Gilbert.*

A. W. G.

[COURT OF APPEAL.]

* JUDSON v. BRITISH TRANSPORT COMMISSION.

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Lord Goddard C.J., Singleton and Hodson L.JJ.

[1952 J. No. 903.]

Railway—Statutory duty—Permanent way men—Man injured at work on line—"Relaying or repairing the permanent way"—Men engaged on preliminary inspection—Whether "working for the "purpose of relaying or repairing"—Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 *Vict. c.* 27), *s.* 1 (1): *Sch. para.* 12—*Prevention of Accidents Rules,* 1902 (*S.R. & O.,* 1902, *No.* 616), *r.* 9.

Negligence—Safe system of work—Suspension—Railway—Inspection of permanent way—Re-layer struck by engine—Duty of ganger.

The plaintiff, a re-layer in the employment of a railway company, and a ganger, under whose directions the plaintiff was working, were walking along a stretch of line to make an inspection to decide what lengths of line would be required for the repairing and relaying of the line on a later day. While so engaged, the plaintiff was struck by an engine and injured. Neither of the men had followed the directions laid down in rule 234 (*a*) of the British Railways' Rules, 1950, and the ganger had not taken the action prescribed in rule 234 (*d*) nor had he taken steps to see that the plaintiff followed the safety procedure enjoined by para. (*a*). The plaintiff brought an action against the defendants for alleged breach of their statutory duty under rule 9 of the Prevention of Accidents Rules, 1902, made under the Railway Employment (Prevention of Accidents) Act, 1900, s. 1 (1), and for negligence, on the ground that the ganger, who was in charge of the work being done, failed to take any steps under rule 9 or rule 234 to protect the plaintiff from danger:—

Held, (1) that at the time of the accident, the men were not engaged in "relaying or repairing" the permanent way. The words in rule 9 "for the purpose of relaying or repairing," when read in conjunction with those in paragraph 12 of the schedule to the Act of 1900, meant "when repairing or relaying." Both rule 9 of the Rules of 1902 and rule 234 (*d*) of the Rules of 1950 contemplated men working in a particular place and had no application to those engaged in a peripatetic inspection. There had therefore been no breach by the defendants either of the statutory regulation or of rule 234 (*d*).

(2) That there was no negligence on the part of the ganger in failing to see that the plaintiff carried out the directions in rule 234 (*a*) since it was no part of his duty to see that the plaintiff who was familiar with the rule, was safe. Both men neglected the rules made for their safety but nothing that the ganger did or omitted to do contributed to the plaintiff's accident so as to make the defendants vicariously responsible.

Stapley v. *Gypsum Mines Ld.* [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478 distinguished.

APPEAL from Donovan J.

The plaintiff, James Edward Judson, was, at the material time, a re-layer employed by the London and North Eastern Railway Co. Among his duties was that of taking part in the relaying of parts of the railway line which were found to be in need of attention. On July 12, 1949, the day before the work of relaying

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was to start on a stretch of line between Newcastle and Low Fell, the plaintiff and a ganger called Varty, under whom the plaintiff was working, were, according to practice, walking along the part of the line which was to be relayed, to note the lengths of new metals which would be required. While the two men were walking along the line, Varty in the 4 ft. way of the up line from Newcastle, and the plaintiff on the left hand side of the 4 ft. way, walking on the ends of the sleepers, a train travelling on the line on which they were walking appeared out of the tunnel from the direction of Newcastle, travelling very slowly. Both men saw it and had ample time to get out of the way and stepped to the left into the 6 ft. way, the space between the up and down lines. The plaintiff, who was slightly in front of Varty stepped into the 4 ft. way of the down line and was struck by an engine which came up from behind, with the result that his leg had to be amputated above the knee. At the time of the accident the requirements of rule 9 of the Prevention of Accidents Rules, 1902, made pursuant to section 1 (1) of the Employment on Railways (Prevention of Accidents) Act, 1900, and of para. 12 of the Schedule thereto [1] were not in operation. Neither of the men adopted the safety procedure laid down in rule 234 (*a*) of the London and North Eastern Railway Rules, 1933 (now the British Railway Rules, 1950,[2] for the avoidance of danger from an approaching train, nor did the ganger take the steps indicated in rule 234 (*d*).

The plaintiff brought an action against the defendants for breach of their statutory duty under rule 9 of the rules of 1902,

[1] Railway Employment (Prevention of Accidents) Act, 1900, s. 1: "(1) The Board of Trade may . . . "make such rules as they think fit "with respect to any of the subjects "mentioned in the schedule to this "Act, with the object of reducing or "removing the dangers and risks "incidental to railway service." Sch. para. 12: "Protection to permanent "way men when relaying or repairing "permanent way."

[2] Prevention of Accidents Rules, 1902, r. 9: "With the object of protecting men working singly or in "gangs on or near lines of railway in "use for traffic for the purpose of "relaying or repairing the permanent "way of such lines, the railway companies shall, after the coming into "operation of these rules, in all cases "where any danger is likely to arise, "provide persons or apparatus for the "purpose of maintaining a good look-"out or for giving warning against "any train or engine approaching "men so working. . . ."

British Railways Rules, r. 234 (*a*): "When a train is approaching, men "working on or near to the line must "not remain on any running lines ". . . but must at once move clear "of all lines unless they can distinctly "see that they are in a place of safety "and in no danger from another train "approaching them unobserved. . . ."

(*d*) "When work is about to be "undertaken on or near lines in use "for traffic and danger is likely to "arise, the ganger or man in charge, "must . . . appoint one or more persons . . . expressly to maintain a "good look-out, and to give warning "of any train approaching. He must "also satisfy himself that the look-"out man appointed is stationed in a "suitable position, is wearing a look-"out armlet, and is equipped with a "whistle or horn, not less than 6 "detonators, red and green flags "during daylight, and a hand signal "lamp after sunset or during fog or "falling snow. This man must on no "account leave his post whilst the "men he is protecting continue at "work unless he is properly relieved, "when he must transfer the 'look-"out' armlet to the reliefman."

and also for negligence on the ground that the ganger, who was in charge of the work being done, failed to take any steps under rule 9 or rule 234 (*a*) and (*d*) to ensure the safety of the plaintiff.

Donovan J. held that there had been a breach of statutory duty by the defendants, but that the plaintiff's injury was entirely due to his own negligence and, accordingly, he gave judgment for the defendants. The plaintiff appealed.

F. W. Beney Q.C. and *W. R. Steer* for the appellant.
Marven Everett Q.C. and *Tudor Evans* for the respondents.

The following cases were cited in argument: *Vincent* v. *Southern Railway*[1]; *Roberts* v. *Dorman Long & Co.*[2]; *Redpath* v. *London and North Eastern Railway Co.*[3]; *Hutchinson* v. *London and North Eastern Railway Co.*[4]; *London and North Eastern Railway Co.* v. *Berriman*[5]; *Stapley* v. *Gypsum Mines Ld.*[6]; *Stevens* v. *Railway Executive.*[7]

LORD GODDARD C.J., stated the facts, and, dealing first with the alleged breach by the defendants of their statutory duty, after reading rule 9 of the rules of 1902, continued: The construction which Donovan J. put on this rule was that the two men when making an inspection for the purpose of relaying, to see what pieces of line required relaying, an operation which would save time the next day when the work was actually put in hand, were engaged on work for the purpose of relaying or repairing the permanent way. If the rule is read without reference to the Act of 1900 there is, no doubt, a great deal to be said for that view, because the men were walking along the line inspecting it for the reason that relaying was contemplated, and as a preliminary to the actual work of relaying, and therefore it was said that what they were doing was "for the purpose of relaying." When, however, reference is made to the Act, I think it is clear that that is not, and cannot be, the true construction. Under the Act, the Board of Trade may make such rules as they think fit with respect to any of the subjects mentioned in the Schedule to the Act, and when one turns to the Schedule, it is found that one of the subjects for which rules may be made is "*Protection to per-*"*manent way men when relaying or repairing the permanent*"*way.*" I do not think that by any canon of construction I could hold that because two men were walking along a line to see what they would require when they came to relay or repair the line, they were then relaying or repairing the permanent way. They were preparing themselves for doing the work in the future

[1] [1927] A.C. 430.
[2] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.
[3] 1944 S.C. 154.
[4] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.
[5] [1946] A.C. 278; 62 T.L.R. 170; [1946] 1 All E.R. 255.
[6] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.
[7] [1952] C.L.Y. 2419.

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by finding out what pieces of permanent way required to be relayed or repaired. When, once, either singly or in a gang, they began to do the actual work, then I think they would be engaged in relaying or repairing the permanent way; but I am not prepared to hold that what these men were doing on that day makes it possible to say that the defendants were in breach of the rule. The rule must be read together with the Act, and, therefore, the words "for the purpose of relaying or repairing" must mean "when repairing or relaying." That seems to me to be the obvious construction. Moreover, when one comes to consider the whole of the rules, I do not think that it is possible that it could be contemplated, that the operation on which these men were engaged at the time of the accident was one to which the rule applies, because the rules require a look-out man, equipped with a whistle or horn, to be appointed to give warning of an approaching train. Where is such a look-out man to stand? These men were walking along the track, and it would seem rather a strange thing for the look-out man to be following them up behind. The men could see what was coming, and it would not be possible for the look-out man, who would be on the move the whole time, to be in a better position than the men themselves to keep a look-out; therefore, it is abundantly clear that rule 9 does not apply to the work which these men were doing on that day, and for exactly the same reason I am prepared to hold that rule 234 (*d*) of the British Railway's rules must be construed in the same way.

The obvious meaning of rule 234 (*d*) is that when a gang of men is at work, actually taking up and putting down new lines or doing work on the ballast on the permanent way, and the like, then it is necessary to station a look-out man who has to stay in one position. The rule does not contemplate that where peripatetic workmen are walking along, perhaps a distance of half a mile, a look-out man is to be stationed. For these reasons I am of opinion that there was no breach by the Railway Executive, either of the statutory rule or of the domestic rule.

Another point which has been argued is that Varty, being the foreman, was negligent in that he did not see that the plaintiff stepped off to the right instead of to the left on to the down line. I cannot bring myself to say that Varty was appointed to see that the plaintiff was safe. The plaintiff knew the rules; he knew, and was accustomed to this class of work, and what he did when Varty was behind him, was to step off the up rail into the 6 ft. way instead of stepping to the right. Varty also did the same thing. The plaintiff was not directed by Varty to do what he did. He broke the rule of his own volition, and he put himself into a dangerous position without taking any notice of where he went. The most that can be said is that a situation arose which was somewhat like the situation in *Stapley* v. *Gypsum Mines Ld.*,[1]

[1] [1953] A.C. 663.

a case which I find very difficult to understand, but, at any rate, I think the present case differs from that case in one material respect. There two workmen had agreed together to do something which, and this I understand to be the root of the decision, the House of Lords thought was negligent. There was a great division of judicial opinion upon the matter. This court gave a unanimous judgment but the decision was reversed in the House of Lords by a majority of one. The facts were that two men had agreed to remain at work under a dangerous roof. Then one man removed himself from being under the roof and went to work elsewhere. The other stayed and was killed. The House of Lords decided that the negligence of the man who went away contributed to a certain extent to the misfortune of the man who stayed under the roof, and that the negligence of the two men was, as it was put, so inextricably mixed up that it could be said to contribute to the accident, and that the employers were vicariously liable.

I decline to come to any such decision in this case with regard to the position of Varty and the plaintiff. It is true that Varty was the ganger, but he was not a ganger for the purpose of seeing that the plaintiff walked in one place rather than in another; he did not give him orders to step out into the 6 ft. way, and it is not suggested that the plaintiff stepped out into the footway because Varty did. It was not a case of the plaintiff following Varty; as a matter of fact, the plaintiff stepped out first without looking what he was doing, and therefore it must be said that he was entirely the author of his own misfortune, and that the employers cannot possibly be made vicariously liable. The fact was that neither of these men looked where he was going, but instead, either for good or bad reasons, they neglected the rules which had been made for their safety. I cannot see, however, that anything that Varty did contributed to the accident to the plaintiff, and therefore, though for different reasons, I agree that the judgment below in favour of the defendants was right.

SINGLETON L.J. There are three matters for consideration upon this appeal. First, has it been shown that the defendants were guilty of breach of their statutory duty which brought about, or contributed to, the accident which the plaintiff sustained? Secondly, has it been shown that the defendants were guilty of a breach of the duty which they owed to their employee under the common law; and thirdly, was the plaintiff himself wholly to blame for the accident which befell him?

[His Lordship referred to the Railway Employment (Prevention of Accidents) Act, 1900, and the Prevention of Accidents Rules, 1902, r. 9, and continued:] It was held by Donovan J. that the two men, Varty and the plaintiff, were working on or near lines or rails used for traffic for the purpose of relaying or repairing the permanent way on such lines, and that there was danger. These two men had gone on a journey of inspection, to

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walk on a particular piece of line to form a view as to the number of portions of rail which would be necessary for the work that had to be done at some future time. They were not doing the work of relaying or repairing, but it is said that because they were inspecting, they were doing work "for the purpose of relaying or "repairing." When one looks at its terms rule 9 contemplates a case where one man is working on the line, or where a number of men are working in a gang. In such a case he or they must be given, in circumstances within the rule, protection of the kind mentioned. I do not think this case falls within it. Rule 234 (*d*) of the British Railways' Rules, 1950, appears to me to be the railways' means of performing their duty specified under rule 9.

Again, it appears to me that rule 234 (*d*) contemplates men working in a particular place upon a line, and not the case of an inspection by one or two men walking along the line to find out what may be necessary for the work of relaying or repairing which has to be done at another time. For these reasons I do not think it can be held that rule 9 applies to the circumstances of this case. It does not mean that whenever one man is going along to inspect the line a look-out man must be provided.

The second point is this: It is the duty of an employer to take reasonable care to prevent his men from meeting with unnecessary risks, and it is submitted by Mr. Beney that when it was seen that a train was coming from the direction of Newcastle, Varty ought to have seen that the plaintiff went from where he was to the right-hand side rather than across on to the other rail. The difficulty I have felt arises from the decision of the House of Lords in *Stapley* v. *Gypsum Mines Ld.*[2] In the present case Varty was the senior man; he and the plaintiff both stepped in the wrong direction when the train from Newcastle was approaching, and they ought to have gone off the railway line altogether. There is no doubt from the evidence which was given that from time to time the rules were read to the men so that they might know what they ought to do, and that from the answers given by the plaintiff himself, he knew that he ought to have gone off the railway line altogether.

The plaintiff admitted that he knew of rule 234 (*a*), but both Varty and he remained on or near the running line, and were, therefore, both in breach of that rule. I do not think that the negligence of one is mixed up with the negligence of the other, as was said to be the case in *Stapley* v. *Gypsum Mines Ld.*[2] Each, it is true, disregarded the provisions of the rule made for his own safety, and that was the cause of the accident. I do not think it would be right to say that employers who have made rules of that kind, and who have brought them to the notice of this particular plaintiff and the other men, have failed in the duty which they owe to their workmen under the common law.

[2] [1953] A.C. 663.

The third point arises upon the plaintiff's own position; he knew what he ought to do; he knew the risk to which he subjected himself if he stepped on to another running line without knowing that that line was safe. He ought to have gone off the railway line altogether when the train from Newcastle was approaching, but he did not do so; he took another course, and upon that Donovan J. said: "We are dealing with "two men each of whom disobeyed a rule well known to him, "and it was that disobedience which, in my view, was the real "cause of this distressing accident."

I have been forced to the same conclusion. This man, knowing the risk—he was 42 at the date of the trial, and a man of experience upon the railway—stepped in a direction to which he ought not to have gone; he knew it was wrong; he knew he was exposing himself to a risk which the rule-book said he must avoid taking. In that sense he was the author of his own wrong, and I agree with my Lord that his appeal must be dismissed.

HODSON L.J. I am of the same opinion. Donovan J. came to the conclusion that the plaintiff was injured because he disobeyed a domestic rule of the defendants which was well known to him, in moving across the other line when a train was approaching on one line instead of moving clear of both sets of metals. If I had agreed with Donovan J. that the defendants were in breach of rule 9 of the Prevention of Accidents Rules, 1902, made pursuant to the Railway Employment (Prevention of Accidents) Act, 1900, I should have found it very difficult to resist the conclusion that the defendants would have been partly to blame; but, in my judgment, Donovan J. did not construe rule 9 correctly. I have very little to add to what has already been said, I think, taking rule 9 by itself, there was great force in the argument that the words "for the purpose of relaying or "repairing the permanent way" were wide enough to include the occupation in which the plaintiff and the ganger were engaged on the day in question. They were walking along the line, a decision having been taken to take up the rails, with a view to deciding where long and short lengths of rail were required, so that it might well be said that what they were doing was something for "the purpose of relaying or repairing the "permanent way." When, however, one looks at the Act under which the regulation was made, and the schedule to that Act, it appears that the words in paragraph 12 of the schedule "Pro-"tection to permanent way men when relaying or repairing perma-"nent way" have the effect of limiting the provisions which the Board of Trade may make. One, I think, is driven to this conclusion, that the words "for the purpose of" in rule 9 are to be treated as equivalent to "when," because if they are not so treated the rule in question would be in part ultra vires. Donovan J. did not have his attention drawn to the statute,

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and, no doubt, he reached his conclusion without considering the limits which it imposes.

I have nothing to add as to the common law position. I think the plaintiff failed to establish the breach of the statutory regulations which Donovan J. found in his favour, and that he is left in the position that he has to accept the judge's finding at common law that the accident was caused by his own fault.

Appeal dismissed.

Solicitors: *Gibson & Weldon for Thomas Magnay, Gateshead; M. H. Gilmour.*

P. B. D.

[QUEEN'S BENCH DIVISION.]

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Nov. 16, 17, 18.
Dec. 21.
Ormerod J.

* DAVIS *v.* ST. MARY'S DEMOLITION AND EXCAVATION CO. LD.

Negligence—Child—Injury to—Trespasser—Demolition work—Child injured while interfering with partly demolished wall—Liability of contractors—Duty of care—Extent.

Trespass.

The plaintiff, a boy of twelve, was injured when, on a Sunday, in company with other boys, he went onto a site where demolition work was being carried out by the defendants under contract with the owners, and with a piece of gas piping loosened some bricks in a wall causing the wall to fall on him. The site was readily accessible from a neighbouring open space where children were in the habit of playing, but they were always ordered off the site of the demolition by the defendants' servants. Ormerod J. found that the defendants were negligent in leaving the wall in an unsafe condition, but that the plaintiff was a trespasser:—

Held that, in the circumstances, although the plaintiff was a trespasser, his presence on the site was so likely as to put him in the class of "neighbour" whom the defendants ought reasonably to have contemplated would be affected by their act in leaving the wall in an unsafe condition and, therefore, having failed to take the necessary precautions to prevent injury to him, they were liable to the plaintiff.

Dictum of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562, 580; 48 T.L.R. 494 applied.

Action.

The plaintiff, Terence David Davis, an infant, brought an action by his father and next friend for damages against the defendant, the St. Mary's Demolition and Excavation Co. Ld. for injuries received on October 1, 1950, by the falling of a wall which was part of a house which the defendants were in the process of demolishing.

The Corporation of the City of London were the owners of houses Nos. 36, 38, 40, 42 and 44 Bittern Street which had suffered bomb damage during the war, but had been temporarily repaired. In 1950 the corporation entered into a contract with the defendants to demolish the houses. Before demolition began, there was at the back of these houses a wall which separated the site of the houses from an open site which had been cleared. On this site children were in the habit of playing. During the course of the demolition of the houses this wall was itself demolished and thereafter it became possible for anyone to step from the open site to the site of the houses in question.

By September 29, 1950, house No. 38 alone remained to be demolished and that house had already had the roof and brickwork down to the first floor ceiling removed. The rear wall of this house, which was some 100 years old, had been damaged by bombing, but the upper part of the wall had later been repaired by new brickwork.

On Sunday, October 1, the plaintiff, who was then 12 years old, in company with other boys went to the site where the demolition was taking place and with the aid of some gas piping started pulling away some loose bricks in the rear wall, when the wall fell and the plaintiff was injured.

The plaintiff claimed damages on the ground that he was a licensee and that the defendants were negligent in leaving the wall in an unsafe condition.

J. F. Platts-Mills and *S. J. Waldman* for the plaintiff.
G. R. Morris and *Peter Crawford* for the defendants.

The following cases were cited in argument: *Edwards* v. *Railway Executive* [1]; *Buckland* v. *Guildford Gas, Light & Coke Co.* [2]; *R. Addie & Sons (Collieries) Ld.* v. *Dumbreck* [3]; *Excelsior Wire Rope Co. Ld.* v. *Callan* [4]; *Cuttress* v. *Scaffolding (Great Britain) and Huntingdon Building and Development Co. Ld.* [5]; *Mourton* v. *Poulter.* [6]

Cur. adv. vult.

Dec. 21. ORMEROD J. delivered a judgment in which he stated the facts, held that the defendants were under no obligation to put a hoarding round the site, but that the wall was left in an unsafe condition which only a small amount of interference by boys would cause to fall, and continued: The next question is whether the defendants owed any duty to the plaintiff, and whether their action in leaving this wall in an unsafe condition was a breach of that duty? It is first necessary to consider whether or not the plaintiff was a trespasser on these premises

[1] [1952] A.C. 737; [1952] 2 T.L.R. 237; [1952] 2 All E.R. 430.
[2] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.
[3] [1929] A.C. 358; 45 T.L.R. 267.
[4] [1930] A.C. 404.
[5] [1953] 1 W.L.R. 1311; [1953] 2 All E.R. 1075.
[6] [1930] 2 K.B. 183.

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or whether he was there by licence or invitation of the defendants or anybody else. The defendants were not the occupiers of the premises. The occupiers were admittedly the City of London throughout.

The plaintiff contended that children were allowed to play on the site of these demolished premises, and under those circumstances, it was said, they were licensed. The evidence is quite to the contrary so far as that is concerned. There is no doubt that children were allowed to play on the cleared site at the rear of the premises, but the evidence of the workmen engaged in the work of demolition was that whenever children came on the site they were ordered off. I found no evidence to show that at any time anybody in authority allowed any of these children to be or to remain on the site.

But that does not end the matter. If I follow the reasoning of Morris J. in *Buckland* v. *Guildford Gas, Light & Coke Co.*,[1] in the case of an accident occurring and an action being brought against the occupier of the land, the burden of proof is on the plaintiff to show that he had a right to go on the land; but on the other hand if the person who is sued is somebody who has put or done something on the land, but who is not in occupation, the burden of proof is on the defendant to show that the plaintiff was a trespasser. The evidence here is that the persons engaged in demolition on all occasions drove the children away whenever they saw them on the site. The evidence of the only official of the corporation who was called, was that he never saw children on the site, although complaints had been made to him by the foreman about children. He agreed that they were a nuisance. I think the proper inference under the circumstances is that these children had no licence from the City Corporation or from anyone to go on the site, and that the plaintiff was in fact at the time of this accident a trespasser.

If the defendants were the occupiers of the site and the plaintiff was a trespasser, that clearly would be an end of the case, following the decision in *Robert Addie & Sons (Collieries) Ld.* v. *Dumbreck*,[2] unless the case could be brought within the decision in *Excelsior Wire Rope Co.* v. *Callan*,[3] or *Mourton* v. *Poulter*,[4] in each of which cases the defendants were found liable despite the fact that the plaintiff was a trespasser because it was found that there was a reckless disregard of the presence of trespassing children. But the plaintiff here argues that the defendants not being the occupiers of the site, the duty as between plaintiff and defendant is different. The plaintiff bases his argument on the decision of the House of Lords in *Donoghue* v. *Stevenson*,[5] and submits here that the plaintiff although a trespasser was somebody whom the defendants should have had

[1] [1949] 1 K.B. 410; [1948] 2 All E.R. 1086.
[2] [1929] A.C. 358; 45 T.L.R. 267.
[3] [1930] A.C. 404.
[4] [1930] 2 K.B. 183.
[5] [1932] A.C. 562; 48 T.L.R. 494.

regard to when considering whether or not the premises were in a safe condition before leaving them, and whether or not the plaintiff was somebody who was likely to be injured by any act or default on their part.

In *Buckland* v. *Guildford Gas, Light & Coke Co.*[6] a girl, who was visiting a farm in company with some other girls, was walking along a footpath through a field when she was moved to climb a tree which was some 90 yards away from the footpath on which she was walking. Some high-power electric cables, the property of the defendants, passed immediately over the top of the tree, and when the girl climbed to the top of the tree she came into contact with the cables and was electrocuted. In an action against the defendants for negligence, Morris J. decided first, that the burden of proving that the girl was a trespasser was on the defendants and they had not discharged that burden. But secondly, the judge held that, whether she was a trespasser or not made little or no difference because the girl belonged to that class of persons who ought to have been in the contemplation of the defendants when they put their electric wires in the particular position in which they did. In his judgment Morris J. first dealt with the test which has to be applied and cited Lord Porter in his speech in *Bourhill* v. *Young*[7] who in turn quoted the statement of Lord Atkin in *Donoghue* v. *Stevenson*[8] as indicating the extent of the duty under which the defendant was. Lord Atkin said[9]: "You must take reasonable "care to avoid acts or omissions which you can reasonably foresee "would be likely to injure your neighbour. Who, then, in law "is my neighbour? The answer seems to be—persons who are "so closely and directly affected by my act that I ought reason-"ably to have them in contemplation as being so affected when "I am directing my mind to the acts or omissions which are "called in question." In a later part of his judgment Morris J. said[10]: "Under most conditions the defendants would be "entitled to assume that persons would not go unlawfully on "land and would not be under obligation to provide against the "contingency of persons trespassing. Though not occupiers of "the land the defendants are in a position closely analogous. "The group of those who must be regarded as 'neighbours' "from the point of view of the defendants is, however, not of "rigid necessity the same as the group of those who must be "regarded as invitees or licensees from the point of view of the "occupier of the land. The test to be applied in considering "who is a neighbour is the test indicated by Lord Atkin. As "a general rule a trespasser on land would not be within the "group of neighbours, but whether some particular person is a "neighbour depends upon the circumstances of a particular "case."

[6] [1949] 1 K.B. 410.
[7] [1943] A.C. 92; [1942] 2 All E.R. 396.
[8] [1932] A.C. 562.
[9] Ibid. 580.
[10] [1949] 1 K.B. 410, 420.

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Applying that test, which appears to me to be the proper test to apply in the present circumstances, I have to ask myself whether the defendants are in the same position vis-à-vis the plaintiff as they would be if they were the occupiers of the land in question? Do they owe no other duty to the plaintiff than the occupier of the land would owe to a trespasser, or are the defendants in these particular circumstances in such a position in relation to the plaintiff that in spite of the fact that he is a trespasser they owe to him a duty to take care so far as this building is concerned? I think any decision which puts the defendants in a different position from the occupier of the land is one which must be considered with very great care. But the position here, as I see it, is that the defendants knew that children were in the habit of coming on to this land, so much so that the defendants' foreman had complained to the representative of the corporation of the nuisance that these children were on the site when they as contractors were getting on with their work. Under those circumstances, it appears to me that the foreman in considering whether the premises were safe and considering against whom the premises had to be made safe ought to ask himself the question—which does not seem to call for any great exercise of the imagination—Are children likely to come on this site, and if they do are they likely to interfere with the brickwork and the building generally? That they were likely to come on the site, I think, could admit of only one answer. The foreman would be bound to answer that question in the affirmative. He knew they were in the habit of coming on the site. Whether they would interfere with the building in such a way as small boys might interfere, again is a question which, in my view, would have to be answered in the affirmative. If small boys of 12 years of age go on to a building site where there are loose stones and bricks and where apparently in the wall in question there are loose bricks, and if there are about the place pieces of old gas pipe and other such implements, it seems one of the most likely things that in the course of an afternoon's play there will be some interference with some part of a building such as that in course of demolition which must offer a constant allurement and temptation to any child who is within sight of it.

In those circumstances, I have come to the conclusion here that, although the plaintiff was a trespasser, yet his presence and that of other children on this site was so likely as to put them in the class of "neighbours" as defined by Lord Atkin in *Donoghue* v. *Stevenson*,[11] so that the defendants should have taken the necessary precautions to prevent injury to them. Accordingly, it seems to me that the plaintiff is entitled to succeed.

[11] [1932] A.C. 562.

[His Lordship held that the plaintiff was not guilty of contributory negligence; considered the medical evidence and continued:] In all the circumstances, I think the proper sum to award as damages is the sum of £750, and I give judgment for the plaintiff for that amount.

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Judgment for the plaintiff.

Solicitors: *W. H. Thompson; Hair & Co.*

J. D. P.

[CHESTER ASSIZES.]

* MACRAE *v.* H. G. SWINDELLS (TRADING AS WEST VIEW GARAGE CO.).

1954 *Feb.* 25.

Barry J.

Damages — Negligence — Remoteness — Damage to plaintiff's motor car through negligence of garage—Loan to plaintiff of another car during repair—Loss of second car through plaintiff's negligence—Hire of third car—Claim against garage for cost of hire. Mitigation —Impossible owing to plaintiff's negligence.

On December 27, 1951, the defendant orally agreed with the plaintiff to repair his Standard 12 h.p. motor car. Owing to the defendant's admitted negligence or breach of contract the Standard car was damaged by fire at the defendant's garage. Thereupon the defendant lent to the plaintiff a Morris 8 h.p. motor car until such time as the Standard car was repaired. On February 6, 1952, the plaintiff's servant or agent met with an accident while driving the Morris car which became a total wreck, and on October 23, 1953, judgment was entered against the plaintiff in favour of the defendant for the value of the car. From February 9, 1952, until April 9, 1952 (when the Standard car was returned) the plaintiff was obliged to hire another motor car at a total cost of £80 18s. In a claim by the plaintiff against the defendant for this sum:—

Held, that the plaintiff was compelled to hire another car as a result of the defendant's negligence or breach of contract and not as a result of his own negligence in respect of the Morris car; he had mitigated his loss by using the Morris car so long as it was available, and the reason for it ceasing to be available was irrelevant; accordingly, the plaintiff was entitled to succeed.

ACTION.

The plaintiff, Finlay Macrae, a veterinary surgeon, used for the purpose of his practice a Standard 12 h.p. saloon motor-car. On December 27, 1951, the defendant, a partner in a garage business known as West View Garage, Hatton Heath, Chester, agreed with the plaintiff to repair a leak in the petrol tank of his car. On the same date the car was damaged by fire in the defendant's garage owing to the admitted breach of contract or

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[Reported by EIFION ROBERTS, Esq., Barrister-at-Law.]

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negligence of the defendant. The defendant lent to the plaintiff an old Morris 8 h.p. car until his own car was repaired, but, while being driven by the plaintiff's servant or agent the Morris car was involved in a collision and became a total wreck. In an action by the defendant against the plaintiff for the value of the Morris car, judgment was awarded in favour of the defendant on the ground of the negligence of the plaintiff's servant or agent. In the meantime, the plaintiff was compelled to hire another motor-car during the time that his own car was being repaired, at a total cost of £80 18s. The present action was for the recovery of this sum from the defendant.

The plaintiff contended that the loss incurred by reason of the hiring was attributable to the defendant's negligence or breach of contract when the plaintiff's car was damaged. The defendant maintained that it was directly caused by the negligence of the plaintiff's servant or agent in destroying the Morris car which would otherwise have remained available to the plaintiff during the whole period of hiring and, furthermore, that the plaintiff had failed properly to mitigate his loss by causing the destruction of the Morris car.

G. G. Lind-Smith for the plaintiff.
H. E. Hooson for the defendant.

Barry J. stated the facts, and continued: The present action is brought upon the admitted breach of contract or negligence on December 27, 1951. The defendant, however, contends that the damage arises from the plaintiff's own negligence or that of his servant or agent in destroying the car lent to him by the defendant which would otherwise have remained available to him until his own car had been repaired. I do not think that this contention is right. As a result of the breach by the defendant on December 27, 1951, the plaintiff lost the use of his Standard motor-car until such time as it could be repaired. It was not repaired till April 9, 1952. Prima facie, therefore, the plaintiff was entitled to recover by way of damages compensation for the loss of use of this car between December 27, 1951, and April 9, 1952. He was, however, under an obligation to act reasonably and to take reasonable steps to mitigate his loss. On the assumption that the Morris 8 was adequate, old though it was, the plaintiff was under a duty to mitigate his damage by driving it while his own car was under repair. He did use the Morris car so long as it was available for use, but it ceased to be available when it was totally destroyed. The plaintiff has compensated the defendant to the full for his negligent conduct in reducing the Morris car to a total wreck.

There was no Morris car which could be used by the plaintiff after February 6, 1952. No other car was offered to him by the defendant and, therefore, no question of mitigation after that date can arise. It was as a result of the original negligent act

or breach of contract that the plaintiff was compelled to hire another car. The fact that the Morris car ceased to be available as a result of the negligence of the plaintiff's servant or agent is wholly irrelevant. The mere lending of the Morris car did not put an end to the defendant's liability in respect of the plaintiff's loss on December 27, 1951. It is quite immaterial whether the Morris car was destroyed through the plaintiff's negligence or fell to pieces due to old age. What matters is that it ceased to be available. The defendant could have provided another car. He did not do so. The plaintiff had therefore to hire another car. The plaintiff is entitled to recover the cost of that hire and I therefore award him judgment in the sum of £80 18s.

Judgment for the plaintiff.

Solicitors: *Mason & Moore Dutton, Chester; Lamb, Goldsmith & Howard, Liverpool.*

[PROBATE, ETC., DIVISION.]

* BRAMMER *v.* BRAMMER.

1954
Feb. 10, 11.

Lord Merriman P., and Sachs J.

Husband and Wife — Maintenance — Justices — Adultery by wife — Evidence—Variation of original order after adultery—Subsequent application to discharge—"Fresh evidence"—Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vict. c.* 39), *s.* 7.

A wife was granted an order for maintenance in 1944 by justices on the ground of wilful neglect to provide reasonable maintenance. In 1946 she committed an act of adultery which the husband condoned in 1947 during a brief reconciliation. In 1950 the wife successfully applied for a variation in the amount of maintenance ordered in 1944; no point was taken by the husband in regard to the adultery in 1946. In 1953 the husband applied for the discharge of the orders of 1944 and 1950 on the ground, inter alia, that the wife had committed adultery since 1944:—

Held, that although the husband might have been entitled to have the order of 1944 discharged when the wife applied for variation, once the order had been remade in 1950 there was no "fresh "evidence" within the meaning of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, on which the husband could rely, and there were, accordingly, no merits in his application.

Natborny v. *Natborny* [1933] P. 1; 48 T.L.R. 590 applied.

APPEAL from the Colwyn Bay justices.

The parties were married in 1922 and there were five children. On February 9, 1944, the Colwyn Bay justices made an order in favour of the wife on the ground that the husband had wilfully neglected to provide reasonable maintenance and the husband was ordered to pay 25s. a week for the wife and maintenance for four of the children, of whom the custody was given to the wife.

The husband had gone to live in Birmingham, where he formed an adulterous association with another woman. He was the

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co-respondent in divorce proceedings brought by that woman's husband, and had had to pay the costs. Their association was said to have continued for several years from before 1947; and they were living under the same roof up to 1953. The wife continued to live in Colwyn Bay, and in or about the year 1946 she committed an act of adultery. There was a brief reconciliation in 1947, each then knowing of the other's adultery.

On April 19, 1950, the order of February 9, 1944, was varied on the wife's application to 35s. a week for the wife and 12s. 6d. for the one child still under 16. In April, 1953, the husband visited the wife in Colwyn Bay in an attempt (he said) to effect a reconciliation; and intercourse took place during a night which they spent together there. The husband then returned to Birmingham and later wrote to the wife a letter which purported to offer a reconciliation.

On November 6, 1953, the husband applied to the justices under section 7 of the Summary Jurisdiction (Married Women) Act, 1895,[1] for a revocation of the order of 1944, as varied in 1950, on the grounds (1) that since the making of the order of 1944 the wife had committed adultery; (2) that she had unreasonably and unjustifiably refused to resume cohabitation with him in 1953. He suggested also that in addition to the admitted adultery in 1946, the wife had committed adultery on other occasions; but the justices did not accept his contention. The justices dismissed the application, holding that the wife's adultery in 1946 had been condoned in 1947, and that the wife was justified in the circumstances in refusing the alleged offer of a reconciliation. The husband appealed.

This report is concerned solely with the issues raised by the wife's adultery in 1946.

Bertrand Richards for the husband.
Victor Williams (who was not called on) for the wife.

The following cases were referred to in argument: *Natborny* v. *Natborny*,[2] in which section 7 of the Act of 1895 was considered; *Read* v. *Read*[3]; *Henderson* v. *Henderson*.[4]

[1] Summary Jurisdiction (Married Women) Act, 1895, s. 6: "No orders "shall be made under this Act on the "application of a married woman if "it shall be proved that such married "woman has committed an act of "adultery: provided that the husband "has not condoned, or connived at, "or by his wilful neglect or mis-"conduct conduced to such act of "adultery."

S. 7: "A court of summary "jurisdiction . . . may, on the "application of the married woman "or of her husband, and upon cause "being shown upon fresh evidence "to the satisfaction of the court at "any time, alter, vary, or discharge "any such order" (made under the Act). ". . . If any married woman "upon whose application an order "shall have been made under this "Act, . . . shall voluntarily resume "cohabitation with her husband, or "shall commit an act of adultery, "such order shall upon proof thereof "be discharged."

[2] [1933] P. 1; 48 T.L.R. 590.

[3] [1952] P. 119; [1951] 2 T.L.R. 1086.

[4] [1944] A.C. 49; 60 T.L.R. 113.

LORD MERRIMAN P. referred to the history of the marriage and to the orders of 1944 and 1950, saying that when the present application was brought "to discharge the said order," as the form of complaint showed, "the said order" must mean the combination of the two orders of 1944 and 1950, because a discharge had to take effect on both orders, the original one and the second one together, and said that there was no doubt that the wife had committed an act of adultery in 1946, and that there had been a reconciliation in 1947, when it appeared that the wife had admitted her adultery. His Lordship continued: As the law stands (at any rate, we are bound so to hold by a decision of this court in *Read* v. *Read* [1]) had the husband brought a summons in 1947 for the discharge of the original order on the ground that the wife had committed the admitted act of adultery, he would have succeeded, because *Read* v. *Read* [2] decides that it is impossible to import into the provisions of section 7 of the Summary Jurisdiction (Married Women) Act, 1895, the proviso which occurs in section 6 in connexion with the condonation of adultery. As the act of adultery had occurred since the making of the order in 1944 it would have been "cause shown upon fresh "evidence," and I think the court would have had at that time no option but to be satisfied that the order must be discharged. But no such application was made, and, what is not less important, when the fresh order was made on April 19, 1950, varying the amount of the original order, this act of adultery was not brought forward by way of defence or by way of objection to the making of the fresh order. It is unnecessary to decide how the matter would have stood then, but I will assume, perhaps too favourably to the husband, that it could then have been brought forward as cause shown upon fresh evidence. But we are considering the position as it stood in November, 1953, when this present application was made by the husband to discharge this order, or this combination of two orders, under section 7.

Natborny v. *Natborny* [3] is, in my opinion, of very great importance on this matter, for that case shows that in connexion with a charge of adultery put forward under section 7 as the ground of an application for the discharge of a subsisting order, the whole section must be read together, and one of the effects of reading the whole section together is that the time-limit of six months, which applies to making the substantive complaint of adultery as the basis of an order, is not imported into the allegation of an act of adultery having been committed since the making of the order. The reason for that is, that the earlier part of the section, which states that "cause" must be "shown upon fresh "evidence to the satisfaction of the court at any time," governs the whole section; and, although the power to alter, vary or discharge under that part of the section is discretionary, when

[1] [1952] P. 119; [1951] 2 T.L.R. 1086.

[2] Ibid.

[3] [1933] P. 1.

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there is proof of an act of adultery, or proof of a resumption of cohabitation, there is no discretion. That, I think, is plainly shown from the judgment of Romer L.J. in *Natborny* v. *Natborny*,[4] where he says: "If on fresh evidence an application "is made under the first part of section 7 of the Act of 1895 "asking the court to alter, vary or discharge an order, and such "fresh evidence shows that the wife has either voluntarily "resumed cohabitation, or has committed an act of adultery, the "court no longer has the wide discretion that it would have had "in other cases." From that it follows that provided the charge of adultery is brought upon what can be called fresh evidence within the meaning of section 7, it is not barred by the time-limit of six months.

Assuming, then, as I think one is right in assuming, that when the wife tried to get the order of 1944 varied in her favour as regards the amount in 1950, the husband would have been entitled to say: "I produce fresh evidence of her having committed "adultery since 1944. The evidence is fresh because she had not "committed the adultery in or before 1944, therefore it has "happened since 1944, and, therefore, the question whether I "could have reasonably put it before the court in 1944 does not "arise," (I am paraphrasing, without quoting, from *Johnson* v. *Johnson*,[5] a decision of this court in which the meaning of the words "upon fresh evidence" was interpreted), "and as I am "entitled to say that this is fresh evidence, the fact that the "adultery, of which I am now complaining as cause to resist this "application and to set the old order aside, is outside the six "months, does not matter": see *Read* v. *Read*,[6] or *Ruther* v. *Ruther*,[7] cited in *Read* v. *Read*.

But the question is whether the husband could say all that in November, 1953. In my opinion, it was quite hopeless for him to attempt to say it. There was nothing fresh about the evidence in 1953. He was not producing this allegation of adultery upon fresh evidence; he had it all available when the order was remade in 1950. And for that reason alone, in my opinion, that ground of his present application is hopeless.

It can be put in another way, which I merely indicate without attempting to decide. One of the elements of estoppel inter partes is that if there is the opportunity to put forward a particular defence which is an answer on an occasion in the past, and there has been deliberate abstention from putting forward that defence, the defendant ought to be estopped from putting it forward on a later occasion. It is not, however, necessary to develop or examine that aspect of the matter.

The magistrates have held that the one act of adultery in 1946 was condoned by the husband in February, 1947, when he cohabited with his wife. I have dealt with this matter, as we

[4] Ibid. 16.
[5] [1900] P. 19; 16 T.L.R. 26.
[6] [1952] P. 119.
[7] [1903] 2 K.B. 270.

are entitled to do under the rules governing these appeals, on the basis that it is open to us to draw any inferences which should have been drawn, and it is true that the mere fact that that act was condoned is not by itself a sufficient reason for not taking it into consideration. But the justices go on to say: "There "is no proof of any other act of adultery on the part of the wife." It is said that there was proof. I do not intend to go behind the note in this matter, and so far as the note is concerned there is no suggestion whatever that it was part of the husband's case that the wife had committed some fresh adultery which would be available to him.

[His Lordship then considered the questions raised by the finding that the wife was justified in her refusal to return to the husband, and continued:] In my opinion this is a hopeless appeal, and should be dismissed.

SACHS J. One of the main issues argued before this court was whether such adultery had been established on the part of the wife as to make it obligatory on the court to discharge the maintenance order by virtue of the provisions of portion of section 7 of the Summary Jurisdiction (Married Women) Act, 1895. [His Lordship considered the husband's allegation of adultery on occasions other than in 1946, and said that he agreed with the rejection of that allegation by the justices, and continued:] The adultery of 1946 was fully known to the husband before the proceedings in 1950 resulted in a further maintenance order of an amount varied from that which had been previously ordered in 1944. On those proceedings, had the husband so chosen, he could have put in evidence the pre-1947 adultery, and in that case it may well have been that he would have succeeded in those 1950 proceedings in securing the discharge of the order. He did not do so.

In my opinion, the evidence which he then had available in 1950 cannot be said to be "fresh evidence" as regards proceedings in 1953. I take the view that "fresh evidence" must mean "fresh" in relation to whatever were the immediately preceding relevant proceedings—in this case the 1950 proceedings. Therefore, the 1946 incidents do not come within that definition of "fresh evidence" which has held the field since *Johnson* v. *Johnson*,[8] in that it could not be said that this evidence was not available to the husband at the date of the previous proceedings in 1950. In that respect I, too, desire to mention the judgment of Romer L.J. in the Court of Appeal to which my Lord has referred, and which, to my mind, makes it entirely clear, if it was not clear previously, that the words "fresh evidence" in the first portion of section 7 must relate also to the matters referred to in the second portion of that section.

On that, accordingly, I found my view, and, like my Lord,

[8] [1900] P. 19.

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I will refrain from discussing the question of estoppel and from canvassing the fine distinction between allegations in the nature of a defence which are available as a traverse, and allegations which are available only by way of confession and avoidance. Between these two types of allegation there lies the important distinction referred to in *Humphries* v. *Humphries*.[9]

As regards the other issues which have been raised in this case I have nothing to add, and I agree with my Lord as to the dismissal of this appeal.

Appeal dismissed.

Solicitors: *Jaques & Co. for David Thomas, Williamson & Co., Colwyn Bay; Whitfield, Byrne & Dean for Osborn, Bennison & Hughes, Colwyn Bay.*

J. B. G.

[9] [1910] 2 K.B. 531.

[PROBATE, ETC., DIVISION.]

1954
Feb. 8.

Lord Merriman P., and Sachs J.

* IVORY *v.* IVORY.

Husband and Wife — Maintenance — Justices — National assistance — Husband in receipt of national assistance—Living with another woman—Wife not "member of the same household"—Discretion of court to order maintenance — Quantum — National Assistance Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 29), *s.* 7.

Although a deserted wife is not "a member of the same house-"hold" as the husband under section 7 of the National Assistance Act, 1948, the court still has a discretion to make an appropriate order for maintenance although the husband's sole income is from the National Assistance Board.

It is wrong in fixing the amount of a maintenance order to fix a figure which is too high for the husband to be able to pay and to order that part of that figure should accumulate as arrears.

Appeal from Gosport Justices.

Husband's appeal to the Divisional Court from an order of the justices for the Gosport Petty Sessional Division, dated August 18, 1953, upon a question of amount of maintenance.

On November 9, 1950, the justices had made an order on the ground of desertion whereby the husband, who was then earning £8 18s. a week, was ordered to pay the wife £3 a week. By March, 1953, arrears of £78 had accumulated, and an order was made for them to be paid off at 10s. a week. The amount of total arrears, however, increased during the summer, and in August, 1953, the husband applied for a variation. Part of the arrears had been remitted on the ground that the wife had been prepared to accept a transfer into her name of the former matrimonial home. The husband was then unemployed and in receipt of £4 16s. 6d. a week from the National Assistance Board, from

which he had to provide for the woman with whom he was living and their child. He was also making instalment payments of 5s. a week in respect of a fine of £50 for a criminal offence which had been previously imposed. The justices decided that the husband should pay 30s. a week maintenance, but since they appreciated that this would be too large a sum for him to manage they decided that he should pay 15s. a week to the wife and that the balance should accumulate week by week as further arrears while he remained out of employment.

The husband appealed, and it appeared at the hearing of the appeal that the justices had made a material error of fact in respect of the wife's current earnings. It was also conceded that the justices had been wrong in fixing a figure too high for the husband to be able to pay, and to order part of that figure to accumulate as arrears. The court was accordingly asked to deal with the question of amount, and to fix a proper sum instead of incurring the further expense of a re-hearing by the justices.

A. H. Ormerod for the husband.
E. B. McLellan for the wife.

LORD MERRIMAN P. stated the facts, and referring to the justices' decision to reduce the amount to 30s. continued: Having decided to reduce the amount to 30s., they realized that in his present situation the husband could not pay that sum. They decided, therefore, that he should pay 15s., and that the balance which, ex hypothesi, on their own finding, he is at present unable to pay, should accumulate week by week as arrears; in other words, that he should pay 15s., and so long as he is out of employment should pile up arrears at the rate of £39 a year. It has not been sought to defend that way of dealing with it, and, in my opinion, it is fundamentally wrong. I fully appreciate the view behind the magistrates' order that this husband has not shown any undue anxiety to support his wife, and that it is not a case in which they were prepared to consider the making of a purely nominal order merely because the wife was earning money and doing her best to keep herself, and, perhaps, put a little by. But, in my opinion, it is fundamentally wrong to fix a figure which is too high for a man to pay, and to order part of that figure to accumulate as arrears, for there is bound to come a moment when, if things remain as they are, the husband will be under an obligation to pay a weekly amount rather than pay which he will go to prison; whereas the proper thing is, if possible, to fix an amount which he will pay rather than go to prison. As it is clear, therefore, that the justices made a very material error of fact as regards the wife's own figures, and directed themselves on a wrong principle as to the amount to be awarded in the circumstances (and I merely observe parenthetically that it is a commonplace nowadays that variations may be made and re-made from time to time according to the actual ability

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P.

of the husband to pay), and as it is conceded that in these two respects they have gone wrong, counsel united in inviting us to deal with the matter of figures ourselves, instead of incurring the expense of sending the case back to the justices, and we have accepted that burden.

The figures which we have to consider are stated in general terms:—The husband's income from the National Assistance Board is £4 16s. 6d., but of that a sum estimated at £1 7s. 6d. is in respect of the woman with whom he has been living for some time, and their child. That leaves him with £3 9s. out of which to satisfy what are called his "requirements." There are two periodical requirements. One is the sum of 30s. a week for the rent of the house, but the other is something different. Some years ago, apparently, for some criminal offence the precise details of which we do not know, he was fined £50, which he has been ordered to pay at the rate of 10s. a week. That 10s., we are told, is for the time being reduced to 5s. But that is a requirement which is quite outside his obligations to his wife. The net result is that, subtracting the 35s. from £3 9s. he is left with £1 14s. for himself, or, bringing back again into the calculation the £1 7s. 6d. in respect of the paramour and the child, a sum of £3 1s. 6d., rent free, for food and clothing. It goes without saying that that is not a large amount for the support of three persons. On the other hand, the wife, taking off her necessary expenses, is left in round figures with £3, plus the house, which, after allowing for the expenses in connexion with it, leaves her rent free.

The question, therefore, is whether this is a case in which, as is argued on behalf of the husband, the amount of the order in favour of his wife should be reduced to some purely nominal amount like 6d. or 1s. a week, or whether it should be something rather more substantial, but still comparatively small, having regard to his present means. We were at first faced with an argument based upon the wording of the National Assistance Act, 1948. The argument was that a statutory duty is put upon the National Assistance Board by the National Assistance Act, 1948, to assess the needs of the husband according to the terms of the Act, and in particular having regard to section 7,[1] which provides for the aggregation of what are called "requirements" and "resources" if the applicant (in this case the husband) "has to

[1] National Assistance Act, 1948, s. 7: "(1) Where it appears to the "Board that an applicant for assist- "ance has to provide for requirements "of some other person being a mem- "ber of the same household, the "Board shall, subject to the provi- "sions of this Act, give assistance by "reference to the aggregate require- "ments and aggregate resources of "the applicant and the said other "person.

"(2) Where in the giving of assist- "ance to an applicant therefor the "requirements of another person are "taken into account, that person is in "this Act referred to as a dependant "of the applicant.

"(3) Where a husband and wife are "members of the same household, "their requirements and resources "shall in all cases be aggregated for "the purposes of this part of this "Act. . . ."

"provide for requirements of some other person being a member "of the same household." It is the paramour and the child who are members of the same household, and the wife, owing to the fact that he has deserted her for the other woman, is not a member of his household: but she is still his wife. The argument with which we were presented originally came to this, that the scheme of the Act prohibited ordering any support for the deserted wife out of the sum computed by the National Assistance Board for the aggregate requirements of the husband, the paramour and their child, for that which the husband in fact receives from the board must be presumed to be neither more nor less than that which is exactly required for the subsistence of those persons, to the exclusion of the wife. It would be a strange result if that was a necessary consequence. Incidentally, on the facts of this case, it is an argument which appears to have a flaw, because one of the deductions out of this sum provided by the National Assistance Board is for the satisfaction of a fine in respect of some wrong-doing of the husband in the not far distant past. I am bound to say that I was relieved to find that the argument was not pressed to its logical conclusion, and we were left, not with an absolute prohibition against making any order in favour of the wife, but with a discretion to be exercised as best we might, on the basis that the husband has been given what is a comparatively small sum for the maintenance of himself and his household.

Giving the best consideration I can to the matter I have come to the conclusion that it would be wrong to reduce the amount to some purely nominal figure, but I think that we ought to reduce it to the sum of 6s. a week, and to get rid, as far as possible, of any order that any part of what he pays should be regarded as a contribution to a fund composed of arrears. I think that that will be effected if we make this variation retroactive to the date of the hearing. We are in no position to deal with the arrears which actually remained at that moment; but that, I think, will get rid of the suggestion that those arrears should receive a weekly accretion of anything like 15s.

SACHS J. A brave attempt was made by Mr. Ormerod to argue that there was, in effect, always an absolute bar to the courts making an order for more than a nominal sum to be paid by way of maintenance when the husband's sole source of income is derived from funds provided under the National Assistance Act, 1948. He was, however, faced with the position that he could cite no provision in that Act which set up such a bar, or which would disable the court from making such an order, however small, as might be just in respect of the man's legal obligations. Nor was he able to point to any provision in the Act which laid upon the husband any obligation not to pay from the funds so provided to him any part of what he received for such objects as beer and tobacco, for instance; nor was he able to tell us how

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Sachs J.

the "requirements" referred to in section 5 (2)[2] of the Act are computed. So in the end he was constrained to concede that the fact that the husband's income derives solely from funds provided under the Act is simply one factor which must be taken into account when assessing what it is proper to pay. With that statement I respectfully agree.

Taking now the facts of the case, I agree with every word which has been spoken by my Lord, and, in particular, with what he has said as to the mischief of making an order with the deliberate intention of ensuring that arrears accrue. Any such order can only be based on a wrong approach to the principles upon which amounts should be awarded. I agree with the figure of 6s. which my Lord has stated as a proper order.

Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Addison, Sons & Madden, Portsmouth; Sinclair, Roche & Temperley for Churcher & Churcher, Gosport.*

J. B. G.

[2] National Assistance Act, 1948, s. 5: "(2) The Minister of National "Insurance shall in accordance with "the provisions of the next following "section ['Preparation, making and "'coming into operation of regula- "'tions under section 5'] make regulations as to the computation of "requirements and resources for the "purposes of this part of this Act and "as to the decision of any such question as aforesaid, and the Board "shall give effect to the relevant provisions of the regulations."

[PROBATE, ETC., DIVISION.]

1954
Feb. 24.

Collingwood J.

* In the Estate of COPE, decd.

Administrator—Revocation of grant—Alleged failure to disclose certain assets—Revocation refused.

Probate.

It was alleged that certain assets of the deceased had not been disclosed by the administration of the deceased's estate and application was made to the court on motion for a revocation of the grant and for a grant of letters of administration de bonis non to an independent person. There was no suggestion of any defect in title of the grantees nor of a supervening incapacity:—

Held, that although there might upon the allegations made be a prima facie case for an inventory and account, this was not a case where the court could order a revocation of the grant.

In the Goods of Galbraith [1951] P. 422; [1951] 2 T.L.R. 412; [1951] 2 All E.R. 470n. distinguished.

Motion.

The following statement of facts is taken from the case on motion: "[The deceased] died on May 25, 1953, at Boscombe "hospital, Bournemouth, intestate, leaving him surviving two

"brothers Bernard and Alfred Cope, one sister Dora Stein, and "having been pre-deceased by two sisters who left issue, such "issue now being of full age. On July 22, 1953, there was "granted out of the Principal Probate Registry to the said "Alfred Cope and to Dora Stein letters of administration of the "estate of the deceased which was sworn at £8,704 14s. 7d. gross "and £3,986 15s. 7d. net, the liabilities being said to include a "debt of £2,475 to the said Alfred Cope which liability is "disputed.

"It is alleged by the said Bernard Cope that certain assets "of the deceased have not been disclosed and that the said sum "of £8,704 14s. 7d. is a considerable understatement, such under-"statement being made deliberately by the said Alfred Cope. "It is submitted that by reason of special circumstances in "relation to the administration of the estate, the grant of July "22, 1953, should be revoked and that a grant of letters of "administration de bonis non should be made to some "independent person."

The court was moved by counsel for Bernard Cope for an order accordingly.

The motion was opposed, Dora Stein (whose surname had been changed by re-marriage to Morris) submitting in an affidavit that "in the circumstances no caveat having been entered to "the application for the grant, no valid reason is set forth in "[Bernard Cope's affidavit in support of the case on motion] to "justify the revocation of the grant, and there is no reason "why my brother Alfred and I should not proceed with the "administration of the estate."

Matters raised in the supporting affidavit had been the subject of correspondence and were in dispute.

Geoffrey Crispin for the applicant.

Stanislaus Seuffert, for the respondents, submitted that there were no special circumstances in the present case to justify an application to revoke the grants.

The cases cited are referred to in the judgment.

COLLINGWOOD J. This is a motion for the revocation of letters of administration which were granted on July 22, 1953, to Alfred Cope and Dora Stein. The applicant also asks that letters of administration de bonis non should be granted to a named chartered accountant.

It was conceded by Mr. Crispin that the facts of this case were not directly covered by any of the grounds for revocation set out in Tristram & Coote, 19th ed., at p. 336 and the following pages, but he submitted that those grounds were not exhaustive and were only examples, and that other cases could be found, of which the present is one, in which it would be proper, in the special circumstances, to revoke the letters of administration already granted and make a new grant in substitution.

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In the Estate of Cope, decd.

Collingwood J.

In support of that contention I was referred to a number of cases, the first being *In the Goods of Bradshaw*.[1] The headnote to that case reads: "A grant of administration of the estate of "an intestate was made to a creditor, who, after his debt had "been fully satisfied, absconded, and could not be found. A "personal representative of the estate being required in an "action in the Chancery Division, the court revoked the grant "to the creditor without citing him, and made a new grant to "the sole next-of-kin of the deceased."

I was next referred to *In the Goods of Covell*[2] in which an administrator, who was also one of the residuary legatees, having partly administered the estate, left his home, and though several years had elapsed no trace of him could be discovered. The court there revoked the grant made to him, and made a fresh grant de bonis non to another of the residuary legatees. That again was a case of an administrator, though this time a residuary legatee, having absconded.

In *In the Goods of William Loveday*,[3] once again the administrator had disappeared. The headnote reads: "The "practice by which a grant of administration may be revoked "and a fresh grant made in the absence of the holder of the "outstanding grant, is not confined to cases where administra-"tion has been taken by creditors. Where an intestate died "leaving a widow and six children by a former marriage, and the "widow, who obtained administration, could not be found, the "court, upon the application of the children, revoked the grant "and directed administration de bonis non in favour of one of "their number." In his judgment Sir Francis Jeune P. said[4]: "Of course it may be said that creditors who apply for grants "stand in a somewhat different position from residuary legatees "or next of kin, because, inasmuch as they are specially "appointed by the court, the court might substitute another "administrator in their place upon their failure to carry out the "administration. But, in my opinion, the fact of the first "administrator being a creditor ought not really to make any "difference in regard to revocation. After all, the real object "which the court must always keep in view is the due and "proper administration of the estate and the interests of the "parties beneficially entitled thereto; and I can see no good "reason why the court should not take fresh action in regard "to an estate where it is made clear that its previous grant has "turned out abortive or inefficient. If the court has in certain "circumstances made a grant in the belief and hope that the "person appointed will properly and fully administer the estate, "and if it turns out that the person so appointed will not or "cannot administer, I do not see why the court should not "revoke an inoperative grant and make a fresh grant. There-"fore I accede to the present application." The words in that

[1] (1887) 13 P.D. 18.
[2] (1889) 15 P.D. 8.
[3] [1900] P. 154.
[4] Ibid. 155.

judgment must be read having regard to the facts of that case and when Sir Francis Jeune P. speaks of the previous grant having turned out to be abortive or inefficient he was dealing with a case of an administrator disappearing for a time, as in *In the Goods of Bradshaw*.[5]

The next case to which I was referred was *Birch* v. *Birch*[6] (which was reversed on the facts on appeal in view of fresh evidence). There the ground for revocation was the fraud in putting forward the document for probate in the very beginning. The headnote reads: "If any person who is interested, directly or "indirectly, in the establishment of a testamentary document is "guilty of a fraud in putting forward that document for probate, "this fraud affects the whole litigation. Where, therefore, the "plaintiff, in an action against executors, claimed, on the ground "of fraud, to revoke a probate granted in solemn form, and the "defendants moved to dismiss the action as res judicata, the "court refused to stay the proceedings, although it was not "suggested that the executors, to whom probate had been "granted, were cognizant of the alleged fraud, and although the "person, against whom the plaintiff now made the charges, was "not a party to the former suit."

In *In the Goods of Galbraith*[7] the headnote reads: "The "court has power to revoke probate granted to executors and "to make instead a grant of letters of administration de bonis "non to another person. The two surviving executors of the "will and codicil of the deceased had become unable properly "to carry out their duties by reason of their infirmities. "Accordingly, application was made on motion to the court for "probate to be revoked and for a grant to the applicant of "letters of administration de bonis non." Karminski J. in a short judgment said[8]: "I propose to make an order in the "terms of the motion, namely, to revoke the probate of the will "with its three codicils, which was granted to the two surviving "executors named in the will, and to grant letters of administra-"tion de bonis non together with the will and codicils to the "applicant, Peter Musson, a great-nephew of the deceased. The "application is a novel one only to this extent: there appears "to have been no reported case in which both executors have "been relieved of their duties in this way; but in the present "case there is the clearest possible evidence that both the sur-"viving executors are men of very advanced age and suffering "from such a degree of physical and mental infirmity as makes a "continuance of their duties impossible. For reasons due to "conditions in the Argentine the estate has not yet been wound "up, and I have to consider the objects of the court in looking "after the estate, in looking after the proper representation, and,

[5] 13 P.D. 18.
[6] [1902] P. 62; 18 T.L.R. 151.
[7] [1951] P. 422; [1951] 2 T.L.R. 412; [1951] 2 All E.R. 470n.
[8] [1951] P. 424.

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In the Estate of Cope, decd.

Collingwood J.

"not least, in looking after the interest of the parties beneficially "interested."

That, of course, correctly states the duty of the court. But here again, one must take that statement of the duty and object of the court having regard to the circumstances of that case. The circumstances there were that both the executors were men of very advanced age and suffering from such a degree of physical and mental infirmity as to make a continuation of their duty impossible. No such suggestion is made in the present case.

The last case to which I was referred was *In the Goods of Edwards-Taylor, decd.*[9] That was not a case of revocation. The proposed grantee of letters of administration was alleged to be under-developed both mentally and physically, but the court refused in those circumstances to make a grant to a stranger in order to protect the interests of the residuary legatee who was a daughter of the deceased.

In my opinion, none of those cases really covers the present one. There is no suggestion here that there is any defect in the title of the grantee of the letters of administration, or any supervening incapacity. There may be, upon the evidence that has been put forward, a prima facie case for an inventory and an account under section 25, but in my opinion it is not a case in which the court can order revocation of the grant.

Motion dismissed with costs.

Solicitors: *Saunders, Sobell, Greenbury & Leigh; Paisner & Co.*

J. B. G.

[9] [1951] P. 24; 66 T.L.R. (Pt. 2) 593.

[PROBATE, ETC., DIVISION.]

1954
Mar. 22.

Willmer J.

* SICHEL *v.* SICHEL.

Husband and Wife — Maintenance — High Court — Committal order — Duration—No longer limited to one year—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 5—*Matrimonial Causes (Judgment Summons) Rules,* 1952 (*S.I.* 1952, *No.* 2209/*L.* 21)—*Bankruptcy Rules,* 1952 (*S.I.* 1952, *No.* 2113/*L.* 14), *r.* 383.

A committal order made in the Divorce Division under the Matrimonial Causes (Judgment Summons) Rules, 1952, continues in operation until the debt in respect of which it was made has been fully paid.

Application to extend committal order.

On March 23, 1953, an order had been made committing the respondent to prison for non-payment of maintenance, the committal order being suspended so long as payments of 2s. 6d. per

week were made. At that rate it would have taken almost 10 years to pay off the debt. The respondent had fully complied with the order, having paid 2s. 6d. per week in addition to the current maintenance. The committal order was now almost one year old and the question arose whether it had to be extended.

Bruce Campbell for the applicant. The Divorce Division was given jurisdiction in 1932 under the Debtors Act, 1869, but its practice and procedure was then governed by the Bankruptcy Rules, 1915 (rule 379) and therefore by the County Court Rules, 1936. The County Court Rules are no longer applicable to committal orders made in a matrimonial cause: see the Bankruptcy Rules, 1952, r. 383.[1] Having regard to the provisions of rule 6 of the Matrimonial Causes (Judgment Summons) Rules, 1952,[2] which provide that after a committal order has been made and suspended all payments made by the debtor are to be applied first in payment of current maintenance, the reduction of the judgment debt would necessarily be by small instalments and in most cases it would take much longer than one year to pay off the judgment debt. In the present case it would take nearly 10 years. It could not have been intended that the judgment creditor in such cases should have to come back to the court every year to have the committal order extended, and the Matrimonial Causes (Judgment Summons) Rules, 1952, which were in themselves complete and comprehensive, contained no such requirement. Latey on Divorce, 14th ed. (1951), at p. 1023, said that an order for commitment, unless issued, was effective for one year only from the date when made; but that textbook was published before the new rules were made. Rayden on Divorce, 6th ed., at p. 360, and the 1954 Annual Practice, at p. 743, also stated that commitment orders expired at the end of a year. It is submitted that these statements are now incorrect. This application, which is in form an application to extend the committal order, is unnecessary and should be dismissed.

WILLMER J. This application is in form an application to extend the period of time in respect of a committal order made on March 23, 1953. In practice, however, the purpose is to

[1] Bankruptcy Rules, 1952, r. 383: "The County Court Rules for the time "being in force as to the committal "of judgment debtors shall, with any "necessary modifications, apply to all "courts exercising jurisdiction under "section 5 of the Debtors Act, 1869, "except to the High Court when exer-"cising jurisdiction in respect of any "order or judgment made or given in "a matrimonial cause."

[2] Matrimonial Causes (Judgment Summons) Rules, 1912, r. 6 (3): "If "an order of commitment is suspended "on such terms as are mentioned in "the last foregoing paragraph" [i.e., "that the debtor pays the amount due ". . . either at a specified time or by "instalments . . ."] "all payment "thereafter made under the order "shall be deemed to be made, first, "in or towards the discharge of any "sums from time to time accruing due "under the judgment, and secondly, "in or towards the discharge of the "debt in respect of which the judg-"ment summons was issued and the "costs of the summons."

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obtain a decision that the application is unnecessary. Having heard the argument I am satisfied that the application was unnecessary, except insofar as it was desirable to clarify the position which was far from clear.

It is an unfortunate fact, as was pointed out by Mr. Campbell, that the two leading textbooks on the work of this Division, as well as the most recent edition of the Annual Practice, state without qualification that it is necessary to apply for the renewal of a committal order after the expiration of one year. The authority for that proposition which is given is Order 25, r. 56, of the County Court Rules, 1936.

Until recently the County Court Rules applied in all cases brought in the High Court under section 5 of the Debtors Act, 1869, by reason of rule 379 of the Bankruptcy Rules, 1915, the jurisdiction under section 5 of the Debtors Act having been assigned many years ago by the Lord Chancellor to the judge sitting in bankruptcy. But new bankruptcy rules were made in 1952, and a different set of rules was, for the first time, applied to proceedings under the Debtors Act arising in this Division. By rule 383 of the Bankruptcy Rules, dated December 5, 1952, cases where the High Court is exercising jurisdiction in respect of an order or judgment made or given in a matrimonial cause were specifically excepted. Within a few days of the publication of those rules, namely on December 18, 1952, the Matrimonial Causes (Judgment Summons) Rules, 1952, were published.

Those are the rules which now govern the procedure of this court when exercising its jurisdiction under the Debtors Act, 1869. The Matrimonial Causes (Judgment Summons) Rules, 1952, are silent with regard to the necessity for renewal of a committal order after the expiration of one year. As has been pointed out by Mr. Campbell, and I think rightly pointed out, there is very good reason for that, having regard to the form of order which it is competent for a judge of this division to make. It would be in many cases almost an absurdity if year by year application had to be made to renew a committal order made on a judgment summons in this division. I say "year by year" advisedly, because it is common knowledge that many cases arise in this division in which it is necessary to suspend the operation of a committal order for what must on any view be a very long period. In those circumstances it is contended, and I think rightly contended, that it really would be quite absurd if a creditor had to come back here once a year to go through the formality of having the committal order renewed. I can only infer, from consideration of the rules themselves, that the omission of any reference to the necessity of renewing a committal order after the duration of one year was deliberate having regard to the nature of order which it is competent to make under the rules.

In my judgment, so far as committal orders made in this division are concerned, there is now no limitation as to the period of time for which they exist, other than the period during which

any part of the debt remains due. A committal order made in this division under the new rules continues in operation until the debt in respect of which it was made has been fully paid. In those circumstances, it is no longer necessary, as it has been in the past, to make application to this court at the end of the year to renew the committal order. For those reasons I hold that Mr. Campbell's application was unnecessary.

Solicitor: *A. G. Parry-Jones, Law Society, Divorce Department.*

J. B. G.

[COURT OF APPEAL.]

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Mar. 9, 10.
Evershed M.R., Denning and Romer L.JJ.

* ROUTLEDGE *v.* McKAY.
NUGENT (THIRD PARTY).
ASHGROVE (FOURTH PARTY).
MAWSON (FIFTH PARTY).

[Plaint No. H. 1607.]

Sale of Goods—Warranty—Collateral warranty—Sale of second-hand motor-bicycle — False statement in registration book as to year bicycle put on market—String contracts—No fraudulent misrepresentation by seller in question—Whether any warranty given.
Revenue—Stamp duty—Unstamped document admitted in evidence in court below—Duty of Court of Appeal—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14. *Court of Appeal.*
Fraud—Who may sue—Sale of goods—Motor-vehicle—False statement in registration book—String contracts.

The owner of a 1930 Douglas motor-bicycle reconditioned it and thereafter it was sold with a registration book showing that the motor-bicycle was a late 1941 or 1942 model. The motor-bicycle was sold to the fifth party who sold it to the fourth party. On this sale the terms of the agreement for sale were set out in a memorandum in writing. The memorandum contained no mention of the date of manufacture of the motor-bicycle. It was subsequently sold by the fourth party to the third party who sold it to the defendant, who sold it to the plaintiff. The plaintiff having found out that the motor-bicycle was not a 1941 model, but a 1930 model, sued the defendant who brought in the third party, who brought in the fourth party, who brought in the fifth party. The Statute of Limitations prevented the fifth party from bringing in as sixth party the person who sold the motor-bicycle to him. Fraudulent misrepresentation was not alleged. At the hearing it appeared to have been assumed as between the plaintiff and the defendant, the defendant and the third party and the third party and the fourth party that the express statement as to the age of the motor-bicycle constituted a warranty. The county court judge held that there had been a breach of warranty and gave judgment for the fourth party against the fifth party. The fifth party appealed.

The fifth party had relied on the written memorandum of his agreement with the fourth party. That memorandum, which was admitted in evidence by the county court judge, was not stamped

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and the question was raised on the appeal whether it was the duty of the Court of Appeal to take notice, in accordance with the requirements of section 14 of the Stamp Act, 1891, of the omission to stamp:—

Held, (1) that the Court of Appeal could not assume merely because an unstamped document had been admitted in evidence below that there had been a decision that it did not require stamping. It was the duty of the Court of Appeal to take notice of the omission to stamp. On the true construction of the document in question, it did not require stamping being exempt under exemption (3) to the heading "agreement" in the First Schedule to the Stamp Act, 1891, as an agreement relating to the sale of goods;

(2) that the evidence did not establish the existence of any collateral contract by which a warranty was given by the fifth defendant that the motor-bicycle was a 1941 model and accordingly the appeal would be allowed.

The dictum of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton* [1913] A.C. 30, 47 considered and applied.

Per Denning L.J. Where a motor-car or motor-bicycle is sold second hand from one person to another in succession, one seller in the chain may tell a purchaser what year's model it is, basing his information on the statement in the registration book. If that statement is false, because some remote seller has falsified the number, the answer to the question whether each seller is responsible to each buyer in damages must depend upon a proper application of the law as to innocent misrepresentation and warranty. The seller, unless he is the first owner, is not the originator of the statement about the year in the registration book. In the ordinary way the statement is only a representation and not a warranty. If the entry in the registration book should turn out to be false, the eventual buyer could sue the original wrongdoer in fraud, but he could not sue innocent people in between who merely passed on a statement which was in the registration book.

Appeal from Judge Fraser Harrison sitting at Liverpool County Court.

The plaintiff, Joseph Routledge, in these proceedings claimed damages from the defendant Charles McKay in respect of the sale of a Douglas motor-bicycle, which the plaintiff had purchased from the defendant believing it to be a 1941 model, when it was in fact a 1930 model. The defendant brought in as third party D. Nugent, from whom he had bought the motor-bicycle. The third party in his turn brought in the fourth party, Philip Ashgrove, who had sold the motor-bicycle to him. The fourth party brought in the fifth party, J. Mawson, who had sold to the fourth party. The fifth party's claim against his vendor was statute barred. No allegations of any fraudulent misrepresentations were made. The claims were based on allegations that in each case the vendor had warranted the age of the motor-bicycle. The sales had been made orally, except that, in the case of the sale by the fifth party to the fourth party, a memorandum of the agreed terms had been drawn up and signed. The facts and the terms of the memorandum are sufficiently stated in the judgment of Evershed M.R.

The county court judge gave judgment for the fourth party against the fifth party for the sum of £80.

The fifth party appealed. In the court below the fifth party relied on the written memorandum of the terms on which he had sold the bicycle to the fourth party. This memorandum was not stamped but it had been admitted in evidence. On the appeal, the court raised the question whether it was bound by section 14 of the Stamp Act, 1891,[1] to take the objection that the memorandum was not stamped.

J. S. Watson for the fifth party.
F. D. Paterson for the fourth party.

The following cases were cited in argument: *Warrington* v. *Furbor*[2]; *Heilbut, Symons & Co.* v. *Buckleton*[3]; *Gilchester Properties Ld.* v. *Gomm*[4]; *Bishopsgate Motor Finance Corporation* v. *Transport Brakes Ld.*[5]; *Miller* v. *Cannon Hill Estates Ld.*[6]; *Walker Property Investments (Brighton) Ld.* v. *Walker*[7]; *Webster* v. *Higgin*[8]; *Couchman* v. *Hill*[9]; *Henderson* v. *Arthur.*[10]

EVERSHED M.R. I think it desirable that I should say that in my judgment it is the duty of the Court of Appeal to pay regard to what Parliament provides in section 14 of the Stamp Act, 1891. The court cannot assume that there has been some decision by the court below merely because in the court below the document has been admitted in evidence. On the other hand, on the facts of this case, I think that the exemption—exemption (3), which on the authorities should be, as I understand it, liberally interpreted—does cover this case, and therefore I think that there has been no infringement of section 14 of the Act; and we need say nothing more about it.

DENNING L.J. I agree.

ROMER L.J. I agree.

The court then heard argument on the question raised by the appeal.

[1] Stamp Act, 1891, s. 14: "(1) "Upon the production of an instrument chargeable with any duty as "evidence in any court of civil judicature in any part of the United "Kingdom . . . notice shall be taken "by the judge . . . of any omission "or insufficiency of the stamp thereon, ". . . (4) Save as aforesaid, an instrument executed in any part of the "United Kingdom, or relating, wheresoever executed, to any property "situate, or to any matter or thing "done or to be done, in any part of "the United Kingdom, shall not, "except in criminal proceedings, be "given in evidence. . . ."

[2] (1807) 8 East 242.

[3] [1923] A.C. 30.

[4] [1948] W.N. 71; 64 T.L.R. 235; [1948] 1 All E.R. 493.

[5] [1949] 1 K.B. 322; 65 T.L.R. 66; [1949] 1 All E.R. 37.

[6] [1931] 2 K.B. 113.

[7] [1947] 177 L.T. 204.

[8] [1948] 2 All E.R. 127.

[9] [1947] K.B. 554; 63 T.L.R. 81; [1947] 1 All E.R. 103.

[10] [1907] 1 K.B. 10; 23 T.L.R. 60.

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Evershed M.R. This appeal involves a question which has found many illustrations in the books, namely, whether upon a sale—in this case a sale or exchange of a motor-bicycle with a sidecar combination—there was a warranty as regards the date when the motor-cycle was originally put upon the market. The classic exposition of the law in regard to warranties is to be found in the speech of Lord Moulton in *Heilbut, Symons & Co.* v. *Buckleton.*[1] Although it has been many times cited I may perhaps be forgiven for citing once again some of the language which the noble Lord used. "It is evident," he said,[2] "both on "principle and on authority, that there may be a contract the "consideration for which is the making of some other contract. "'If you will make such and such a contract I will give you "'one hundred pounds,' is in every sense of the word a complete "legal contract. It is collateral to the main contract, but each "has an independent existence, and they do not differ in respect "of their possessing to the full the character and status of a "contract. But such collateral contracts must from their very "nature be rare. . . . Such collateral contracts . . . must be "proved strictly. Not only the terms of such contracts but "the existence of an animus contrahendi on the part of all the "parties to them must be clearly shown. Any laxity on these "points would enable parties to escape from the full performance "of the obligations of contracts unquestionably entered into by "them and more especially would have the effect of lessening "the authority of written contracts by making it possible to vary "them by suggesting the existence of verbal collateral agree-"ments relating to the same subject-matter."

Then, after dealing with the particular facts in the *Heilbut, Symons* case and after referring to certain cases on the Chancery side, Lord Moulton said[3]: "On the common law side of the "court the attempts to make a person liable for an innocent "misrepresentation have usually taken the form of attempts to "extend the doctrine of warranty beyond its just limits and to "find that a warranty existed in cases where there was nothing "more than an innocent misrepresentation. . . . But in respect "of the question of the existence of a warranty the courts have "had the advantage of an admirable enunciation of the true "principle of law which was made in very early days by Holt "C.J. with respect to the contract of sale. He says: 'An "'affirmation at the time of the sale is a warranty, provided it "'appear on evidence to be so intended.'" Then he says, a little later, "One often sees quoted the dictum of Bayley J. in "*Cave* v. *Coleman*[4] where, in respect of a representation made "verbally during the sale of a horse, he says that 'being made "'in the course of dealing, and before the bargain was complete,

[1] [1913] A.C. 30.
[2] Ibid. 47.
[3] Ibid. 49.
[4] (1828) 3 Man. & Ry. 2.

"'it amounted to a warranty'—a proposition that is far too "sweeping and cannot be supported."

Finally, after reference to and disapproval of the language of this court in *De Lassalle* v. *Guildford*,[5] Lord Moulton says[6]: "It is, my Lords, of the greatest importance, in my opinion, "that this House should maintain in its full integrity the "principle that a person is not liable in damages for an innocent "misrepresentation, no matter in what way or under what form "the attack is made."

The subject-matter of the sale, with which we are concerned, was a motor-bicycle of somewhat ancient vintage. The appellant here is the fifth party in proceedings which were begun in the form of an action by the plaintiff who had bought this motor-bicycle from the defendant. The defendant himself introduced a third party; the third party introduced a fourth party; and the fourth a fifth. The matter stopped there, not because there had not been other previous sales, but, as I understand it, because, upon the footing that a warranty was the question, and the only question, involved, the Statute of Limitations would have stood in the way of the fifth party bringing in a sixth and so on.

For reasons which will later appear, I confess that the result leaves an uneasy feeling in my mind that in the end some injustice may be done. Apparently by the display of a certain amount of mechanical ingenuity an earlier possessor of this machine (which first left the works of the makers in the month of October, 1930) proceeded to recondition it and (in a measure) remake it so that, although substantially it remained the old 1930 model, it had acquired certain characteristics which this ingenious mechanic thought justified him in attributing to it a somewhat later origin.

The registration books or log books (which were renewed from time to time) eventually showed on their face that this Douglas motor-cycle combination was what is called "a late "1941 or 1942 model." In the one before us, and against the item "Date of original registration under the Roads Act, 1920" it has "9.9.1941," and then the words "forty-one" written afterwards. In the court below it seems reasonably clear that, in the case of the final sale and in those which immediately preceded it, the alleged warranty amounted to a statement to the effect found in the log book. I assume that in each case there was an express affirmation of what there appeared; but it does not seem that there was anything more; yet (again so far as I can judge from the material before us) the parties or their representatives seem to have been content to let the matter proceed on the footing that such an express statement, without more, did amount to a warranty.

When, following the chain down, the matter came to be determined finally between the fourth and fifth parties, counsel

[5] [1901] 2 K.B. 215, 221.

[6] [1913] A.C. 30, 51; 17 T.L.R. 384.

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for the latter for the first time raised the question in clear terms whether, as between him and the fourth party, there ever was a warranty at all; and he particularly relied upon the circumstance that in the sale (or exchange; for it was substantially an exchange) which took place between the fourth and fifth parties a written memorandum of agreement was entered into at the time when the transaction took effect.

I shall have to refer presently in a little more detail to the evidence and to that agreement; but, bearing in mind the passages which I have read from Lord Moulton's speech, in approaching this matter it is important to observe that, if there was a warranty, then there was a contract between the two parties to the effect that the seller, for good consideration, undertook to indemnify the buyer against any loss the buyer might suffer, if, in truth, the origin of this motor-cycle was not 1941 or 1942 but some much earlier date. Such a contractual obligation could be part of the contract of sale itself or it might be collateral to it. In the present case, if there was a warranty, it must have been collateral to the actual contract of sale or exchange, though I do not think that that matter is necessarily conclusive of the question before us.

I have mentioned these anterior questions partly because of the feeling of regret which I have about this case and which I have already mentioned, but also because (in fairness to the judge) it seems clear to me that his attention was not directed, at any rate during the earlier stages, to the essential requirements of a warranty; and particularly he did not have the advantage of refreshing his memory by looking again at Lord Moulton's speech: so that when the matter came to be determined as between the fourth and fifth parties the reference to what was stated in the log book had come to be treated (as far as I can see) as prima facie constituting a warranty; with the result that the judge's judgment was confined, in effect, to this: was that prima facie effect of the reference displaced by the written contract? I found that conclusion on this passage from the notes of the judgment: "I then dealt in some detail with "the transaction between the fourth party and the fifth party. "I accepted the evidence of Mr. Philip Ashgrove, the fourth "party, and I rejected any evidence given by Mr. John Mawson, "the fifth party, which conflicted with that given by Mr. Ash-"grove. I found as a fact that before the purchase in question "in October, 1949, the fifth party gave a warranty to the fourth "party that the Douglas motor-cycle combination was a 1942 "model. There was no dispute that this"—videlicet, that it was a 1942 model—"was incorrect. That, in so far as it is a "question of fact, I found and in so far as it is a question of "construction I held, that the written agreement signed on "October 30, 1949, by the fourth party and the fifth party and "having therein the words 'That when the £30 is paid over

"'that this transaction is closed' was not intended to exclude "any warranty."

Now Mr. Paterson has very properly pressed upon us that, in so far as that is a matter of fact, then a finding by the county court judge, who heard the witnesses, would be conclusive in this court; provided that there was some evidence upon which it could be founded. But I think (and I must state this at the beginning of my observations) that the judge did not really direct his mind to the question whether there was, in the reference to the date of origin as it emerged from the evidence, a real intention to contract, in the sense I have already described and in the sense which must be found to be present if what otherwise would be a misrepresentation is to be translated into a warranty. I think that he did not apply his mind to that, because the parties had not really during the earlier stages of the battle raised the matter and were content to assume that such a statement did constitute a warranty. I therefore do not feel that Mr. Paterson's submission can be (in this case) an answer to the fifth party's appeal.

[His Lordship considered the evidence and continued:] On the oral evidence, all there is and all the judge found, or I think intended to find, was that on the first meeting of the fourth and fifth parties (and before, be it noted, the bargain was eventually made), and in answer to a question, the fifth party specifically stated that it was a 1942 model, and pointed to the corroboration of that statement found in the book.

I now turn to the written memorandum or contract which the fourth party had caused to be prepared and which was signed by the two contracting parties on the second or later occasion. "It is agreed between the parties Mr. Ashgrove . . . and Mr. "Mawson . . . that a 250 c.c. B.S.A. solo motor-cycle No." so and so "now by"—"owned by," I suppose that means—"Mr. Ashgrove to be exchanged for a Douglas flat twin 600 c.c. "combination . . . owned by Mr. Mawson and further Mr. Ash-"grove will pay the sum of £30 to complete the transaction. It "is understood that when the £30 is paid over that this "transaction is closed."

Now the point is made (and it is a significant one) that the Douglas motor-cycle is expressly referred to as being of the capacity of 600 cubic centimetres, when on this registration book it is stated as having only 500 cubic centimetres capacity. The true cubic capacity according to the fifth party was 600; that fact was deliberately and carefully pointed out by the fifth party, who showed the discrepancy in that respect in the registration book, and the agreement (and this is significant) expressly refers to that matter.

This document represents prima facie the record of what the parties intended to agree when the actual transaction took place. Mr. Watson has contended that the terms of it necessarily exclude any warranty—that is to say, any collateral bargain,

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either contemporary or earlier in date. I am not sure that I would go as far with Mr. Watson in that respect. But I think that, as a matter of construction, it would be extremely difficult to say that such an agreement was consistent with a warranty being given at the same time and so as to be intended to form a part of the bargain then made. I think, with Mr. Watson, that the last words "It is understood that when the £30 is paid "... this transaction is closed" would make such a contention exceedingly difficult. But I will assume that the warranty here was not a warranty given when this bargain was struck, but was a warranty which had been given on the earlier date, on which date alone, according to the evidence, any representation about the date of the Douglas was made at all.

Now if the earlier representation is to be a warranty, then it has got to be contractual in form. In other words, so far as I can see, once the existence of a warranty as part of the actual bargain is excluded, it must be a separate contract; and the difficulty, and I think the overwhelming difficulty, which faces the fourth party here is that when the representation was made there was then no bargain, and it is therefore, in my view, impossible to say that it could have been collateral to some other contract. But even apart from that, it seems to me that, on the evidence, there is nothing to support the conclusion, as a matter of law and bearing in mind Lord Moulton's observations, that in answering the question posed about the date of this Douglas there was anything more intended than a mere representation.

If that is the right analysis, then the problem which the judge below felt he had to consider really never arose, because it was not a question whether on its construction this agreement negatived or excluded the possibility of an earlier warranty. On the view I take there really was no evidence before the judge capable of supporting the existence of any earlier warranty at all, and I prefer to base my conclusion on that ground than upon the view that the agreement, according to its language, necessarily excluded a warranty. I have felt compelled to the conclusion that the judge here had not before him any evidence which entitled him to conclude that there was given, and intended to be given, a warranty (in the proper sense of that word) when the reference to the date of origin of the motor-cycle was made by Mr. Mawson; and I only add that the written agreement tends to support that view rather than to controvert it.

I conclude (as I began) by a reference to my anxiety in the case, because I am bound to say that I feel grave doubt whether on this evidence there ever was a warranty given by anybody to anybody else among those who were parties to these proceedings. Whether any earlier owner or fifth party or anyone else might have been held liable upon a fraudulent misrepresentation does not now arise; but my sympathies certainly are with all these parties who were all undoubtedly misled by the circumstances

that there appeared in a registration book a false date as a result of what I have called (and I am using the phrase so as to avoid any opprobrious significance) the mechanical ingenuity of an earlier proprietor.

In my judgment, this appeal must be allowed and, taking that view, I do not say anything more upon Mr. Watson's second point, that in any case the sum of damages awarded, £80, ought not to stand. Upon that matter it is sufficient to say that, if that question had to be determined, as at present advised I am not satisfied that there is any ground upon which this court could interfere with the award; but I need not express any concluded view upon it.

DENNING L.J. When a motor-car or a motor-cycle is sold second hand from one person to another in succession down a line of persons, it often happens that each seller in the chain tells each buyer what year it is, basing his information on the statement in the registration book. Suppose that, unknown to either party, the statement in the registration book is false, because some remote seller falsified either the number plate or the book; what is the legal position? Has each seller in the chain warranted the correctness of the entry in the registration book so that each seller is responsible to his buyer in damages; or has he merely made an innocent representation for which he is not liable in damages at all?

The answer must depend, of course, upon a proper application of the law about innocent misrepresentation and warranty as laid down by the House of Lords in *Heilbut, Symons & Co.* v. *Buckleton.*[7] But in considering this question it is important to remember that the seller, unless he is the first owner, is not the originator of the statement about the year. He does not know for himself, of his own knowledge, what year the car or cycle is. He has to accept it from the book, and he cannot be expected to warrant its accuracy, unless he in express terms makes himself responsible for it. In the ordinary way, therefore, the statement is only a representation and not a warranty. If the entry in the registration book should turn out to be false, the eventual buyer can sue the original wrongdoer in fraud without any trouble incidentally about the Statute of Limitations; but he cannot sue the innocent people in between who merely passed on a statement which was in the registration book.

Then I ask myself: is there anything to take this case out of the ordinary? It seems to me that as between the fourth and fifth parties, for the reasons which my Lord has given, this was only a representation and not a collateral contract at all. Mr. Paterson relied on the fact that the seller did correct one statement in the registration book in that he corrected 500 c.c. to 600 c.c. No doubt any seller ought to correct any statement in the book which he knows or has reason to suppose is inaccurate;

[7] [1913] A.C. 30.

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but that does not turn the representation about the year into a warranty. I cannot see that there was any evidence in this case (any more than in *Heilbut, Symons & Co.* v. *Buckleton*[7]) on which a warranty could be found. It is unfortunate that none of the counsel in the case (and there were five of them) referred the judge to *Heilbut, Symons & Co.* v. *Buckleton*[7]; because it means that Mr. Ashgrove, an entirely innocent party, is left to bear the whole burden when he ought not to have been.

I agree with my Lord that the appeal should be allowed.

Romer L.J. I also agree. Having regard to the law as laid down in *Heilbut, Symons & Co.* v. *Buckleton*,[7] and especially in the speech of Lord Moulton, it seems to me impossible to arrive at the view that the statement which the fifth party made to the fourth party amounted to a warranty. I confess that I have come to this conclusion with some reluctance, because not only did the fifth party think proper to give evidence before the judge that was untrue, but it is plain that he knew perfectly well himself that when he told the fourth party (as he did tell him) that this motor-cycle was a 1941 model, he had already been informed by the makers that it was earlier than that by some years. Indeed, apparently as a result of what he was told by the manufacturers, he seems to have pondered for a time as to whether he would not sue the man who had sold it to him, but eventually he decided not to do so. Therefore, as I say, it is with some regret that I have come to the conclusion that the fourth party (who was perfectly innocent in the matter) should lose this appeal; but, having regard to the law, that is the result at which one must arrive, for no charge of fraudulent misrepresentation was made against the fifth party.

Appeal allowed.

Solicitors: *Ranger, Burton & Frost for G. F. Lees & Son, Birkenhead; Kinch & Richardson for Percy Hughes & Roberts, Birkenhead.*

B. A. B.

[7] [1913] A.C. 30.

[WINCHESTER ASSIZES.]

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Lynskey J.

* STREET *v.* DENHAM.

Husband and Wife — Property — Matrimonial home — Desertion by husband—Right of wife to remain enforceable against husband's successor in title with notice—Right not lost by incomplete agreement to accept alternative accommodation—Right not superseded by express licence.

A deserted wife has an irrevocable licence to remain in occupation of the matrimonial home, which is enforceable not only against

[Reported by Niul Hogg, Esq., Barrister-at-Law.]

her husband, but also against his successor in title with notice, even against a purchaser for value if he buys with knowledge of the facts. While this right may be lost by the wife entering into a concluded agreement to accept specific alternative accommodation, an agreement which does not deal with the question of the beneficial ownership of the proposed alternative accommodation is not sufficient. Moreover, the husband cannot, by expressly allowing his deserted wife to remain in the matrimonial home upon terms, cut down the irrevocable quality of the licence which the law allows her, for there is no consideration to support the terms.

Bendall v. *McWhirter* [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307 and *Ferris* v. *Weaven* [1952] 2 All E.R. 233; [1952] W.N. 318 applied.

ACTION.

The plaintiff claimed possession of premises at 58, St. Michael's Grove, Fareham, of which she claimed to be the owner by virtue of a conveyance to her by the defendant's husband in 1952. In 1937 the premises were conveyed to the husband, a deposit of £25 being paid and the balance of the purchase being raised by a building society mortgage, executed by the husband. The defendant alleged that she had provided the whole of the deposit, but it was found to have been contributed, as to £20, by the husband's grandmother and, as to the remainder, by the husband himself. The defendant, the husband, their two children and the grandmother all lived in the premises until December, 1942, when the husband deserted the defendant and went to live with the plaintiff, with whom he had lived ever since.

In 1943 the defendant obtained a house in Portsmouth and was about to move into it with the children and the grandmother when the husband, fearing for their safety owing to air-raids, told the defendant that she could continue to live at St. Michael's Grove until she found somewhere safe to go and so long as she had the children and the grandmother with her.

By May, 1949, both children had left the premises and only the defendant and the grandmother remained. The following month the husband's solicitors wrote to the defendant asking her to vacate the premises, but nothing further happened until in September, 1950, the husband took the defendant to see a house in Henrietta Street, Portsmouth, with a view to her moving there from St. Michael's Grove. The defendant expressed her willingness to do this on condition that certain alterations and improvements were effected. These were carried out and arrangements made for her to move in, but at the last moment she decided, on the advice of her solicitors, to hold back until the question of the beneficial ownership of the new house should be decided. Negotiations followed but these proved abortive and the defendant remained at St. Michael's Grove, but no longer with the grandmother, whom she now refused to have with her. Meanwhile the husband and the plaintiff resided at Henrietta Street.

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Throughout the whole of this time the defendant had kept up the payments on the mortgage and had discharged the rates and the insurance premiums out of moneys which she alleged were her own but which were found to have been supplied by the husband. On December 20, 1950, the husband himself paid off the remaining money due under the mortgage, and on January 14, 1952, he conveyed 58, St. Michael's Grove to the plaintiff for the sum of £1,500.

The plaintiff now sued for possession, contending that the defendant was in possession by permission of the husband, which permission had been withdrawn prior to the conveyance to the plaintiff. The defendant denied the plaintiff's right to possession and alleged that, the purchase-money having been found in whole or in part by the defendant, the premises belonged in equity to her or to her and the husband jointly. In the alternative the defendant claimed that the premises were the matrimonial home of herself and the husband, that the husband had deserted her, and that she had an irrevocable licence to remain in the premises, valid not only against the husband, but also against the plaintiff who had acquired the premises with full knowledge of the facts. The plaintiff, in reply, denied the defendant's allegations, and alleged in the alternative that, if the defendant had any licence from the husband to remain in the premises, it was a contractual licence the terms of which the defendant had broken, or that the licence had been rescinded by an agreement by the defendant to accept alternative accommodation.

T. G. Field-Fisher for the plaintiff.
I. N. D. Wallace for the defendant.

The following cases were cited in argument: *Thompson* v. *Earthy* [1]; *Errington* v. *Errington* [2]; *Bendall* v. *McWhirter* [3]; *Ferris* v. *Weaven* [4]; *Lee* v. *Lee* [5]; *Rimmer* v. *Rimmer* [6]; *Lloyds Bank Ld.* v. *Oliver's Trustee* [7]; *Bradley-Hole* v. *Cusen* [8]; *Jones* v. *Maynard*.[9]

Cur. adv. vult.

December 21. Lynskey J. stated the facts and continued: The first question which I have to consider is whether the defendant has a beneficial interest in the premises at 58, St. Michael's Grove as a result of contributing part of the purchase-money, either originally as part of the deposit or later by paying the

[1] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.
[2] [1952] 2 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.
[3] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[4] [1952] 2 All E.R. 233; [1952] W.N. 318.
[5] [1952] 2 Q.B. 489; [1952] 1 T.L.R. 968; [1952] 1 All E.R. 1299.
[6] [1953] 1 Q.B. 63; [1952] 2 T.L.R. 767; [1952] 2 All E.R. 863.
[7] [1953] 1 W.L.R. 1460; [1953] 2 All E.R. 1443.
[8] [1953] 1 Q.B. 300; [1953] 2 W.L.R. 193; sub nom. *Hole* v. *Cuzen* [1953] 1 All E.R. 87.
[9] [1951] Ch. 572; [1951] 1 T.L.R. 700; [1951] 1 All E.R. 802.

building society contributions. On the facts as I have found them, I am satisfied that although the moneys paid to the building society, apart from the final payment, were made by the defendant, such payments were made out of moneys provided by the husband, and the defendant's claim that the husband and, therefore, the plaintiff was a trustee for her fails.

The next question is whether as a deserted wife, living in a matrimonial home, the defendant has an irrevocable claim to remain in those premises not only as against the husband but also as against the plaintiff. If I were not bound by authorities I should have taken the same view as Roxburgh J. expressed in *Thompson* v. *Earthy*,[1] that the deserted wife's right is a personal right against her husband and does not give her any legal or equitable or other interest in the premises so as to bind them in the hands of the purchaser. Since that decision there have been the cases of *Errington* v. *Errington*,[2] *Bendall* v. *McWhirter*[3] and *Ferris* v. *Weaven*.[4] As a result of these cases it seems to me to be now established that where a wife has been deserted by her husband and left by him in the matrimonial home, she must be held to be not a tenant of the husband-owner nor a bare licensee, but to be in the special position of a licensee with a right under which the husband cannot turn her out except by order of the court.

This is the view of Romer L.J. in *Bendall* v. *McWhirter*,[5] adopting an earlier judgment of Denning L.J. in *Errington* v. *Errington*.[6] In *Bendall* v. *McWhirter* Denning L.J. said[7]: "I "must say, however, that even if a successor cannot compel the "husband to apply under section 17 [of the Married Women's "Property Act, 1882], but has himself to bring an action at "law, nevertheless I should have thought the court would have "a discretion whether to order possession or not, for that "is the only way in which effect can be given to the wife's right "as now established. Any other view would lead to great injus-"tice. It would mean that a guilty husband could transfer the "house into the name of his new mistress and then get her to "evict his innocent lawful wife from the matrimonial home. No "civilized community could tolerate such a cynical disregard of "the married state. Equity demands that the successor in title "should be in no better position than the husband." In that statement Denning L.J. has visualized the facts of the present case. In the later case of *Ferris* v. *Weaven*[8] Jones J. held that a purchaser with the notice of the wife's right and position could not recover possession of the house against her. In the present case the husband in evidence admitted that the plaintiff had full

[1] [1951] 2 K.B. 596; [1951] 2 T.L.R. 82; [1951] 2 All E.R. 235.
[2] [1952] 1 K.B. 290; [1952] 1 T.L.R. 231; [1952] 1 All E.R. 149.
[3] [1952] 2 Q.B. 466; [1952] 1 T.L.R. 1332; [1952] 1 All E.R. 1307.
[4] [1952] W.N. 318; [1952] 2 All E.R. 233.
[5] [1952] 2 Q.B. 466, 485.
[6] [1952] 1 K.B. 290, 298.
[7] [1952] 2 Q.B. 466, 484.
[8] [1952] W.N. 318.

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knowledge of all the facts and every step taken by the husband in relation to the defendant had been discussed by him with the plaintiff. In these circumstances I feel bound to hold that the defendant's irrevocable right is enforceable against the plaintiff, subject of course, to the remaining questions which I have to decide.

The next question is whether the defendant's irrevocable right is lost on account of her actions in September and October, 1950, when she was offered alternative accommodation. The case for the plaintiff is that there was a concluded agreement by the defendant to leave St. Michael's Grove and remove to Henrietta Street. I am satisfied that she expressed her willingness so to do and that, in reliance on that, the husband entered into a contract to purchase the premises and expended moneys in decorations and alterations. The defendant, however, changed her mind at the last moment. The question I have to ask myself is whether or not there was a concluded legal agreement, or did the husband act prematurely. In my view, until the terms on which the defendant was to occupy the new house had been agreed, an essential element in the concluded contract was missing. It seems clear from the correspondence that the Henrietta Street premises were being purchased in the name of the husband. According to the husband's solicitors' letter of October 25, 1950, the question of the beneficial ownership of the new house had not then been finally decided. In view of this statement, I am not surprised that the solicitors for the defendant advised her to remain at St. Michael's Grove for the time being. When the offer to give her the freehold was made later, she did not accept it. The result is, in my view, that the plaintiff has failed to establish any concluded agreement between the defendant and the husband for her to give up her right to remain in possession of the house in St. Michael's Grove.

The other point I shall have to consider is whether the defendant was there under a contractual licence made when the husband said she could remain there until she found somewhere safe to go, and so long as the two children and the grandmother resided with her. It is clear that by December 7, 1950, the defendant was saying that she would no longer have the grandmother residing with her, and if this was a contractual licence this would have been a breach of its terms. The difficulty, I feel, following Denning L.J., is that the defendant, although she may not have known it, had a right to remain in these premises as the deserted wife in the matrimonial home, and the fact that the husband said she could remain on certain other terms does not give any further right to her. There was no consideration for her agreeing to allow the children and the grandmother to remain in the house. So the plaintiff cannot take advantage of the breach of what is alleged to be a contractual licence, which was

an attempt to limit the existing right of the wife to remain in the matrimonial home. In the result, the plaintiff's claim fails.

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Judgment for the defendant.

Solicitors: *Churcher & Churcher, Gosport; Hobson Thomas, Sherwell & Wells, Portsmouth.*

[COURT OF APPEAL.]

* SOLOMON v. ORWELL.

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1954 *Mar.* 10, 11.

Evershed M.R., Denning and Romer L.JJ.

[Plaint No. J. 532.]

Landlord and Tenant—Rent restriction—Sublease—Subtenancy with right of sharing living accommodation granted by statutory tenant—Statutory tenant's surrender of possession—Rights of subtenant determined—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 15.

Landlord and Tenant—Sublease—Surrender of head tenancy—Effect on sublease. Rent Restriction—Statutory tenant—Nature of rights.

A statutory tenant sublet three rooms in a dwelling-house together with a right to share the use of the kitchen with the statutory tenant. In 1952 the statutory tenant gave up possession of the part of the premises she occupied to the landlord, who in these proceedings sought to recover possession of the remainder of the premises from the subtenant:—

Held, that when a statutory tenant sublets part of a dwelling-house, he does not confer any estate or interest in the premises on the subtenant. The subtenant, like the statutory tenant, has only a personal right or privilege, and when the statutory tenancy comes to an end, the subtenancy automatically comes to an end also, unless there is some statutory protection afforded to the subtenant. A subtenant who has been sharing with the statutory tenant is not protected by section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Accordingly, the statutory tenancy having come to an end, the sharing subtenancy also came to an end and the landlord was entitled to possession.

APPEAL from Judge Granville Smith sitting at Barnet County Court.

The whole of No. 51 Jackson Road, East Barnet, premises within the protection of the Rent Acts, had originally been let by the plaintiff, Miss Ada Mary Solomon, to a Mrs. Houghton. That contractual tenancy having determined, the tenant continued in occupation as a statutory tenant at a rent which, with permitted increases, amounted to 15s. 3d. a week. During the subsistence of her statutory tenancy the tenant sublet three rooms with a right to share the kitchen and scullery to the defendant Mrs. Nellie Orwell at a rent of 18s. a week which included certain services. In September, 1952, the tenant gave up her statutory right of

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occupation to the landlord. In these proceedings the landlord claimed possession from the subtenant. The landlord had not given the subtenant any notice to quit.

The county court judge made an order for possession and an order for payment of mesne profits at the rate of 15s. per week.

The subtenant appealed.

J. Lloyd Eley for the subtenant.
John Gower for the landlord.

The following cases were cited in argument: *Shackleton* v. *Greenhalgh*[1]; *Doe d. Beadon* v. *Pyke*[2]; *Mellor* v. *Watkins*[3]; *Parker* v. *Jones*[4]; *Cow* v. *Casey*[5]; *Moyes* v. *Caldwell*[6]; *Lockwood* v. *Lowe*[7]; *Stanley* v. *Compton*[8]; *Brock* v. *Wollams*[9]; *Lowe* v. *Russell*[10]; *Pike* v. *Eyre*.[11]

Evershed M.R. This appeal has raised a point of interest, and I do not say that it is free from difficulty. We have had great assistance from the clear arguments which Mr. Eley on the one side and Mr. Gower on the other have put before us; but for my part I think that the answer to the appeal rests upon one relatively short conclusion of fact. The subtenant was granted some few years ago a so-called subtenancy of three rooms on the first floor of premises known as 51 Jackson Street in East Barnet, together with a right to share with the tenant (that is to say, the subtenant's landlord) a further room which was essential to the accommodation as a dwelling-house—namely, the kitchen or scullery.

The effect of a contract of that nature, before the passing of the Landlord and Tenant (Rent Control) Act, 1949, was not to give to the so-called subtenant any right to the protection of the Rent Restrictions legislation. In the Act of 1949 a distinction was drawn between cases in which the so-called "sharing" was a sharing by the tenant with the landlord, on the one hand, and cases where the "sharing" was a sharing with other tenants, on the other. In the latter case it was provided by the Act of 1949 that the tenant who was given this sharing right with other tenants had a "dwelling-house" let to him (or her) so as to invoke the protection of the Acts; but where the grant of the right of sharing was by a landlord, so that the right was shared with the landlord, then the Act of 1949 did not say that a "dwelling-house" had been let: in other words, in such a case the tenant did not get the protection of the Rent Acts but he did

[1] [1951] 1 K.B. 725; [1951] 1 T.L.R. 361; [1950] 2 All E.R. 1223.
[2] (1816) 5 M. & S. 146.
[3] (1874) L.R. 9 Q.B. 400.
[4] [1910] 2 K.B. 32; 26 T.L.R. 453.
[5] [1949] 1 K.B. 474; 65 T.L.R. 84; [1949] 1 All E.R. 197.
[6] 1949 S.L.T. (Sh.Ct.) 73.
[7] [1953] 1 W.L.R. 1123; [1953] 2 All E.R. 801.
[8] [1951] 1 All E.R. 859.
[9] [1949] 2 K.B. 388; [1949] 1 All E.R. 715.
[10] [1928] 2 K.B. 117, 134; 44 T.L.R. 278.
[11] (1829) 9 B. & C. 909.

get the considerably more limited right to invoke certain of the provisions of the Furnished Houses (Rent Control) Act, 1946.

I have made that preliminary statement because, so far as I can see, this much is clear: the rights which the subtenant acquired as a result of her contract with the tenant were rights which would not give to the subtenant the statutory protection of section 15 (3) of the Rent (Restrictions) Act of 1920.. If (in other words) the subtenant can now resist the landlord's claim for possession she must do so, not in reliance upon anything in the special rent restrictions legislation, but by virtue of some common law right; and that is the basis of her appeal in this court. She says that, by the general law of the land, she has a right to persist in occupation at least of the three rooms on the first floor until, by an appropriate notice to quit, that common law right is terminated; and I add that there is this lying behind that argument that, if she is right, since no notice to quit has been given, it will at least give her time to invoke such remedies as the Act of 1946 may give her, and she will therefore be able to gain some advantage as against the landlord, though not, of course, anything like the full advantage to which she would be entitled, if she could claim to be a protected or statutory tenant.

It is, I think, abundantly clear that in order that there should be some common law right in the subtenant there must have been a corresponding common law right in the tenant when the contract of subtenancy was made. The facts appearing from the pleadings indicate that many years ago the whole dwelling-house was let to the tenant by the landlord; and it is alleged in paragraph 2 of the particulars of claim that that tenancy—that is, the original contractual tenancy—was terminated by the service on the tenant of a statutory notice of increase of rent, with the result that the tenant became a statutory tenant and remained in occupation as such until a date in September, 1952, when she gave up her rights of occupation to the landlord.

If those allegations are correct it follows that, at any rate when she gave up her right of occupation (and I think also, if I understand the pleading aright, when she granted the so-called subtenancy to the subtenant) she was a statutory tenant, a person of whom it has been said time and time again that she had no estate or interest in the land of the kind understood by the common law. Her right was one which was exclusively derived from the statute and was one to remain (subject to conditions) in occupation.

Mr. Eley in opening this case observed that if a tenant has his interest determined as upon forfeiture, then it follows that (subject to any special statutory rights there may be under the Law of Property Act, 1925, or otherwise) an interest derived out of the tenant's estate will fall with the tenancy. But there is (Mr. Eley says) a well-established exception to that principle, namely, the case of voluntary surrender. The matter is stated in Foa on Landlord and Tenant, 7th ed., p. 627, quite plainly,

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and (as far as I can see from looking at the cases) perfectly accurately, as follows: "Hence, where the lessee underlets a "portion of the demised premises, and afterwards surrenders his "lease to the lessor, the latter cannot dispossess the underlessee "without determining his interest in a regular manner, notwith-"standing that the underlessee has notice of the surrender, or "that the lease itself was at the time of surrender liable to "forfeiture." Mr. Eley's first argument was that that passage applies even though the transaction was not a surrender of an estate by a lessee but was a surrender (so called) by a statutory tenant of his statutory right—that is to say, a giving up voluntarily of the statutory right of occupation. I am unable to accept that argument. A reference to the cases seems to me to indicate quite plainly that the proposition which I have cited from Foa rests upon the existence of an estate and upon a surrender in the true sense of the term—that is, a voluntary giving up of an estate so as to permit it to merge in the superior estate—and further upon the proposition that, for the protection of a subtenant who has himself been granted a subsidiary interest, the estate which otherwise would be surrendered and disappear persists so as to permit the continued existence, until proper determination, of the subsidiary interest.

The matter is stated quite clearly by Lord Coke in Co.Litt. 338b in a passage cited by Lord Ellenborough C.J. in *Doe d. Beadon* v. *Pyke*.[1] Lord Coke's observation is quoted as follows: "Lord Coke, after noticing, that as between the parties to a "surrender the estate is absolutely drowned, says 'But having "'regard to strangers who were not parties or privies there-"'unto'"—that is, to the surrender—"'(lest by a voluntary "'surrender they may receive prejudice touching any right or "'interest they had before the surrender), the estate surrendered "'hath, in consideration of law, a continuance'."

Unless it can be said that, notwithstanding the allegation that I have read from the particulars of claim, the tenant had (either at the time of the grant of the said tenancy or of the surrender, or both), some interest capable of existing in law as an estate out of which interest was carved or created the subtenant's interest, then the proposition which I have cited from Foa and on which the appeal really rests falls altogether to the ground.

The answer to this appeal seems to me to be that the essential premise in fact does not exist; for I am satisfied not only that Mr. Eley cannot now claim in this court that the tenant had anything other than a statutory tenancy at any relevant date, but also, I think, it is reasonably clear that she had not as a fact.

It is to be noted that the defence does not put in issue the allegations in paragraph 2 of the particulars of claim; the defendant merely says that she has no knowledge of those facts save as to the original letting (which inferentially she concedes); and

[1] (1816) 5 M. & S. 146, 154.

I think it is quite clear that in the county court the matter proceeded without there being any attention directed to what, in the end of all, was an essential matter of fact. I have no doubt at all that the county court judge proceeded on the view that the tenant was at all relevant dates a statutory tenant; and I think that that is clearly the right inference, even apart from what I think was in effect conceded on the pleadings. The tenant eventually retired from the premises at the age of 80, having been there a very long time. The amount of the rent seems to have been altered—for example, in paragraph 2 of the particulars of claim it is stated as 14s. 9d.; Mr. Gower says that in his recollection that figure was altered at the hearing to 15s. 2d.; and I see that the notice of appeal puts it at 15s. 3d.

On general principles, and paying due regard to common sense (as my brother Denning has pointed out in *Brock* v. *Wollams* [2] in this court), the inevitable inference is that the tenant at all material dates was a statutory tenant. That being so, I think that the basis for Mr. Eley's very attractive and forceful argument is removed, for it is significant at once that, although you may talk of a surrender, what happened was not a surrender as properly understood by the law; it was not an attempt to drown an estate; it was a mere voluntary giving up of a statutory right of occupation; and, therefore, the premise upon which the proposition in Foa is rested is found in this case to be absent.

I add this only. Mr. Eley did intimate a second point, that, assuming he was wrong (as I think he is) upon his first point, the court ought to interfere with the award as to damages (that is, mesne profits) which the judge fixed at 15s. per week. I follow that, in all the circumstances of the case, a less figure might well have been adopted. It was a figure which was less than the rent the subtenant had been paying, although it was substantially the same, apparently, as the rent for the whole house. Still, mesne profits are damages; and, as Denning L.J. has observed, there are other considerations which may fairly be taken into account when you are considering damages than the relation of the number of rooms sublet to the total number of rooms in the house. In short, I am not satisfied (within the scope of the well-known principles applicable to awards of damages) that the Court of Appeal can properly interfere in this case with the award made, namely, the figure fixed by the judge, 15s. a week.

I therefore think that this appeal fails and must be dismissed.

DENNING L.J. When a statutory tenant sublets a part of the premises, he does not thereby confer any estate or interest on the subtenant. A statutory tenant has no estate or interest himself, and he cannot carve something out of nothing. The subtenant, like the statutory tenant, has only a personal right or

[2] [1949] 2 K.B. 388.

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privilege. The question in this case is, What is the position of the subtenant when the statutory tenancy comes to an end? A statutory tenancy may, of course, come to an end without a notice to quit. It may come to an end, for instance, by death (if there are no entitled relatives) or by the delivery up of the premises to the landlord. When the statutory tenancy comes to an end, the subtenant's right automatically comes to an end, unless there is some statutory protection afforded to him. In the case of an ordinary subtenant he is protected under section 15 (3) of the Act of 1920. He becomes the direct tenant of the head landlord, on the same terms as those on which he would have held from the previous tenant. But a subtenant who has been sharing with the tenant is not protected. That is shown by *Shackleton* v. *Greenhalgh*[3] and *Stanley* v. *Compton*.[4] In this case the subtenant was a sharing subtenant and her right came to an end as soon as the statutory tenant surrendered the premises to the landlord.

I would only add this: It was suggested that the sharing subtenancy might have been created during the contractual tenancy. But even so, when the contractual tenancy came to an end by notice of increase or notice to quit, the contractual subtenancy also came to an end. Thereafter the position was the same as if the subtenancy had been created during the statutory tenancy. On the statutory tenancy coming to an end, the sharing subtenancy also came to an end. I agree that the appeal should be dismissed.

Romer L.J. I also agree. Mr. Eley's very attractive and (if I may say so) able argument was founded upon the conception that the tenant was a contractual tenant at all material times, and he relied, therefore, on the principle that a subtenancy, which is created out of a contractual tenancy, survives the destruction of the tenancy if the tenancy comes to an end by surrender. But once he found himself (as he did find himself) driven from the basis that the tenancy was a contractual tenancy, he was, as I venture to think, in an impossible position, because it is quite plain that a statutory tenant has no legal or equitable estate whatever which can be the subject of a surrender to the reversioner or out of which a subsidiary estate may be taken by a subtenant. All he has is a personal right of occupation which he can bring to an end by relinquishing possession. But that is a very different thing from surrendering an estate which will merge in the superior estate of the reversioner, because, as I say, there

[3] [1951] 1 K.B. 725; [1951] 1 T.L.R. 361; [1950] 2 All E.R. 1223.

[4] [1951] 1 All E.R. 859.

is no interest or estate vested in the statutory tenant which can be the subject of such a merger.

I accordingly agree that the appeal fails.

Appeal dismissed.

Solicitors: *Donovan J. Smalley; Ellis & Ellis.*

B. A. B.

[CHANCERY DIVISION.]

* WRIGHT AND ANOTHER v. PEPIN.

1954
Mar. 24, 25.
Harman J.

[1953 W. No. 1943.]

Limitation of Action — Acknowledgment — Mortgage — Possession — No interest paid for over 12 *years—Acknowledgment in solicitor's letter —Authority—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 18 (4), 23 (1), 24 (1), (2).
Solicitor—Authority. Mortgage.

Property subject to a mortgage dated November 10, 1928, was destroyed by enemy action in September, 1940. The principal sum and interest under the mortgage having remained unpaid for over 12 years, the mortgagees took out a summons asking for an order for possession.

The mortgagor by her defence claimed that as there had been no payment of interest or acknowledgment of the mortgage for over 12 years, time under the Limitation Act, 1939, had now run, and the mortgagees' claim was statute-barred. The mortgagees contended that the existence of the mortgage had been acknowledged in letters from the mortgagor's solicitor to the mortgagees' solicitors. The mortgagor denied that the letters constituted an acknowledgment, but contended that if they did constitute an acknowledgment, the solicitor had no authority to make them.

The letters chiefly relied on by the mortgagees were letters from their solicitors, respectively dated October 19, 1949, stating: "as "mortgagees' solicitors, we shall be glad if you will advise us fully "on the present position of the matter. . . ," and February 2, 1950: "From our clients' point of view as mortgagees, they would "wish to have their mortgage paid off, . . . " and a letter in reply of August 4, 1950, from the mortgagor's solicitor to the mortgagees' solicitors (which was said to constitute an acknowledgment of the mortgage debt), stating: " . . . I understand that Mrs. P. [the "mortgagor] will shortly be making an appointment to see you "with regard to her accounts with you for some time past. She "has several questions which she wishes to raise. Steps are being "taken to rebuild 101 Mountview Road [the mortgaged property]. "Plans have been prepared and submitted to the local authority, "and as soon as the work is in hand I will let you know, when "Mrs. P.'s position can again be reviewed":—

Held, (1) that an acknowledgment of the existence of a debt was sufficient to take the case out of the statute, and that the letter of August 4, 1950, in the light of the claims made by the mortgagees constituted such an acknowledgment.

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Stansfield v. *Hobson* (1853) 3 De G.M. & G. 620 applied.

(2) That as the solicitor was employed by the mortgagor to clear up her affairs, which included the mortgaged property, the letter of August 4, 1950, was within the scope of her authority. The period of 12 years under the Limitation Act not having run, the mortgagees were entitled to an order for possession.

Bowring-Hanbury's Trustee v. *Bowring-Hanbury* [1943] Ch. 104; 59 T.L.R. 121; [1943] 1 All E.R. 48 distinguished.

Smith v. *Webster* (1876) 3 Ch.D. 49, and *Grindell* v. *Bass* [1920] 2 Ch. 487; 36 T.L.R. 867 considered.

Adjourned summons.

By a mortgage dated November 10, 1928, the defendant, Mrs. Gertrude Minna Pepin, mortgaged a property known as 101, Mountview Road, Hornsey, comprised in a lease for a term of 99 years from June 24, 1879, to one Frederick Adlard Wright, to secure £600 with interest to be payable on the first day respectively of August, November, February and May. The mortgage, which contained an attornment clause, was in the common form.

The mortgagee died on September 5, 1933; by a transfer dated January 17, 1935, his executors transferred the benefit of the mortgage to Mrs. Alice Pilley. A firm of solicitors called Pilley & Mitchell acted for both the mortgagee and the mortgagor, and they also acted as solicitors for the transferee of the mortgage, Mrs. Pilley. She died on July 15, 1939, having appointed the plaintiffs and one Mitchell, a partner in the firm of Pilley & Mitchell, as her executors.

The interest on the mortgage continued to be paid by the defendant, the mortgagor, until August 1, 1940. Pilley & Mitchell collected rents for her of this and other properties and generally looked after her affairs.

In September, 1940, the house was almost entirely destroyed by enemy action. No interest was paid in November, 1940, and none had been paid since. In a claim made in 1941 by Pilley & Mitchell, as solicitors for the mortgagor, for compensation under the War Damage Act, 1941, the existence of the mortgage was mentioned. In 1944 the War Damage Commission wrote to Mrs. Pepin and also to the mortgagees, Mrs. Pilley's executors, saying that a value payment of £930 would be made. In the next year, however, the War Damage Commission stated that, subject to the consent of all parties interested, a cost of works payment would be made instead of a value payment, that letter being sent to Pilley & Mitchell on behalf of both the mortgagor and the mortgagee. Although there was no evidence of the fact, it appeared that the necessary consents were given as the property was repaired on a cost of works basis.

In 1946 Mitchell died, and his business was taken over by the solicitors acting now for the plaintiffs under the style of Elliot & Macvie. Mrs. Pepin consulted a new solicitor, and on December 31, 1947, that solicitor, Miss Wyatt, wrote to Elliot & Macvie (but writing to them as Pilley & Mitchell) asking for

accounts in respect of four properties, one of them being 101 Mountview Road. In that letter she said: "I understand from "my client that you have dealt with these properties and "collected rents from some of them at various times. She also "states that you hold mortgages but she has not received any "accounts for many years past, and I shall be obliged if you will "let me know how much is owing in respect of each property, "what amounts have been received and payments made. I must "request this information from you as my client wishes to know "the full extent of her liability." That letter was sent to Elliot & Macvie as the former solicitors of Mrs. Pepin, and not as agents for the mortgagee. Harman J. held that that letter could not be an acknowledgment, being merely a demand by Mrs. Pepin for proper accounts from her former solicitors who had been managing her affairs.

No answer was made to that letter, and Miss Wyatt on April 2, 1948, wrote a similar letter. Accounts eventually were furnished by the firm in April, 1948, and nothing further happened until October 19, 1949, when Elliot & Macvie wrote to Miss Wyatt a letter headed: "Re 101 Mountview Road. Executors "of Alice Pilley decd." which continued: "The above was the "subject of air raid damage. As mortgagees' solicitors, we shall "be glad if you will advise us fully on the present position of the "matter whether the property is to be rebuilt or not, and if so "what stage has the matter reached." There was a reminder letter dated October 25, 1949, and some telephonic communications with Miss Wyatt in November, but no communication written by her.

On January 27, 1950, Elliot & Macvie wrote again: "The "Hornsey Borough Council are continually communicating with "us with regard to the disposal of this site or the leasing thereof. "Will you please let us hear from you as to what has transpired?" Miss Wyatt replied on February 1, 1950, to the effect that an architect had been instructed to make plans for rebuilding the property, and complained that the inquiries of the borough council had not been passed on sooner.

In their next letter dated February 2, 1950, Elliot & Macvie wrote: "From our clients' point of view as mortgagees, they "would wish to have their mortgage paid off as this is the "only item holding up completion and winding up of the estate "of the late Mrs. Alice Pilley. Can anything be done in the "matter, please?" They obtained no satisfaction, and wrote again on March 23, 1950: "Our clients wish their mortgages dis-"charged," (mortgages being in the plural because there was another house in Mountview Road as well as No. 101 with which they were concerned). On July 8, 1950, they wrote: "We shall "be glad to know what is transpiring with regard to both these "properties, and whether there is any possibility of our clients' "mortgage being discharged in the near future, as we have "instructions to take proceedings." On July 31 there was

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another letter to the same effect. On August 4, 1950, Miss Wyatt wrote the following letter: "Re 101 and 50 Mountview Road. "I thank you for your letter of the 31st ultimo. I understand "that Mrs. Pepin will shortly be making an appointment to see "you with regard to her accounts with you for some time past. "She has several questions which she wishes to raise. Steps are "being taken to rebuild 101 Mountview Road. Plans have been "prepared and submitted to the local authority and as soon as "the work is in hand I will let you know, when Mrs. Pepin's "position can again be reviewed." There was no further correspondence after August, 1950.

Nothing further was done so far as Elliot & Macvie were concerned from 1950 to 1952. The interest on the mortgage had remained unpaid for over 12 years.

This summons was taken out on June 4, 1953, by the plaintiffs as executors of the mortgagee, Mrs. Pilley, asking for an order for possession. The defendant resisted the order on the ground that 12 years having elapsed since the last payment of interest the mortgagees' claim was now barred by statute.[1]

K. W. Rubin for the plaintiffs, the mortgagees.
James Gibson for the defendant mortgagor.

Cases cited in argument, not referred to in the judgment: *Daniels* v. *Trefusis*[2]; *Forster and Wife* v. *Rowland*[3]; *Jones and Others* v. *The Victoria Graving Dock Co.*[4]; *Walford* v. *Narin*.[5]

Harman J., having stated the facts: The first question is whether there has been any acknowledgment which would prevent the Limitation Act, 1939, from running as it would otherwise have done. The Act is that of 1939, because the relevant period begins in 1940.

[1] Limitation Act, 1939, s. 4 (3): "No action shall be brought by any ". . . person to recover any land "after the expiration of twelve years "from the date on which the right of "action accrued to him. . . ."

S. 18 (1): "No action shall be "brought to recover any principal sum "of money secured by a mortgage . . . "after the expiration of twelve years "from the date when the right to "receive the money accrued . . . "(4) Nothing in this section shall "apply to a foreclosure action in "respect of mortgaged land, but the "provisions of this Act relating to "actions to recover land shall apply "to such an action."

S. 23 (1): "Where there has "accrued any right of action (includ-"ing a foreclosure action) to recover "land . . . and (*a*) the person in "possession of the land . . . acknow-"ledges the title of the person to "whom the right of action has "accrued . . . the right shall be "deemed to have accrued on and not "before the date of the acknowledg-"ment or payment."

S. 24: "(1) Every such acknow-"ledgment as aforesaid shall be in "writing and signed by the person "making the acknowledgment. (2) "Any such acknowledgment . . . as "aforesaid may be made by the "agent of the person by whom it is "required to be made under the last "foregoing section, and shall be made "to the person, or to an agent of the "person, whose title or claim is being "acknowledged. . . ."

[2] [1914] 1 Ch. 788.

[3] (1861) 7 H. & N. 103.

[4] (1877) 2 Q.B.D. 314.

[5] [1948] 2 K.B. 176; [1948] 2 All E.R. 85.

[His Lordship referred to sections 4 (3), 18 (4), 23 (1) and 24 (1), (2), of the Limitation Act, 1939, and continued:] Section 4 of the Act of 1939 seems at first sight unsuitable to apply to an action by a mortgagee for possession, because the mortgagee always has the right to go into possession at any moment, and in a sense, therefore, that right first accrued when the mortgage was made. So long, however, as the mortgagor paid the interest that prevented the statute from running, and the right of action would be deemed to have accrued when payment was due, but was not made, that was November 1, 1940. As there has been no payment for 12 years from that time, unless there has been an acknowledgment in the meanwhile, section 4 applies after the expiration of the 12 years from the date on which the right of action accrued.

The question is, therefore, has there been an acknowledgment? An acknowledgment is to some extent defined by section 24, which is in these terms: "(1) Every such acknowledgment as aforesaid shall be in writing and signed by the person making the acknowledgment. (2) Any such acknowledgment . . . as aforesaid may be made by the agent of the person by whom it is required to be made under the last foregoing section, and shall be made to the person, or to an agent of the person, whose title or claim is being acknowledged . . ." Here the principals have made no acknowledgment. If there be an acknowledgment it must be in one of the letters to which I have referred. The dealings with and by the War Damage Commission are, in my judgment, irrelevant for this purpose. If any acknowledgment were made by Pilley & Mitchell, it was not made by them on behalf of either party, since they acted as solicitors for both sides.

It is a different matter, however, when Miss Wyatt was instructed by Mrs. Pepin, because the latter did not know her position vis-à-vis her creditors, and wished to have accounts from Pilley & Mitchell, the solicitors who had been managing her affairs and collecting rent on her behalf. So long as Miss Wyatt was merely asking Pilley & Mitchell, or the successors of that firm, for an account as her client's solicitors, I think that there was no acknowledgment.

The position changes again in 1949, when a claim to have information is made for the first time on behalf of the executors of Mrs. Pilley in their capacity as mortgagees.

It is clear from October 19, 1949, and onwards, that Elliot & Macvie are writing as the mortgagees' solicitors. Their position as such is impliedly acknowledged in Miss Wyatt's letter of February 1, 1950. It is true that that is a letter in which Miss Wyatt complains that documents had not been sent on to her, but it seems clear that she would not have dealt with strangers on that footing, and it would not have been anything to do with her client's former solicitors. There is, however, no acknowledgment there of the existence of the mortgage.

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By her last letter, dated August 4, 1950, Miss Wyatt, in my judgment, there recognizes a position as between her client and the mortgagees' solicitors, Elliot & Macvie, in which her client is or may be a debtor in respect of 101 Mountview Road. Mrs. Pepin admits, by her solicitor, that there is a charge on 101 Mountview Road, her solicitor writing: "Mrs. Pepin's "position can again be reviewed when the property has been "rebuilt."

All that is necessary for an acknowledgment to take the case out of the statute is that the debtor should recognize the existence of the debt, or that the creditor should recognize a similar position. A good example for that proposition was cited to me in *Stansfield* v. *Hobson*.[1] That case has been disapproved for one purpose. It purports to decide that an acknowledgment after the statute has run was, at any rate under the old law, sufficient to revive the claim. That was disapproved by the Court of Appeal in *Sanders* v. *Sanders*.[2] But that is not the purpose for which I cite the former case. The judgments of the Lords Justices, in *Stansfield* v. *Hobson*[3] show that they decided the case (apart from the question of date) on one ground. It was an action to redeem against the mortgagee in possession, and he, in response to a letter by the agents for the mortgagor, wrote this letter[4]: "Sir,—I received yours of the 2nd instant. I do not "see the use of meeting either here or at Manchester, unless "some party is ready with the money to pay me off." That is a most casual reference to his position as mortgagee, but, of course, unless it was such a reference, the words "money to pay me off" were not sensible, and the Lords Justices concluded that that was a sufficient acknowledgment. So in the present case, examination of the letter written by Miss Wyatt on August 4, 1950, when looked at in the light of the claims being made against her client by the plaintiffs' solicitors, who described themselves as the mortgagees' solicitors, is an acknowledgment of the existence of the mortgage. In consequence that letter written within 12 years of November, 1940, takes the case out of the Limitation Act of 1939, subject only to one point, namely, was there authority in Miss Wyatt to bind her client by such an acknowledgment? There is nothing in this statute in the shape of the phrase "signa-"ture by an agent thereunto lawfully authorized," as there is in section 40 of the Law of Property Act, 1925, and in section 13 of the Mercantile Law (Amendment) Act, 1856, which relates to acknowledgments by agents. Nevertheless, a person is not an agent for the purpose of making an acknowledgment unless he is duly authorized to make it. It seems clear that it is not necessary that the agent should have authority to acknowledge, as in this case, the existence of the mortgage; it seems to be enough that the agent should have authority to write the letter

[1] (1853) 3 De G.M. & G. 620.
[2] (1881) 19 Ch.D. 373.
[3] 3 De G.M. & G. 620.
[4] Ibid. 623.

which she did in fact write, and that what she said in the letter is within the scope of her authority.

There is a long line of cases on this subject, beginning with *Smith* v. *Webster*.[5] There the solicitors who had instructions to settle a formal contract wrote to the solicitors on the other side enclosing a draft and mentioning in the covering letter that their client had told them that he had made an arrangement of a certain character. It was held that that was not within the scope of their authority, and therefore a memorandum could not be spelt out of such letter. It would have made for one thing a contract which the parties had never authorized. All that had been authorized was a formal written contract between the parties, and to make an open contract in a letter written by solicitors, whose only authority was to negotiate a different contract, was quite out of the question. It seems that that case has been taken to mean rather more than it does. A good illustration of that is found in *John Griffiths Cycle Corporation Ld.* v. *Humber & Co. Ld.*[6] The headnote is this: "A letter "written by an agent within the scope of his authority, "which refers to and recognizes an unsigned document as con- "taining the terms of a contract made by his principal, is a "sufficient memorandum of the contract within the fourth "section of the Statute of Frauds, and it is not necessary, in "order to satisfy the statute, that the principal should have "authorized the agent to sign the letter as a record of the "contract." A. L. Smith L.J. said this[7]: "It is undoubted "law that the party to the contract himself may, by signing a "document subsequent to that containing the terms of the con- "tract, recognize the contract in the way required by the fourth "section of the Statute of Frauds. It is also undoubted law that "a signature to a document which contains the terms of a "contract is available for the purpose of satisfying section 4 of "the statute, though put alio intuitu and not in order to attest "or verify the contract." Then in considering *Smith* v. *Webster*[8] he said this[9]: ". . . all that is decided by *Smith* v. *Webster*[10] is "that, if reliance is placed on the signature of an agent, as "satisfying the fourth section of the Statute of Frauds, you "must, whether the document signed be a record of the terms "or a document referring to and recognizing the document con- "taining the record of the terms, show that the agent signing "was an agent 'thereunto lawfully authorized,' but that is all "that is necessary. In *Smith* v. *Webster*[10] the person said to be "the agent thereunto lawfully authorized was a solicitor. He "was not expressly authorized to sign any document recognizing "the document which in fact contained the proposed terms, and

[5] (1876) 3 Ch.D. 49.
[6] [1899] 2 Q.B. 414.
[7] Ibid. 417.
[8] 3 Ch.D. 49.
[9] [1899] 2 Q.B. 418.
[10] 3 Ch.D. 49.

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"the court held that it was not within the scope of his authority "so to do." He held, therefore, in the case before him, that the document was within the scope of the solicitors' authority. An acknowledgment can therefore be made or a memorandum signed by an agent, although he does not realize that he is signing a memorandum or producing any such effect.

The most surprising example of that principle is *Grindell* v. *Bass*,[11] where counsel signing a defence pleaded that a defendant could not fulfil a contract with the plaintiff because she had agreed to sell the property to someone else. The last thing that counsel thought was that in signing that pleading he was committing his client to a bargain with a third party. Nevertheless, the third party in question, who was also made a defendant, counterclaimed on the verbal agreement of which the only written evidence was the pleading, and that was held to be a memorandum signed by a person duly thereunto authorized, because counsel was authorized to sign the pleading and to put into it presumably anything which he in his discretion thought necessary as a defence for his client in the action then in suit.

I should not have had much difficulty on this question of authority but for the observations of Lord Greene M.R. in *Bowring-Hanbury's Trustee* v. *Bowring-Hanbury*.[12] That case came first before Bennett J.,[13] who decided that there was a good defence under the Statute of Limitations. It was said that there was an acknowledgment there, first, in the Inland Revenue affidavit signed by the executor for probate, but that was held to be no acknowledgment because it was not made to the creditor. Secondly, the executor's solicitors had sent an estimate to his trustee in bankruptcy on which there was a note at the bottom saying that one of the assets in the bankruptcy might be a debt due to the bankrupt by his wife's estate, of which he was executor. On that the trustee in bankruptcy sued the executor for the debt said to be thus acknowledged. Bennett J. rejected that claim, not on the question of the solicitors' authority but on the facts. He said [14]: "The document was sent by the solicitors for the executor "to the trustee in bankruptcy, solely to inform the trustee of the "position of the estate of the testatrix and it is plain from the "words used that, when the note was appended to the foot of "the statement, there was no intention of acknowledging the "existence of a debt." Whether that was right or not, it was not the ratio decidendi in the Court of Appeal,[15] who held "that "in the absence of evidence of authority in the solicitors to "acknowledge the debt the note to the estimate did not con-"stitute such an acknowledgment. . . ." This was not a point

[11] [1920] 2 Ch. 487; 36 T.L.R. 867.

[12] [1943] Ch. 104; 59 T.L.R. 121; [1943] 1 All E.R. 48.

[13] [1942] Ch. 276.

[14] Ibid. 279.

[15] [1943] Ch. 104.

taken by counsel but it was taken by the court. Lord Greene, in the course of the argument said this [16]: "Has a solicitor any "authority to bind his client in this way?" And the answer was that the solicitor had a general authority. Lord Greene then referred to section 13 of the Mercantile Law (Amendment) Act, 1856, to which I have already made reference.

The judgment of the court was read by Lord Clauson, who said [17]: "As regards the note written to the trustee in bankruptcy "by the executor's solicitors, Bennett J. held that the document "disclosed no intention of acknowledging the existence of the "debt. However this may be (and we express no opinion on "the point), it is a complete answer to the plaintiff's plea based "on this note that there was no evidence of any authority given "to the solicitors by the executor to make any acknowledgment "of the debt on his behalf."

It is said here that there is no evidence of Mrs. Pepin authorizing Miss Wyatt to make any acknowledgment of the debt on her behalf. It is admitted that there need not be express authority nor need there be evidence aliunde: it can be inferred, and in my judgment it is not difficult here to infer that Mrs. Pepin had instructed Miss Wyatt to clear up her affairs; part of which was 101 Mountview Road, which was being rebuilt to her order and constituted an important part of her property. She wanted her affairs cleared up, and she instructed her solicitor accordingly. Her solicitor is approached by the mortgagees' solicitors, the time not having then run, and under pressure from them the solicitor of Mrs. Pepin, as she was well authorized to do, said: "Please hold your hand until the property has been rebuilt, "and then Mrs. Pepin's position can be reviewed." What is that but an acknowledgment that there is an obligation to the mortgagees in respect of the property and a request for forbearance? A solicitor instructed to clear up the defendant's affairs had implied authority to make such a plea. Miss Wyatt was, in my judgment, an agent duly authorized to make the acknowledgment which she did make—in other words, to write the letter which she wrote on August 4, 1950, and that letter, as a matter of construction, amounted to an acknowledgment.

The consequence is that the plea under the Limitation Act fails and there must be an order for possession in the usual form.

Application granted.

Solicitors: *Elliot & Macvie; Rees-Jones & Co.*

I. G. R. M.

[16] Ibid. 107.

[17] Ibid. 109.

[CHANCERY DIVISION.]

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*LLOYDS BANK LD. *v.* MARGOLIS AND OTHERS.

[1950 L. 2937.]

Debt—Demand—Whether condition precedent to payment—Mortgage—Legal charge—Charge to secure repayment to bank "on demand" of moneys due on current account—Foreclosure proceedings by bank within 12 *years of demand but over* 12 *years after advance—Effect of covenant to repay "on demand"—Charge in favour of bank a collateral security—Limitation of action—Limitation Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *ss.* 4 (3), 18 (4).

Mortgage. Banking. Limitation of action.

By a legal charge dated September 16, 1936, and being subject to a first mortgage, A charged a farm with repayment to the bank of moneys due on his overdraft. By clause 1 of the charge he covenanted with the bank "to pay to them on demand all money "and liabilities which now are or at any time hereafter may be "due or owing or incurred from or by the mortgagor to the bank "or for which the mortgagor may be or become liable to them on "any current account or in any manner whatever . . . together "with interest to date of repayment (such interest being computed "both before and after such demand. . .)." By clause 2 (1), A as beneficial owner charged the property by way of legal mortgage "with payment to the bank of the principal money, liabilities and "interest hereby covenanted to be paid by the mortgagor." On September 19, 1936, the legal charge was registered pursuant to the Land Charges Act, 1925. On June 24, 1938, B contracted with A to buy the farm free from incumbrances. On December 13, 1938, B took action to prevent the first mortgagees from selling the property. On December 19 the bank by notice in writing demanded from A repayment of the moneys due on his banking account and, as the purchase price could not discharge that amount and the amount due on the first mortgage, A could not complete. On December 23, 1938, B took a transfer of the first mortgage and in May, 1939, obtained an order for specific performance against A, who did not comply with it. In 1944 B obtained an order vesting the property in him and in March, 1950, contracted to sell it to C, to whom it was conveyed subject to the bank's legal charge.

By this summons, issued on November 29, 1950, against B, C and A, the bank, having taken no step for nearly 12 years, claimed to enforce the legal charge. The bank contended that time ran from the date of the demand, i.e., from December 19, 1938: the defendants B and C (A not appearing) claimed that it ran, in the case of advances made before the date of the legal charge, from the date of that charge and, in the case of subsequent advances, from the dates of the advances; and that, as the bank did not claim any advance made after October 14, 1938, when it received notice of the contract between B and A, all those advances were barred by section 4 (3) of the Limitation Act, 1939, and there was no debt in respect of which to bring a foreclosure action:—

Held, in ordering enforcement of the legal charge, (1) that, as clause 1 of the legal charge was, on its true construction, a covenant to pay on demand, it was a condition precedent to the issue of a writ that there should be a demand; (2) that also it was conclusive in favour of the bank that the legal charge, being a charge in the ordinary form between banker and customer, was a collateral security and so came within the rule, stated by Chitty J. in *In re Brown's*

Estate [1893] 2 Ch. 300, at p. 305, that ". . . where there is a "present debt and a promise to pay on demand, the demand is not "considered to be a condition precedent to the bringing of the action. "But . . . on a promise to pay a collateral sum on request . . . the "request ought to be made before action brought."

Observations of Denning L.J. in *Barclays Bank Ld.* v. *Beck* [1952] 2 Q.B. 47, at p. 54; [1952] 1 T.L.R. 595, at p. 600; [1952] 1 All E.R. 549, at p. 553, considered and applied.

ADJOURNED SUMMONS.

The plaintiffs, Lloyds Bank Ld., took out a summons to enforce by foreclosure or sale a legal charge dated September 16, 1936, between the third defendant, George John Lyster and the bank, whereby a farm known as Winterslow Farm was charged with repayment of the sums due on the third defendant's overdraft with the bank.

The legal charge was registered on September 19, 1936, pursuant to the Land Charges Act, 1925. It was a second mortgage, being subject to a mortgage to the Agricultural Mortgage Corporation to secure £7,200. On June 24, 1938—the first defendant, one Morris Margolis, contracted with the third defendant to purchase the mortgaged premises for £10,000 free from incumbrances. There was doubt whether the contract excluded some 7½ acres from the whole premises, which, however, the court ignored. The farm was very large, comprising some 950 acres, and substantially the contract extended to the whole of it. The date fixed for completion was September 29, 1938, but completion did not take place on that day. On October 14, 1938, the contract between the first defendant and the third defendant was registered pursuant to the Land Charges Act as an estate contract. On December 19, 1938, the bank by notice in writing to the third defendant, demanded repayment of the moneys due on his banking account, being £3,188 14s. 7d., together with interest from June 30, 1938, amounting to £93 17s. 11d. There was still £7,200 due to the Agricultural Mortgage Corporation and over £3,000 due to the bank. Thus, the purchase-money was insufficient by some £700 to discharge those two mortgages and the third defendant could not complete the sale. On December 13, 1938, the first defendant took action against the Agricultural Mortgage Corporation to prevent them from selling the property, as they were threatening to do, in exercise of their powers as mortgagees. In the result, on December 23, 1938, the first defendant took a transfer to himself of that first mortgage on payment to the Agricultural Mortgage Corporation of £7,211 7s. 5d.

The first defendant instituted proceedings for specific performance against the third defendant and on May 2, 1939, obtained an order for specific performance. The accounts and inquiries duly proceeded in the absence of the third defendant who was not heard of after 1939. On December 19, 1944, the first defendant obtained an order in the action vesting the farm

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in him expressly subject to the two mortgages, namely, the former Agricultural Mortgage Corporation mortgage then vested in the first defendant and the legal charge in favour of the bank, it being recited that the amount due thereunder was in excess of the purchase price; and the first defendant, by the order, undertook to indemnify the third defendant against any liabilities under the incumbrances, but only to the extent of the amount of the purchase-money and interest payable after deducting costs.

On March 2, 1950, the first defendant contracted to sell Winterslow Farm to the second defendant, one Reginald George King; and on September 27, 1950, the farm was duly conveyed to the second defendant, discharged from the first mortgage but expressly subject to the bank's legal charge. Thus, the second defendant became the beneficial owner in possession subject to the bank's legal charge. As between the first and second defendants, however, the first agreed to indemnify the second defendant against the bank's legal charge if it remained enforceable.

On November 29, 1950, the bank issued this summons against all three defendants, of whom only the first two appeared, claiming to enforce their mortgage. The amount due by that time was very substantial; the sum due for principal being £2,684, that due for interest £1,954. The defendants contended that the legal charge was no longer enforceable against them or any of them, because the remedy was barred by the Limitation Act, 1939.[1]

Clause 1 of the legal charge provided: "The mortgagor hereby "covenants with the bank to pay to them on demand all money "and liabilities which now are or at any time hereafter may be "due owing or incurred from or by the mortgagor to the bank or "for which the mortgagor may be or become liable to them on "any current or other account or in any manner whatever "(whether alone or jointly with any other person and in whatever "name, style or firm) together with interest to date of repay-"ment commission banking charges law and other costs charges "and expenses (such interest being computed both before and "after any such demand according to the usual mode of the bank "with current accounts and that notwithstanding any account "hereby secured may from any cause cease to be carried on as an "ordinary banking account and so that interest shall be payable "at the rate so provided as well after as before any judgment "obtained hereunder)."

[1] Limitation Act, 1939, s. 4 (3): "No action shall be brought by any "other person"—i.e., other than the Crown (see subs. (1)) or than a spiritual or eleemosynary corporation (see subs. (2))—"to recover any land "after the expiration of twelve years "from the date on which the right of "action accrued to him or, if it "first accrued to some person through "whom he claims, to that person. ". . ."

S. 18 (4): "Nothing in this section "shall apply to a foreclosure action "in respect of mortgaged land, but "the provisions of this Act relating "to actions to recover land shall "apply to such an action."

Clause 2 provided: "(i) The mortgagor as beneficial owner "hereby charges by way of legal mortgage all and singular the "property mentioned or described in the first schedule hereto with "the payment to the bank of the principal money liabilities "interest and other money hereby covenanted to be paid by the "mortgagor subject to a prior charge particulars of which are set "out in the second schedule hereto; (ii) In favour of a purchaser "the principal money hereby secured shall be deemed to have "become due on the day on which demand for payment thereof "is made by the bank and the statutory power of sale as hereby "extended shall be exercisable from and after that date which "date (without prejudice to the equitable right to redeem) shall "be the redemption date." Clause 8 provided that the total amount recoverable should not exceed £4,000 exclusive of interest at the current rate from six months prior to the date of demand for repayment of the moneys and liabilities thereby secured.

Sir Lynn Ungoed-Thomas Q.C., *H. A. Rose* and *O.M. Swingland* for the bank.

W. S. Wigglesworth for the first and second defendants.

The third defendant did not appear.

The cases cited in argument are referred to in the judgment.

UPJOHN J., after stating the facts: I have to determine on what date the right to bring a foreclosure action first accrued to the bank. The rival contentions are these. The bank contends that the time runs for 12 years from demand, i.e., from December 19, 1938, and that therefore they are just in time. The defendants, however, say that the time runs, in the case of advances made before the date of the legal charge, from the date of that charge; that, in the case of subsequent advances, it runs from the dates of the subsequent advances; and that, as no claim is made to any advance made after October 14, 1938, when the bank received notice of the contract between the first defendant and the third defendant, all those sums have become irrecoverable, so that there is no debt in respect of which an action to foreclose can be brought.

To return to clause 1 of the legal charge; it seems to me that the construction of it, quite apart from authority, is too plain to admit of argument. It expressly provides that the covenant between the mortgagor and the bank is to pay to the bank "on "demand" all money and liabilities which were then or at any time thereafter might be due. Purely as a matter of construction, I do not see how that can be construed otherwise than as a covenant to pay on demand; and, therefore, prima facie, it seems to me that the bank's claim is well founded.

It is argued, however, by Mr. Wigglesworth (who has said everything that can possibly be said for the defendants) that where there is a covenant to pay on demand, it is not, on the

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authorities, necessary or a condition precedent to the issue of a writ that there should be a demand, but that in fact time runs from the date of each advance. He referred to *In re Brown's Estate*.[1] In that case the mortgagee agreed to lend and did lend to the mortgagor, Alfred Brown, a sum of £3,000 on the security of certain property. In the mortgage deed Alfred Brown and his father, John Brown, entered into a joint and several covenant that they would, on demand, pay to the mortgagee, his executors, administrators and assigns, £3,000. That was in 1867. John Brown having died, no demand was made against the father's estate until July, 1889; and it was held that the mortgagee could come in and prove his claim against the father's estate without, of course, disturbing dividends already distributed. It was contended that a demand need not be made and that time therefore ran from the execution of the mortgage.

Chitty J. said[2]: "Now, for those interested in the testator's "estate it is said that the meaning of the words 'on demand' "is the same as that which has been attributed to them in "promissory notes and the like. The law is quite settled that, "with regard to a promissory note payable on demand, no "demand is necessary before bringing an action; and indeed the "Statute of Limitations begins to run from the making of the "note."

He then refers to certain cases and considers whether the fact that the time runs from the date of the promissory note is part of the law merchant or of the general law. After considering *Brighty* v. *Norton*[3] and *Norton* v. *Ellam*[4] he continues his judgment as follows, beginning with a quotation from the judgment of Parke B. in *Norton* v. *Ellam*[5]: "'I entertain no doubt at all "'on this point'"—i.e., about the Statute of Limitations running from the date of the note. "'It is the same as the case "'of money lent payable upon request, with interest, where no "'demand is necessary before bringing the action.' That is a "general proposition and not one based upon the law merchant; "and, without going through the whole of the cases to which I "have referred in the course of the argument, it is plain that a "distinction has been taken and maintained in law, the result of "which is, that where there is a present debt and a promise to "pay on demand, the demand is not considered to be a condition "precedent to the bringing of the action. But it is otherwise on "a promise to pay a collateral sum on request, for then the "request ought to be made before action brought. I think the "distinction which I have mentioned, is sufficiently pointed out "in Saunders' argument in *Birks* v. *Trippet*,[6] which was accepted "by the whole of the court, the judges having been apparently "somewhat impatient at the learned counsel labouring his argu-"ment to the extent he did." He then considers the construction

[1] [1893] 2 Ch. 300.
[2] [1893] 2 Ch. 300, 304.
[3] (1862) 32 L.J.Q.B. 38.
[4] (1837) 2 M. & W. 461.
[5] 2 M. & W. 461, 464.
[6] (1666) 1 Wms.Saund. 32.

of the instrument and concludes that on its true construction it meant what it said: it was a payment on demand; and therefore, no demand having been made against the father's estate until 1889, time did not run until that date. I find the judgment a little difficult to follow, for this reason: the judge put a construction on the joint and several covenant in the case of John Brown. If the passages which I have read meant that the judge, had it been necessary to determine the matter, would have given a different construction to those very same words in the case of the same covenant by Alfred Brown, I would respectfully disagree with him. As he pointed out, it is always a question of construction in each case.

In my judgment, at all events where there is the relationship of banker and customer and the banker permits his customer to overdraw on the terms of entering into a legal charge, which provides that the money then due or thereafter to become due is to be paid on demand, that means what it says. As between the customer and banker, who are dealing on a running account, it seems to me impossible to assume that the bank were to be entitled to sue on the deed the very day after it was executed without making a demand and giving the customer a reasonable time to pay. It is indeed a nearly correlative case to that decided in *Joachimson* v. *Swiss Bank Corporation*,[7] where the headnote is: "Where money is standing to the credit of a customer on "current account with a banker, in the absence of a special agree-"ment a demand by the customer is a necessary ingredient in the "cause of action against the banker for money lent." In this case the agreement has provided quite clearly what is to be done before the bank can sue: they must demand the money.

Sir Lynn Ungoed-Thomas also submits, and rightly, that if necessary the case is concluded in his favour on the ground that this legal charge is a collateral security, and therefore falls within the rule stated by Chitty J. in *In re Brown's Estate*.[8] I agree with that submission. I think that it is clear that where there is a banker's charge, a charge in the ordinary form as between a banker and a customer to secure a running account, that must be treated as a collateral security .

I need refer only to the judgment of Denning L.J. in *Barclays Bank Ld.* v. *Beck*.[9] The question there was whether by executing a charge under the Agricultural Credits Act, 1928, there was a merger of the simple contract between the bank and its customer. It was held that there was no merger. Denning L.J. said[10]: "The distinction is clearly shown by considering the difference "between a mortgage debt to a building society, and a charge to a "bank to secure a running account. The mortgage debt to a "building society is created under and by virtue of a deed, and is

[7] [1921] 3 K.B. 110; 37 T.L.R. 534.

[8] [1893] 2 Ch. 300, 304.

[9] [1952] 1 T.L.R. 595; [1952] 1 All E.R. 549.

[10] [1952] 1 T.L.R. 595, 600; [1952] 1 All E.R. 549, 553.

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Lloyds Bank Ld. v. Margolis.

Upjohn J.

"a specialty debt from its commencement; but a future debt on "a running account is a debt created by parol, and it remains a "simple contract debt, even though the customer has previously "given a charge to secure it, which includes a covenant under "seal. The future debt on running account is not created under "the deed. It may be that it would never have been created but "for the deed, but that is a different matter. It only means that "the deed is collateral security for its repayment."

I think that on that ground, too, the plaintiff succeeds; but I prefer to rest my judgment on the broad ground which I have already discussed. Accordingly, there must be an order to enforce the security.

Order accordingly.

Solicitors: *Cameron, Kemm & Co.; Woodcock, Ryland & Co. and Darley, Cumberland & Co., for Wansbroughs, Robinson, Taylor & Taylor, Devizes.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

1954 *Mar.* 22.

Devlin J.

* ALMA SHIPPING CO., S.A. *v.* V. M. SALGAONCAR E IRMAOS LTDA.

Shipping—Charterparty—Demurrage—"Average"—Despatch money—Calculation—"Charterers to have right to average days allowed for "loading and discharging."

Judicial Precedent — Decision at first instance — Whether binding on other judge at first instance—Construction of commercial document.

Where a charterparty gives the charterers a right to "average" the days allowed for loading and discharging, the time on demurrage at the port of loading is set against the time saved at the port of discharge, or vice versa, and the payment of demurrage or despatch money will depend on the net result.

Watson Brothers Shipping Co. Ld. v. *Mysore Manganese Co. Ld.* (1910) 26 T.L.R. 221; 15 Com.Cas. 159 applied.

Moliere S.S. Co. Ld. v. *Naylor, Benzon & Co.* (1897) 13 T.L.R. 187; 2 Com.Cas. 92 distinguished.

Action.

The plaintiffs were at all material times the owners of the *s.s. Alma.* By a charterparty dated December 17, 1952, between Faros Shipping Co. Ld., on behalf of the owners, and William Shyvers Ld., on behalf of the charterers, the charterers chartered the *Alma* to load a full and complete cargo of iron ore, say 7,000 tons, 10 per cent. more or less at captain's option, at Mormugao and to deliver the same at Rotterdam.

Loading began at Mormugao on January 16, 1953, and finished on February 10, 1953, and discharge at Rotterdam began

on March 25 and was completed on March 26. There were no holidays or non-working days (apart from periods from noon on Saturdays to 8 a.m. on Mondays) and no interruptions due to excepted perils during either loading or discharge.

The quantity of cargo loaded at Mormugao was 7,475 tons, and in accordance with clause 5 of the charterparty the time allowable for the separate operations of loading and discharging, without prejudice to the parties' contentions as to the effect of clause 9 of the charter, was

(a) for loading ... $\frac{7,475}{500}$ = 14 days 22 hours 48 minutes

(b) for discharging ... $\frac{7,475}{1,500}$ = 4 days 23 hours 36 minutes

By clause 9 of the charter it was provided "Charterers to "have the right to average the days allowed for loading and "discharging." The charterers exercised that right and claimed that they were entitled to be paid despatch money under the charter amounting to £431 3s. 3d. (calculated according to method "B" below).

The owners denied that the charterers were entitled to be paid dispatch money and claimed that they (the owners) were entitled to be paid demurrage under the charter amounting to £54 6s. 9d. (calculated according to method "A" below).

It was agreed between the parties that an alternative method of calculation to "A" and "B" was method "C" (below) whereby the charterers would be entitled to despatch money amounting to £201 19s. 11d.

Method "A."

	D.	H.	M.
(1) *Time used in loading.*			
Time allowed for loading	14	22	48
Demurrage	4	5	12
Time allowed for discharge	4	23	36
Deduct excess time at loading port	4	5	12
Actual time left for discharge		18	24
(2) *Time used in discharging.*			
Time allowed for discharge		18	24
Demurrage		5	13

(3) Total demurrage 5 hours 13 minutes at £250 per day = £54 6s. 9d. (Balance of freight account due to owners £370 17s. 2d.)

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Method "B."

	D	H.	M.
(1) *Time allowed.*			
For loading	14	22	48
For discharging	4	23	36
Averaged lay time	19	22	24
(2) *Time used* (loading and discharging).			
Time to count	19	22	24
Time saved	3	10	47

Dispatch money on 3 days 10 hours 47 minutes at £125 per day = £431 3s. 3d. (Balance of despatch money due to charterers £114 12s. 10d.)

Method "C."

	D.	H.	M.
(1) *Time on demurrage at loading port.*			
As in method "A"	4	5	12
(2) *Time allowed for discharging*	4	23	36
(3) *Net time saved.*			
Time saved in discharging	5	19	59
Deduct time on demurrage at loading port	4	5	12
Net time saved	1	14	47

Dispatch money on 1 day 14 hours 47 minutes at £125 per day = £201 19s. 11d. (Balance of freight account due to owners £114 10s. 6d.)

Subject to the charterers' right to set off against the agreed balance any such amount as the court might hold to be due to the charterers as dispatch money, it was agreed that there was due from the charterers to the owners as the balance of the freight the sum of £316 10s. 5d.

The question for the decision of the court was which of the three methods of calculation was, on the true construction of the charter, the correct method.

T. G. Roche for the owners.
Basil Eckersley for the charterers.

All cases cited in argument are referred to in the judgment.

Devlin J. This case turns entirely upon the construction of clause 9 in a charterparty, which provides: "Charterers to have

"the right to average the days allowed for loading and dis-"charging." "The days allowed," of course, refers to the lay days for loading and discharging. There is no difficulty about computing the lay days because the computation is agreed. Computed according to the method which is described in the charter-party (that is by rates of loading per day) they are agreed at almost 15 days for loading and almost 5 days for discharging—I will call them, for the sake of simplicity, 15 and 5. The reason why they are different is because the charterers are expected under the lay day clause to discharge three times as fast as they are expected to load; it may be because of better facilities at the discharge port, Rotterdam, as compared with the loading port, Mormugao, but at any rate so it is.

The differences that have arisen between the parties as to whether demurrage is payable, and, if so, what amount, and whether dispatch money is payable, relate therefore not to the calculation of lay days but to the way in which the time used is to be related to the lay days; and what has given rise to divergence is the clause which I have read.

It is clear that, unless there is some clause of this sort, the operations of loading and discharging have to be considered quite separately. The lay days have to be calculated separately, and the time used has to be considered against each separately and demurrage and dispatch money arrived at accordingly. The object of a clause of this kind is to prevent the two from being considered separately and to allow the charterer in this part of the clause, since the option is with him, to avail himself, if he wants to, of days saved in loading so as to advantage himself in the discharging, or vice versa. These clauses, the authorities show, adopt various forms. The use of the word "average" is very common; the use of the word "reversible" is also common; and sometimes there is a clause which simply provides, quite clearly and simply, for the addition of the two lots of lay days together.

Three methods of operating the clauses have been advanced. The simplest of them is the one that is advanced by the charterers and is called method "B." That simply means that one adds the two lots of lay days together, making approximately 20 days, and one takes the total time used, and the difference between them one way or the other produces the results. That is not, in any strict sense of the term, "averaging"; it is aggregating, or pooling the two lots of periods and pooling the results. One can get at the same result by averaging if, say, instead of taking 20 days for the whole one took 20 days divided by two, the average for loading and discharging would be 10 and one gives oneself 10 days at each place. At first sight, one would think that it could not matter which way one set about it, but in fact it does. The reason why it matters, and the reason why all three methods of calculation produce different results, is

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because the time used does not flow smoothly and uninterruptedly; it is interrupted by Sundays, half holidays and other non-working days, and it is, so to speak, the interjection of these into the period which is actually used that causes different results to be produced by these different methods of calculation. What might be regarded as the stricter way of doing it by averaging (that is dividing the aggregate by two) would, I am told, produce quite a different result and is not in fact a method that is advised by either side in this case.

The principal method upon which the owners rely is method "A." Upon that basis one takes the time by which the time used exceeded the lay days at the port of loading—it might, of course, be less, but on the particular facts of this case it happens to have exceeded it, and exceeded it by something over four days —and one deducts that excess from the lay days fixed at the port of discharge. The result of that, of course, is to diminish the lay days for discharging and one then puts the time actually used at discharging against that diminished amount of lay days. If time is saved on loading, then that is added to the lay days allowed for discharging in the same way.

The third method (which has been called method "C") is one which is advanced in the alternative by the owners and accepted, though with considerable reluctance, by the charterers as an alternative method if their method "B" is not allowed. There the two calculations are kept entirely separate until the very end when a balance is struck. If time is saved on discharge that is set against the excess time of loading, or vice versa, and in that way a net result is arrived at.

The matter is not free from authority, because clauses of this type are not uncommon. The first authority to which I have been referred in which a clause providing for "averaging" was considered by a court is *Moliere Steamship Co. Ld.* v. *Naylor, Benzon & Co.*[1] That was a judgment of Kennedy J. The material words in the charterparty were: "Charterers to be at liberty to "average the days for loading and discharging in order to avoid "demurrage." It is sufficient to say about the judgment that it supports the charterers' view in the present case; it supports method "B" if the position is rightly summarized in the headnote. The headnote reads: "Where a charterparty gives "liberty to the charterers 'to average the days for loading and "'discharging in order to avoid demurrage,' the charterers may "add together at the port of loading the days allowed for the "two operations of loading and discharging, and the ship does "not come on demurrage till the days so added together are "exhausted." But when one examines the judgment, as Mr. Roche has done, it is plain that Kennedy J. was influenced by considerations other than the mere construction of the words. The report says that evidence was called in respect of the

[1] (1897) 2 Com.Cas. 92; 13 T.L.R. 187.

defendants' system of calculation, and Kennedy J. said[2]: "From the evidence called on behalf of the defendants it appears "that during a period of ten years the clause has been in common "use, and that during that time it has had an accepted meaning, "on the basis of which settlements have been made without "objection—that meaning being the one now put forward by the "defendants. It seems to me that I ought to act upon that "evidence. Apart from that understood meaning, the words "'to average the days' appear to me to be not very apt and to "be open to argument. I do not say that without the evidence "called by the defendants their construction of the words would "be an impossible one, but it would certainly be doubtful "whether it was correct."

So what the judge is saying there is that he doubts very much whether the construction which he put on the words is the correct one if he had been looking simply at the words themselves, but he felt it better in that case, because he thought the clause was ambiguous, to be guided by the evidence which he had heard. In those circumstances the headnote I feel is a little misleading because it gives the impression, or might give the impression, that the judge had arrived at his conclusion as a matter of construction, which is not the case.

The next authority is a decision of Hamilton J. in *Watson Brothers Shipping Co. Ld.* v. *Mysore Manganese Co. Ld.*[3] There the wording was a little different. It was a charterparty which apparently provided for a number of voyages though in fact only one voyage took place under it, and the words used in clause 5 of the charterparty were: "Days to be averaged over all voyages "performed under and during the entire currency of this charter "to avoid demurrage." The decision of Kennedy J. to which I have just referred was not, so far as appears from the report, discussed in the argument or in the judgment. Hamilton J. said[4]: "The defendants then contend that they are entitled to "take 10 days for the loading, and add to that 10 days for dis-"charging, and interpret them as 20 clear working days of 24 "hours as they would be interpreted under the circumstances of "the port of Marmagoa, and they say this is the meaning of the "provision 'days to be averaged over all voyages performed "'under and during the entire currency of this charter to avoid "'demurrage'"—that is method "B" in the present case. "There are other provisions with regard to demurrage in this "charterparty which throw a little light upon it, but I think the "real question turns on what is meant by the word 'average.'" Then he considers some of the other provisions of the charterparty, and he then says: "All these provisions show that the "business men who entered into this charterparty contemplated "that at the time the vessel was loaded at Marmagoa it would

[2] Ibid. 99.

[3] (1910) 15 Com.Cas. 159; 26 T.L.R. 221.

[4] Ibid. 166.

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"be possible then to know whether she was on demurrage or "not, so that they would be able to exercise a lien for that "demurrage or pay the commissions mentioned. It is, perhaps, "technically a sufficient answer to say that some application "might be given to those words in the event of the vessel being "more than 20 days on demurrage at the port of loading, so that "in no possible event, and in no kind of averaging, could there "fail to be demurrage due and payable, but, still, it does show "that the shipper is trying to get a good deal out of the words "'days to be averaged over all voyages,' when he claims that he "is entitled to say his ship is not on demurrage at Marmagoa "until more than 20 of the charterparty days have expired, and "yet she is not loaded. I think the words 'days to be averaged "'over all voyages' will not bear this interpretation. Parties "often stipulate, and the parties could have stipulated, that so "many days are to be allowed for loading and discharging. The "other form of averaging days over the voyage or voyages to "avoid demurrage carries a different meaning. In my opinion "the meaning of the average clause is that a number of days for "shipment having been stipulated, and then a number of like "days for discharge having been stipulated, the vessel's right to "demurrage must be determined upon the events which happen "at the port of loading and according to the number of days "allowed for loading there, though subsequent events at the "port of discharge may entitle the charterers to abate the "amount of demurrage incurred at the port of loading by taking "credit for the number of days saved, if any, at the port of "discharge. The plaintiffs admit that two days were saved at "the port of discharge, the defendants claim three, but my view "is that, as a matter of construction at the end of ten charter-"party days for loading at Marmagoa, the vessel was on "demurrage." There he adopts method "C."

Mr. Eckersley put forward the view that the decision of Hamilton J. in that case is distinguishable, on the terms of the charterparty, from that which I have to decide today. I do not think it is. I observe that Hamilton J. puts the real question which he has to determine as turning on what is meant by the word "average." It is plain that he has chosen between method "B," which the defendants there were advancing, and the method which he pronounces in favour of, which is method "C." He says particularly in referring to method "B": "I think the "words will not bear this interpretation," and then he adopts method "C." Once one has ascertained the number of days for shipment and the number of like days for discharge they become just as if they were days stipulated in the charterparty, so his reasoning exactly applies.

One other authority which was cited to me was *Rederiaktiebolaget Transatlantic* v. *La Compagnie Française des Phosphates*

de L'Oceanie.[5] There the clause which the Court of Appeal had to construe was a straightforward one providing in terms: "At "the charterers' option any days or parts of days not consumed "in loading might be added to the average for discharging, and "any extra time consumed in loading might be deducted from "the time for discharging." I do not think that the judgment of Scrutton L.J., which was referred to by Mr. Eckersley—although it has some helpful observations about the general way in which these clauses should be approached—really touches the clause in the present case and the meaning of the word "average" which I have to determine.

Mr. Eckersley quite rightly drew my attention to, and adopted as part of his argument, the references to this point in two of the leading textbooks, Scrutton on Charterparties and Carver on Carriage by Sea. In Scrutton, 15th ed., p. 344, the editors sum up what they conceived to be the effect of the decisions in these words: "The clause 'to average the days "'for loading and discharging in order to avoid demurrage' "allows the charterer to add together the days agreed for both "operations, not being liable for demurrage till the total days "are exhausted." In Carver, 9th ed., p. 896, the author said: "Charterers sometimes stipulate for 'liberty to average the days "'for loading and discharging.' This was held in *Moliere S.S.* "*Co. Ld.* v. *Naylor, Benzon & Co.*[6] to entitle them to add together "the time allowed for loading and the time allowed for discharging "and to exhaust the whole before demurrage could begin to run." It is, therefore, fair to say that in those words no distinction is drawn between the different forms of clause. No particular weight is put upon the use of the word "average," and they are all conceived as having the effect which the charterers in the present case urge that they should be given. But in neither of those books is the decision of Hamilton J. referred to, and in both of them the decision in the *Moliere Steamship Co.* case[7] of Kennedy J. is treated as if it were an authority upon construction, whereas in fact I adopt Mr. Roche's submission that it cannot be so regarded.

In those circumstances I am left with the one authority which I think is clearly applicable, namely the decision of Hamilton J. in the *Watson Brothers Shipping Co.* case,[8] and I can only decide in favour of the charterers by adopting their method "B" if I disagree with that decision. I am bound to say that if the matter were res integra a lot might be said for treating all these types of clauses as if they were intended to achieve the same thing, whether the words used were "averaging," "adding" or "reversible," but in the face of that decision, which clearly distinguishes between the clauses which use the word "average" and clauses which use the word "adding" or have a similar effect to using the word "adding," I do not conceive that I can

[5] (1926) 32 Com.Cas. 126.
[6] 2 Com.Cas. 92.
[7] Ibid.
[8] 15 Com.Cas. 159.

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do so. If it were a decision given by a judge speaking with no greater authority than my own, I should still in the circumstances of the present case think it right to follow it, because nothing can be more unfortunate in my judgment than that different shadows of meaning in clauses of this type should be introduced by different judges thus leading to a multiplicity of authorities; but coming as it does from Hamilton J., one speaking with great authority, it gives such added weight to it that in my judgment it would be wrong for me to disregard it.

In those circumstances, therefore, I reject method "B" and I reach the conclusion that a distinction must be drawn when the word "average" is used in a clause of this type from a clause which, though no doubt with similar intent, is phrased so as to use other terms which are quite as commonly used.

I am left therefore to distinguish between method "A" and method "C." There is, as I have said, no authority in favour of method "A." There is nothing to show that it was actually considered by Hamilton J., but there is no doubt that he pronounces in favour of method "C" or that that was the one which he adopted.

Mr. Roche has argued that that can be distinguished having regard to the words in the present clause, "days allowed." He submits that method "A" gives effect to those words, whereas method "C" is really only an accounting operation at the end of the whole thing; it does not operate on the days allowed either at one place or the other place, but merely balances the results of the two calculations at the end. I do not think that distinction is one which ought to operate upon my mind. I attach great importance to there being, not physically more authorities, but the reverse in matters of this kind. If it were possible to give one common meaning to all these clauses I feel there would be a great deal of advantage in so doing. For the reasons I have given I cannot go as far as that, but I certainly do not think that I ought to allow slight differences of wording to give rise to somewhat subtle reasoning so as to produce different results according to only slightly different formations of words. I therefore adopt the judgment of Hamilton J. in its entirety as governing this case, and accordingly I adopt method "C" as being the method that is produced by the right construction of this clause. The consequence of that is agreed between the parties. There is a balance of credit which has to be taken into account. The result is that it is agreed that there should be judgment for the owners for £114 10s. 6d., and I give judgment accordingly.

Judgment for the owners.

Solicitors: *Stokes & Mitcalfe; Sinclair, Roche & Temperley.*

J. D. P.

[CHANCERY DIVISION.]

* INLAND REVENUE COMMISSIONERS *v.* BROADWAY COTTAGES TRUST. SAME *v.* SUNNYLANDS TRUST.

1954
Mar. 4, 5, 11.

Wynn-Parry J.

Trust and Trustee—Uncertainty, trust void for—Imperative trust to distribute income among specified class—Specified class unascertainable at any given time—Charities members of class—Payment of income to charities—Claim for exemption from income tax—Income not income of charities—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (*b*).

Revenue—Income tax—Charity.

An imperative trust for the distribution of a fund (whether capital or income) among a class or such members thereof as the selector may select depends for its validity on the answer to the question: Is the class capable of ascertainment? If the answer is in the affirmative, the trust is valid. If the answer is in the negative, it is void for uncertainty.

By a settlement dated July 14, 1950, the settlor settled a sum of £80,000 upon trust to apply the income of the trust fund during a period within the perpetuity period for the benefit of all or any of a class of beneficiaries specified in the schedule to the deed, in such shares, proportions and manner as the trustees in their absolute discretion thought fit. The specified class was admittedly unascertainable at any given time. Two charitable bodies, members of the specified class, claimed exemption from income tax in respect of sums of money which they had received from the trustees of the settlement under the provisions relating to the trust of the income of the trust fund:—

Held, that the trust being an imperative trust for the distribution of income among a class of beneficiaries which was incapable of ascertainment, it was void for uncertainty; so that the sums of money received by the charities from the trustees were not the income of the charities, which were accordingly not entitled to exemption from income tax under section 37 (*b*) of the Income Tax Act, 1918.

In re Ogden [1933] Ch. 678; 49 T.L.R. 341 and *In re Gestetner Settlement* [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150 applied.

APPEALS by the Crown from decisions of the Commissioners for the Special Purposes of the Income Tax Acts, heard together.

The stated cases set out the following facts: On October 22, 1952, the respondent, Broadway Cottages Trust, and the respondent, the Sunnylands Trust, both of which were trusts established for charitable purposes only, appealed against decisions of the Commissioners of Inland Revenue, disallowing claims made for exemption from income tax in respect of the years 1950–51, 1951–52, in the case of the Broadway Cottages Trust, and the year 1950–51 in the case of the Sunnylands Trust, in relation to certain sums of money alleged to be the income of the respondents and received by them from the trustees of a settlement dated

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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Inland Revenue Commissioners v. Broadway Cottages Trust. Same v. Sunnylands Trust.

July 14, 1950 (hereinafter called "the trustees"). The settlement was made between Alan Geoffrey Timpson (hereinafter called "the settlor") of the one part and the trustees of the other part. The subject of the settlement was £80,000, which was to be held by the trustees on trust for the wife of the settlor, Ethel Beatrice Timpson, and the other persons specified in the schedule. The settlement provided, inter alia: "(1) In this "settlement the following expressions shall where the context "so admits have the following respective meanings and shall be "construed in the following manner, viz.:—(c) 'The appointed "'period' means a period beginning on the date hereof and con-"tinuing until terminated under the power hereinafter contained "or if not so terminated until twenty years after the death of "the last survivor now living of the issue of his late Majesty "King George V. (d) 'The beneficiaries' mean the persons "specified in the schedule hereto and 'beneficiary' means one "of the beneficiaries.

"(4) The trustees shall hold all such investments as afore-"said and the varied investments and property and interests in "property (if any) from time to time subject to the trusts hereof "(all of which are hereinafter included in the expression 'the "'trust fund') upon trust for such of the beneficiaries as shall "be living or (being a charitable trust) existing at the termination "of the appointed period and if more than one in equal shares.

"(5) The interest to be taken under the last preceding clause "hereof by any beneficiary at the termination of the appointed "period shall be absolute interest.

"(6) Provided always that the trustees at any time or times "not being less than six years after the said day of declaration ". . . if in their discretion they think fit so to do may by deed "declare the appointed period to be terminated either as to the "whole of the trust fund or as to any aliquot or specific part "thereof to the intent that the trust fund or (as the case may "be) the part thereof to which such declaration relates and the "income of the same may be held upon the trusts and subject "to the powers and provisions upon and subject to which the "same would at the date of such declaration be held if the "appointed period had then been terminated by effluxion of time "and such declaration should be effectual.

"(7) And if all the beneficial trusts hereinbefore declared "shall fail . . . then the trust fund and the income thereof shall "be held upon charitable trusts to be declared by the trustees ". . . to the intent that neither the donor or any wife or widow "of his shall in any event whatsoever take any interest by way "of resulting trust or otherwise in the trust fund or the income "thereof or any accretions thereto or in any part of the same.

"(8) During the appointed period the trustees shall hold the "income of the trust fund from the date or respective dates from "which the trustees shall become entitled to such income upon "trust to apply the same for the benefit of all or any one or more

"of the donor's said wife and the beneficiaries in such shares "proportions and manner as the trustees in their discretion from "time to time think fit (and so that such moneys as the trustees "may from time to time think fit to apply for the benefit of any "of the beneficiaries who shall have attained the age of twenty-"one years be paid to him or to her on his or her receipt which "shall be a completed discharge to the trustees).

"(9) PROVIDED ALWAYS that the trustees shall have the power "from time to time at their discretion to capitalize the said "income or any part thereof either by investing the same and "treating such investments as part of the capital of the trust "fund or in any other mode of capitalization which may appear "to the trustees to be expedient and pending such application "as aforesaid of such income the trustees may temporarily invest "or place on deposit the same and all income thereby produced "shall be treated as the income of the trust fund.

"(10) The trustees shall also have power during the appointed "period to apply the whole or any part of the capital of the trust "fund in their discretion for the benefit of all or any one or more "of the beneficiaries either by way of advancement on account "of his or her or their share or shares or not as the trustees may "in their discretion think fit and notwithstanding in the case of "any beneficiary that the total amount so applied for the benefit "of such beneficiary may exceed the share to which he or she is "contingently entitled to any share in the capital of the trust "fund."

["(15) Every discretion hereby conferred on the trustees shall "be an absolute and uncontrolled discretion and may (if and so "far as circumstances permit) be exercised from time to time."]

"THE SCHEDULE.

"1. All persons (other than the settlor and any wife of his "and any infant child of his) who have been in the past or (as "the case may be) at the date of these presents or subsequently "thereto at any time during the period ending on December 31, "1980, or during the appointed period whichever shall be the "shorter employed by:—(*a*) the settlor; (*b*) the wife of the "settlor; (*c*) William Timpson deceased (father of the settlor and "who died on January 20, 1929); (*d*) Katherine Chapman Timp-"son deceased (mother of the settlor and who died on December "16, 1940); (*e*) William Timpson Limited or by any other limited "company which may succeed to the business of William Timpson "Limited; (*f*) Any other limited company of which the settlor is "a director at the date of these presents.

"2. The wives and widows of any such persons as is specified "in cl. 1 of this schedule.

"3. All persons (other than the settlor and any wife of his "and any infant child of his) who are the issue however remote "of the said William Timpson deceased . . . and Charles Henry

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"Rutherford deceased (father of the wife of the settlor and who "died on February 17, 1930).

"4, 5, 6, 7. [Certain named persons.]

"8. Alastair John Grenville Stevenson and any spouse of his "or issue of him.

"9. [The trustees of the settlement and their spouses or "issue.]

"10. Joseph Baker and any spouse of his or issue of him.

"11. Godchildren of the settlor or his wife. . . .

"12. Broadway Cottages Trust and Sunnylands Trust (both "being charitable foundations)."

It was contended on behalf of the Crown: (*a*) That in order to construe this deed the whole deed must be looked at, both the clauses relating to the capital of the settled fund and those dealing with the income; (*b*) that a complete and exhaustive list of all the beneficiaries entitled to participate in a distribution of the capital could not be provided; (*c*) that the deed was void for uncertainty; (*d*) that, accordingly, the sums of money received by the respondents from the trustees were not the income of the respondents and that the respondents were not entitled to exemption from income tax under section 37 (*b*) of the Income Tax Act, 1918.

It was contended on behalf of the respondents: (*a*) That the validity of the trusts affecting the income of the settled fund was not affected by the validity or otherwise of the trusts relating to the capital of the settled fund; (*b*) that the trustees had been given a power of selection by cl. 8 of the settlement in regard to the income of the settled fund among the beneficiaries, and the proper test of the validity of such a power was whether the qualification of the class was such that it could be determined whether any given person did or did not possess the qualification; (*c*) that the qualifications required under the terms of this settlement were neither mental nor moral, but were in the nature of facts which could be determined by the court; (*d*) that the power to appoint the income was valid; (*e*) that the money received by the respondents from the trustees was income of the respondents in respect of which the respondents were entitled to repayment of income tax under the exemption granted to any body of persons established for charitable purposes only by section 37 (*b*) of the Income Tax Act, 1918.

The Special Commissioners allowed the appeal of the respondents and held that the trusts of the settlement in so far as they related to the income of the trust fund were not void for uncertainty, and that the trustees under the provisions of cl. 8 of the settlement had a power of selection and that it was a valid and effective trust of the income of the trust fund, and that, accordingly, the sums of money received by the respondents from the trustees were the income of the respondents and thus entitled to the exemption claimed.

The Crown now appealed from this decision.

Geoffrey Cross Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

John Pennycuick Q.C. and *P. J. Brennan* for the respondents.

Cases cited in argument in addition to those contained in the judgment: *Wilson* v. *Duguid* *; *Blight* v. *Hartnoll* †; *In re Park* ‡; *Drummond* v. *Collins* §; *Lindus and Hortin* v. *Inland Revenue Commissioners* ¶; *Cunard's Trustees* v. *Inland Revenue Commissioners.* ||

Cur. adv. vult.

WYNN-PARRY J. These two cases are indistinguishable; they were heard together, and I propose to give one judgment covering both.

I propose first to construe, so far as necessary, the settlement of July 14, 1950, which has given rise to the dispute. Clause 1, which is a definition clause, contains a definition as beneficiaries of those who are to be regarded as objects of the powers and trusts established by the document. The definition is by way of reference to the schedule. I need not refer to that schedule, because it is common ground that the class there defined is a class, the members of which are unascertainable at any given moment. The subject of the settlement is the sum of £80,000 mentioned in the recital and in cll. 2 and 3.

Clause 4 declares the trusts relating to the capital of the trust fund, namely, "for such of the beneficiaries as shall be living "or (being a charitable trust) existing at the termination of the "appointed period" which is within the perpetuity period "and "if more than one in equal shares." By cl. 5 the interests of the beneficiaries under cl. 4 are declared to be absolute interests. It is agreed that, as the class of beneficiaries is one the members of which are unascertainable at any given moment, cl. 4 is void for uncertainty. I need not and do not decide what in those circumstances is the destination of the trust funds.

The critical clause for the purpose of this appeal is cl. 8. I read this clause as containing an imperative direction to the trustees to distribute the whole of the income from the trust funds, subject to the provisions of cl. 9, which do not affect the question before me, among such of the members of an unascertainable class as they may in their discretion from time to time think fit; a discretion which having regard to cl. 15 is an absolute and uncontrolled discretion.

Upon this view of the clause these two cases would appear prima facie to be covered by the judgments of Lord Tomlin in *In re Ogden* [1] and Harman J. in *In re Gestetner Settlement.* [2]

* (1883) 24 Ch.D. 244.
† (1881) 19 Ch.D. 294.
‡ [1932] 1 Ch. 580.
§ [1915] A.C. 1011; 31 T.L.R. 482.
¶ (1933) 17 Tax Cas. 442.
|| [1946] 1 All E.R. 159; 27 Tax Cas. 122.
[1] [1933] Ch. 678; 49 T.L.R. 341.
[2] [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.

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In *In re Ogden*[1] the relevant bequest was in the following language: "4 per cent. of his residuary estate 'to the Right "'Honourable Sir Herbert Samuel to be by him distributed "'amongst such political federations or associations or bodies "'in the United Kingdom having as their objects or one of their "'objects the promotion of Liberal principles in politics as he "'shall in his absolute discretion select, and in such shares and "'proportions as he shall in the like discretion think fit.'"

Now I agree with Harman J. (see *In re Gestetner Settlement*[3]) that the direction in that bequest was imperative, and it is clear that the judgment of Lord Tomlin in *In re Ogden*[4] proceeded on this basis. He says: "Now, applying these prin-"ciples to this case, and leaving out of account the question "whether there is an illegal trust, all that I have to consider "is, whether there is such uncertainty in the field of selection "that it is impossible for the selector to determine from which "institutions he is to select. If so, the bequest is bad on the "ground of uncertainty. The question is one of degree in each "case, whether, having regard to the language of the will, and "the circumstances of the case, there is such uncertainty as to "justify the court in coming to the conclusion that the gift is "bad. Now, it is to be observed that in the present case the "field of selection is: 'Political federations or associations or "'bodies in the United Kingdom, having as their objects or one "'of their objects the promotion of Liberal principles.'"

In other words, Lord Tomlin is saying, if the selector can draw up a complete list of the objects from whom he is to select, then there is certainty and the trust is good; if he cannot do so, the trust is void for uncertainty.

It is upon the basis of this test that he proceeds: "I have "the evidence of Sir Herbert Samuel, who has referred to a "number of bodies which come within the description, and who "states that, in fact, he can ascertain by inquiry all the bodies "that can come within that description, and I take the view "that upon that evidence, and the language of the will, and "having regard to the principles laid down from time to time, "there is certainty here in the field of selection. It comes within "the words of Lord Atkinson in *Houston* v. *Burns*[5]: 'I do not "'think that this case has the slightest resemblance to those "'in which property is vested in trustees to be applied for the "'support or benefit of such institutions of a particular class as "'may be in existence, or in the course of creation, in any given "'town or area at the time of which the will speaks. There is "'no vagueness or uncertainty in such cases at all.'

"Now, it seems to me that here you have a class capable "of ascertainment, and in a specified area, and in my view the "bequest is not void on the ground that the field is too vague. "I hold that the gift is not void for uncertainty."

[1] [1933] Ch. 678.
[3] [1953] Ch. 672, 686.
[4] [1933] Ch. 678, 682.
[5] [1918] A.C. 337, 345.

It is argued that the words, "If so, the bequest is bad on the "ground of uncertainty,"[6] are mere obiter dicta. I cannot so regard them. It is true that in fact there was evidence before the court which enabled Lord Tomlin to conclude that there was no uncertainty, but it was because and only because of that circumstance that he was able to reach that conclusion. The statement of principle which, in my opinion, emerges from the judgment is that an imperative trust for the distribution of a fund (whether capital or income appears to me to be immaterial) among a class or such members thereof as the selector may select depends for its validity on the answer to the question: Is the class capable of ascertainment? If the answer is yes, the trust is valid; if the answer is no, it is void for uncertainty.

This is the view of the matter which was taken by Harman J. in *In re Gestetner Settlement.*[7] In his judgment he says: "In "other words, that decision" (that is, *In re Ogden*[8]) "turned "on the fact that Lord Tomlin accepted Sir Herbert Samuel's "evidence that the number of objects was ascertainable; failing "that, he would have held the power bad. It was clear that "Sir Herbert Samuel had an absolute duty. There was no gift "over. This was a share of a residue. He had an absolute duty "to distribute it. He merely had the right to say to whom, "among a number of persons, he should distribute. If, there-"fore, all those persons had joined together and had agreed to "take in agreed shares, they could have put an end to Sir "Herbert's discretion, and come to the court and had the fund "distributed between them. That being so, it was in effect a "gift to all of them in such proportions as Sir Herbert should "select. One can see, therefore, that certainty among the objects "was a necessity."

This passage shows clearly the reason why the rule has emerged that in cases of an imperative trust to distribute there must be certainty as to the objects.

Harman J. in *In re Gestetner Settlement*[9] was able to distinguish the case before him from *In re Ogden*[10] because he found as a matter of construction that the document in question conferred a bare power as opposed to a duty to distribute. He says[11]: ". . . there is in this case an express power in the trustees to "exclude members from the specified class, but so that the "specified class be not reduced to none; in other words, they "are not entitled entirely to release the power. That means that "they are bound, as I see it, to consider at all times during which "the trust is to continue whether or no they are to distribute any "and if so what part of the fund and, if so, to whom they should "distribute it. To that extent, I have no doubt that there is a "duty on these trustees: a member of the specified class might, "if he could show that the trustees had deliberately refused to

[6] [1933] Ch. 678, 682.
[7] [1953] Ch. 672, 686.
[8] [1933] Ch. 678.
[9] [1953] Ch. 672.
[10] [1933] Ch. 678.
[11] [1953] Ch. 672, 688.

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"consider any question at all as to the want or suitability of any "member of the class, procure their removal; but there is not, "as in Sir Herbert Samuel's case, *In re Ogden*,[12] any duty, as "I see it, on the trustees to distribute the whole of either income "or capital among the members of the specified class; and if the "whole of those members could join together, they could still, "as I understand it, not divide the fund between them; because "there is a class in default of appointment, and the document "on its face shows that there is no obligation on the trustees to "do more than consider—from time to time, I suppose—the "merits of such persons of the specified class as are known to "them and, if they think fit, to give them something. The "settlor had good reason, I have no doubt, to trust the persons "whom he appointed trustees; but I cannot see here that there "is such a duty as makes it essential for these trustees, before "parting with any income or capital, to survey the whole field, "and to consider whether A is more deserving of bounty than B. "That is a task which was and which must have been known to "the settlor to be impossible, having regard to the ramifications "of the persons who might become members of this class. If, "therefore, there be no duty to distribute, but only a duty to "consider, it does not seem to me that there is any authority "binding on me to say that this whole trust is bad."

On the view which I take of the case of *In re Ogden*[13] and the fact that the same view of it is taken by Harman J. in *In re Gestetner Settlement*,[14] I say again that prima facie, these two cases would appear to be covered by *In re Ogden*.[15]

It is said, however, by Mr. Pennycuick on behalf of the respondents, first, that so far as the points raised in the present appeals are concerned, the judgments of Lord Tomlin in *In re Ogden*[16] and the remarks thereon of Harman J. in *In re Gestetner Settlement*[17] are obiter dicta, and that if the line of cases, conveniently called "the relations cases," had been cited to Lord Tomlin he would not have said, as according to Mr. Pennycuick he need not have said: "If so, the bequest is bad on the "ground of uncertainty."

In *In re Deakin*[18] Stirling J. said of this line of cases, "The "law on that point is certainly in a peculiar state, and I do not "express any opinion as to whether it is entirely satisfactory or "not; I simply have to administer it as I find it." That is a plain indication that in the view of that learned judge the cases embody a principle, which, though useful, should not be extended, certainly not more than is necessary, to effect the limited purpose for which the principle was introduced.

[12] [1933] Ch. 678.
[13] [1933] Ch. 678.
[14] [1953] Ch. 672.
[15] [1933] Ch. 678.
[16] [1933] Ch. 678.
[17] [1953] Ch. 672.
[18] [1894] 3 Ch. 565, 575.

It appears to me that Mr. Cross is right when he submits that when examined all these cases are found to be examples of a mere power to distribute and not of an imperative direction as in this case. *Grant* v. *Lynam*,[19] *Salusbury* v. *Denton*,[20] *In re Deakin*,[21] *In re Scarisbrick*,[22] and *In re Jones*[23] are all examples of mere powers of distribution.

Upon this view of the matter it becomes impossible, in my view, to place any qualification upon the principle upon which, as it appears to me, the judgment in *In re Ogden*[24] proceeded: and if it be remarked as it was in argument that the relations cases were not cited in that case, the short answer can be given that that omission can be justified upon the best of all grounds: they were irrelevant.

If a reason be asked for the existence of the principle stated in *In re Ogden*[24] it is to be found, I think, in a sentence from the judgment of Harman J. in *In re Gestetner Settlement*.[25] "It may often be uncertain what objects are in existence; but, "in an ordinary family settlement, the fact that a father did "not know whether one of his sons had married and had children "or no could not possibly invalidate the exercise by him of a "power of appointment in favour of those grandchildren of whom "he did know. On the other hand, if it is the trustee's duty to "distribute the fund among a number of people, his task being to "select which of those people shall be the objects of his bounty, "then it seems to me there is much to be said for the view that "he must be able to review the whole field in order to exercise "his judgment properly."

For these reasons I come to the conclusion that these two appeals are covered by *In re Ogden*,[26] by which I am bound, but with the judgment in which and the observations thereon of Harman J. in *In re Gestetner Settlement*[27] I respectfully agree.

It follows that I must treat the trust of income in cl. 8 of the deed as void.

On this view of the matter it becomes unnecessary to consider the second point put forward by Mr. Cross on behalf of the appellant. The appeal of the Crown in these two cases will be allowed.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Boxall & Boxall.*

[19] (1828) 4 Russ. 292.
[20] (1857) 3 K. & J. 529.
[21] [1894] 3 Ch. 565.
[22] [1951] Ch. 622; [1951] 1 T.L.R. 989; [1951] 1 All E.R. 822.
[23] [1945] Ch. 105; 61 T.L.R. 120.
[24] [1933] Ch. 678.
[25] [1953] Ch. 672, 685.
[26] [1933] Ch. 678.
[27] [1953] Ch. 672.

[CHANCERY DIVISION.]

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Mar. 5, 11.

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* INNES (Inspector of Taxes) *v.* HARRISON.

Perpetuities, Rule against—Discretionary trust—No limit of time—Imperative trust to distribute trust fund among objects of fund at such time or times as trustees thought fit—Objects of fund unascertainable—Invalidity of trust—Claim for repayment of tax—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 27 (5).

Trust and Trustee—Uncertainty, trust void for. Revenue—Income tax—Repayment.

By a settlement dated May 1, 1949, the settlor covenanted to pay to the trustees thereof for a period of ten years from the date of the settlement or until the death of the settlor (whichever should be the earlier date) ("the appointed period") the sum of £2,000 per annum payable monthly without any deduction except for income tax, which constituted the trust fund.

Clause 3 of the settlement provided that the trustees should pay or apply the trust fund to or for the benefit of such one or more of the objects of the trust in such shares (if more than one) at "such "time or times" and in such manner as the trustees in their absolute discretion should from time to time think fit.

The objects of the fund comprised relatives of the settlor, including in particular the lawful children of the settlor's three daughters, persons who had at any time been or were or should at any time during the appointed period be in the employment of any company of which the settlor was at the date of the deed a director, relatives of such employees, and such other persons as the settlor should from time to time name by a deed expressed to be supplemental to the deed of settlement, but so as to exclude the settlor or any wife of his from being included in any of the objects of the trust.

J. S. H. as parent and on behalf of G. J. C. H., a grandson of the settlor and an object of the trust, appealed under the provisions of section 27 (5) of the Income Tax Act, 1918, against an objection of the inspector of taxes to a claim for repayment of tax for the years 1949–50 and 1950–51 in respect of payments made to the grandson under the terms of the settlement:—

Held, (1) that the settlement created an imperative trust to distribute the trust fund among a class of objects which was unascertainable, and that accordingly, on the principle of *Inland Revenue Commissioners* v. *Broadway Cottages Trust; Same* v. *Sunnylands Trust,* ante, p. 659, the trust was void for uncertainty;

(2) that in any event the trust was void as offending the rule against perpetuities, in that the application of the fund might be made "at such time or times" as the trustees thought fit, and that there was no ground for implying into the terms of the trust a provision that the trustees were under a duty to distribute within a reasonable period, which period could not extend to 21 years;

(3) that, accordingly, there was a resulting trust of income for the settlor; that the trust property reverted to the settlor and the income paid to the beneficiary was income of the settlor; and, accordingly, there was no right to claim reliefs.

Appeal by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

[Reported by J. A. Griffiths, Esq., Barrister-at-Law.]

The case stated set out the following facts: On February 26, 1952, John Savory Harrison as parent and on behalf of Giles John Chalmers Harrison [an infant] appealed under the provisions of section 27 (5) of the Income Tax Act, 1918, against an objection by the inspector of taxes to a claim for repayment of tax for the years 1949/50 and 1950/51 in respect of payments made to Giles John Chalmers Harrison under the terms of a deed of settlement dated May 1, 1949.

The settlement was made between Henry Rupert Hood Barrs, company director (hereinafter called "the settlor") of the one part and trustees therein named of the other part. The settlement provided, inter alia:—

"1. In this deed the following expressions shall have the "following respective meanings:—

"(*a*) 'The trustees' means and includes the first trustees "and the survivor of them and the trustees or trustee for the "time being of this deed.

"(*b*) 'The appointed period' means a period beginning on "April 6, 1949, and terminating on March 31, 1959, on the death "of the settlor (whichever shall be the earlier date).

"(*c*) 'Relatives of the settlor' means and includes all the "descendants of the settlor's grandparents (other than the settlor "himself) and the wives and husbands of such descendants (other "than any wife of the settlor).

"(*d*) 'Relatives' in relation to any person other than the "settlor means and includes all the descendants of such person's "grandparents (other than such person himself or herself) and "the wives and husbands of all such descendants (including any "wife or husband of such person himself or herself).

"(*e*) 'The objects of the trust' means and includes such of "the following individuals as shall from time to time during the "appointed period be living (that is to say):—

"(i) Relatives of the settlor (including in particular the lawful "children of the settlor's three daughters each child to receive not "less than £50 per annum): Stella Margaret Bickel, Christine "Mary Angela Harrison, and Heather Pauline Collings.

"(ii) Individuals who have at any time been or are at the date "of this deed or shall at any time during the appointed period be "in the employment of any company of which the settlor is at the "date of this deed or shall at any time during the appointed "period be a director (whether a managing director or otherwise).

"(iii) Relatives of the individuals mentioned in the last "preceding sub-paragraph.

"(iv) Such other individuals as the settlor shall from time to "time name by a deed expressed to be supplemental to these "presents PROVIDED ALWAYS that neither the settlor nor any wife "of his shall in any event be included in any of the objects of "the trust.

"(*f*) 'The trust fund' means the sums received by the "trustees under the covenant by the settlor hereinafter contained

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"and all other moneys and property (if any) from time to time "subject to the trusts hereof.

"(g) 'Benefit' includes future benefit whether contingent or "not.

"2. The settlor hereby covenants with the trustees that during "the appointed period he the settlor will pay to the trustees the "monthly sum of £166 13s. 4d. [£2,000 per annum] without any "deduction except for income tax by equal monthly payments on "the last day of each calendar month the first of such payments "to be deemed to have become due on April 30, 1949, and to be "made on the execution hereof.

"3. The trustees shall pay or apply the trust fund to or for "the benefit of such one or more of the objects of the trust in such "shares (if more than one) at such time or times and in such "manner as the trustees in their discretion shall from time to "time think fit.

"4. The discretion hereby conferred on the trustees shall be an "absolute and uncontrolled discretion and may (if and so far as "circumstances permit) be exercised from time to time. . . ."

On March 28, 1950, in exercise of their powers under the deed the trustees paid to Giles John Chalmers Harrison, who was a grandchild of the settlor, the sum of £700 less tax at 9s. in the £ amounting to £315 resulting in a net sum paid of £385.

It was contended on behalf of the respondent: (i) That the deed was a settlement within the meaning of section 41 (4) (*b*) of the Finance Act, 1938; (ii) that the objects of the trust were sufficiently certain to enable it to be enforced, and that, accordingly, the respondent as parent of Giles John Chalmers Harrison was entitled to claim personal allowances.

It was contended on behalf of the inspector of taxes: (i) That the deed of May 1, 1949, was void for uncertainty; (ii) that the objection to the repayment claim made on behalf of the infant beneficiary Giles John Chalmers Harrison was properly made, as the deed being void for uncertainty there was a resulting trust of income in favour of the settlor; (iii) that the appeal failed, and that accordingly the trust property must revert to the settlor and that the income paid to the minor was income of the settlor and, accordingly, there was no right to claim reliefs.

The Special Commissioners, allowing the appeal, held that they did not consider themselves required or competent to decide whether the deed was void for uncertainty, that the deed for the purposes of the Finance Acts, 1936 and 1938, provided for payment of sums of money by the settlor to trustees and that the deed was a settlement as defined by those Acts and the recipients of those moneys from the trustees were entitled to claim repayment of personal allowances.

The Crown now appealed from this decision.

Geoffrey Cross Q.C., *J. H. Stamp* and *Sir Reginald Hills* for the Crown.

J. A. Wolfe for the respondent.

Cases cited in argument in addition to those contained in the judgment: *In re Ogden* *; *In re Gestetner Settlement.*†

Cur. adv. vult.

WYNN-PARRY J. The judgment in *Inland Revenue Commissioners* v. *Broadway Cottages Trust* and *Inland Revenue Commissioners* v. *Sunnylands Trust* [1] covers this case also, but perhaps I ought shortly to state my views on the further point taken by the appellant in this case, namely that the trust in cl. 3 of the deed of May, 1949, offends against the rule against perpetuities because that clause provides that the application of the fund may be made "at such time or times" as the trustees may think fit: the trustees it is said cannot be compelled as to when they distribute; and further the objects of the power are not necessarily lives in being and there is nothing in the trust to confine the period to the lives of objects. If this is well taken, it is clear that the clause offends against the rule against perpetuities.

Mr. Wolfe in an endeavour to avoid this consequence submitted that I should read cl. 3 as carrying an implication that the trustees must distribute within a reasonable time, and that such a reasonable time could not extend to 21 years. I cannot accept this. Apart from the consequences of the application of the rule, there is no ground for implying any such qualification, and the fact that unless that implication is implied, the rule will apply, is no ground for making the implication.

Mr. Wolfe also contended that the case falls within the last example given by Parker J. in *In re De Sommery*,[2] where he said: "Lastly, where the settlor has used language from which "the court may fairly infer that he contemplated the creation, "not of a single power, but of two distinct powers, one of which "only is open to objection because of the rule against perpetuities, "the court will avoid the latter only and will give effect to the "power which is not open to this objection. Thus, although a "power vested in the trustees for the time being of a settlement "has, so far as I can discover, been uniformly looked on as a "single and indivisible power, it may be otherwise if the power "be limited to A and B or other the trustees of the settlement "for the time being. In this case the court may treat the "settlor as having created one power vested in A and B while "trustees, and a distinct power vested in their successors, in "which case the power vested in A and B would be open to "no objection on the ground of remoteness: *Attenborough* v. "*Attenborough.*" [3]

* [1933] Ch. 678; 49 T.L.R. 341.

† [1953] Ch. 672; [1953] 2 W.L.R. 1033; [1953] 1 All E.R. 1150.

[1] Ante, p. 659.

[2] [1912] 2 Ch. 622, 631.

[3] (1855) 1 K. & J. 296.

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I cannot see any room for the application of that last example in this case. It is true that the settlor defines Messrs. Wells and Stone as "the trustees" in the statement of the parties, but in cl. 1 (a) he enlarges the definition of "the trustees" and directs not only that it shall "include" but shall "mean" the two named persons to whom the draftsman is now constrained to refer as "the first trustees" and the survivor of and, not or, the trustees or trustee for the time being of the deed. It appears to me that the effect of that language is to create a single and indivisible trust and not two trusts, one in the first trustees and a second in future trustees.

I am therefore of the view that cl. 3 of the deed is void as offending against the rule against perpetuities.

In this case also, therefore, the appeal will be allowed.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Tyrrell Lewis & Co.*

[COURT OF APPEAL.]

C. A.

1954
Mar. 11, 19.

Evershed M.R., Denning and Romer L.JJ.

* BUSHFORD *v.* FALCO.

[Plaint No. J. 716.]

Landlord and Tenant—Rent Restriction—Personal occupation—Shop and dwelling-house let together—Dwelling-house made uninhabitable owing to war damage and failure to repair—Occupation of dwelling-house abandoned—Shop still occupied—Whether any animus possidendi on part of tenant.

In 1943 a ground floor shop with living accommodation on the two floors above which had suffered war damage was relet to the original tenant at a reduced rent upon the terms that the top floor should not be used. The tenancy agreement imposed no obligation on either party to do repairs. The tenant and his wife lived on the first floor of the premises and carried on business in the shop. No repairs were done to the premises and they steadily deteriorated. In 1948 the tenant and his wife, without informing the landlord, ceased to live on the premises but the tenant continued to carry on his business in the shop. The landlord having determined the tenancy by notice to quit, in these proceedings claimed possession:—

Held, that the fact that the tenant left the premises owing to their condition was not of itself sufficient to entitle him to continue to claim the protection of the Rent Restriction Acts; that having left the residential part of the premises without informing the landlord or making any protest as to their unfitness for habitation, he must be deemed to have abandoned occupation; that he had not shown any animus possidendi; and that the landlord was accordingly entitled to possession.

Appeal from Judge Pugh sitting at Bloomsbury County Court.

In 1943 No. 3 Camden High Street, which consisted of a ground floor shop with residential accommodation on the first and second floor, suffered war damage. The plaintiff, Ernest Charles Bushford, the owner of the premises, by an agreement contained in a letter of June 24, 1943, agreed to let the premises to the defendant, Lewis Falco (who had previously been the tenant of the premises), at the reduced rent of £75, subject to the tenant not making use of the rooms on the top floor. No obligation was imposed on the landlord or on the tenant to repair. The tenant and his wife lived on the premises, carrying on business in the shop. In 1948 the premises having deteriorated owing to the fact that no repairs had been done, the tenant, without informing his landlord, ceased to live on the premises and went to live with his wife and family elsewhere in the neighbourhood. He continued to carry on his business in the shop. By notice to quit dated September 23, 1952, the landlord determined the tenancy on or before March 31, 1953. The tenant failed to give up possession and the landlord claimed possession. The tenant claimed to be entitled to the protection of the Rent Restriction Acts. The county court judge dismissed the proceedings holding that the tenant was entitled to the protection of the Acts.

The landlord appealed. The facts are more fully stated in the judgment of Evershed M.R.

Harold Heathcote-Williams Q.C. and *Elson Rees* for the landlord.

John Montgomerie for the tenant.

The following cases were cited in argument: *Brown* v. *Brash* [1]; *Cunliffe* v. *Goodman* [2]; *Morleys (Birmingham) Ld.* v. *Slater* [3]; *Denman* v. *Brise* [4]; *John M. Brown Ld.* v. *Bestwick.* [5]

Cur. adv. vult.

March 19. The following judgments were delivered.

EVERSHED M.R. This was an action for possession of certain premises known as No. 3 Camden High Street, in London. The premises at the time of the relevant letting consisted of dwelling accommodation above the ground floor and a shop on the ground floor. It appears that the tenant had carried on a greengrocer's business in the shop for (as he said) as much as 30 years past. There was before us a written agreement dated February 27, 1937,

[1] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[2] [1950] 2 K.B. 237; (1950) 66 T.L.R. (Pt. 2) 109; [1950] 1 All E.R. 720.

[3] [1950] 1 K.B. 506; 66 T.L.R. (Pt. 1) 483; [1950] 1 All E.R. 331.

[4] [1949] 1 K.B. 22; 64 T.L.R. 335; [1948] 2 All E.R. 141.

[5] [1951] 1 K.B. 21; 66 T.L.R. (Pt. 2) 248; [1950] 2 All E.R. 338.

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for letting these premises by the landlord to the tenant for three years at a rent of £205 per annum, and containing an obligation on the tenant's part to repair. In the early part of the war the premises were damaged by enemy action and a new letting then supervened, the terms of which were contained in a letter dated June 24, 1943, written on behalf of the landlord to the tenant in these terms: "3, Camden High Street. With reference to our "recent interview with Mrs. Falco and our subsequent conver-"sation with your solicitor, Mr. Emmanuel, we confirm that your "landlord, Mr. E. C. Bushford, is prepared to accept the sum "of £75 per annum for the rent of the above premises, exclusive "of rates and subject to your not making use of the rooms on "the top floor, the rent to be payable by monthly instalments "of £6 5s. 0d. on the first day of every month. When these "rooms have been renovated and made fit for occupation and "use, the rent will be increased to £104 per annum (exclusive). "These terms are on the understanding that the rent from April 1 "last, amounting to £18 15s. 0d. is paid by Monday next, the 29th "instant. We understand from Mr. Emmanuel that you will "agree to do this on hearing from us with the terms."

As is apparent from that letter no obligation was imposed on either side to do repairs. It was also apparent that the top floor of the premises was then uninhabitable, and the tenant agreed that he would not occupy that floor, though the letter obviously contained an intimation that, in the mind of the writers, it would be restored or renovated in due course, in which event the rent would increase from £75 to £104.

The tenant and his wife proceeded to enter and live upon the first floor of the premises (which were, I gather, already dilapidated); and the condition of that first floor became progressively worse and worse until some date in or about 1948 or 1949, when the tenant and his wife departed. I say "in or about 1948 or "1949" because it is a striking and significant feature of the case that they left without apparently making any intimation, protest or other communication to or with the landlord.

The judge came to the conclusion, in the circumstances, that the landlord was not entitled to an order for possession: that the tenant, having "involuntarily" left, had not lost his rights under the Rent Restrictions legislation.

As I read his judgment, the county court judge thought that because the tenant had left the premises "involuntarily," that circumstance was, in effect, conclusive in his favour. According to the brief note of his judgment: "Tenant did not go out volun-"tarily either in fact or in law—he was forced out by circum-"stances, i.e., by the condition of [the] premises—I must hold "that the tenants retain protection, otherwise landlords could "let premises fall into a bad state of repair and thereby deprive "tenants of the protection of the Acts. . . ." Taking that view, the judge did not find as a fact that ever since his removal from

No. 3 Camden High Street, the tenant intended to return; had, that is to say, an animus revertendi or animus possidendi.

With all respect to the judge, I think his view was an over-simplification of the matter. No doubt, if a tenant is forced to leave his home by some sudden calamity, he will prima facie be regarded as doing so as a temporary expedient, meaning and intending to return as soon as possible. This will be, for example, the natural conclusion if he is compelled to leave because he is sent to prison for three months or because his house is invaded by the waters of a flood. But even so, if the absence is long, the conclusion is not inevitable. The tenant may change his mind and come to prefer a new abode. If the absence from the original home be long, the onus, according to the classic judgment of Asquith L.J. in *Brown* v. *Brash*,[1] is upon the tenant; though the circumstances may make the onus easy for him to discharge.

Moreover, in the present case the departure of the tenant was not occasioned by any sudden catastrophe. The premises were from 1943 (when the tenancy must be taken to have begun) till 1948 or 1949 (when the tenant left) in a greatly dilapidated condition. I asssume that they progressively deteriorated until the time came when the tenant and his wife, having found alternative accommodation, concluded that continued residence at No. 3 Camden High Street was no longer to be borne. At least there is no evidence to rebut what would appear, inevitably, to have been the natural course of events; and for that the tenant must be taken to be to blame; for not only did he not give any such evidence at the trial but (as the judge emphasized) he and his wife left without any communication, by way of protest or affirmation of intention to return, to the landlord. If, then, the word "involuntary" is appropriately used at all, it must be, at least, subject to qualification.

In my judgment, therefore, the fact that the tenant's departure from No. 3 Camden High Street, was attributable to the condition of the premises is not of itself sufficient to support a conclusion in his favour. As I have said, the judge did not find a continuing intention to resume occupation when the premises had been rendered fit. It is therefore necessary to look at the evidence so far as recorded in the judge's notes; and although it may well be in such cases as the present that the court should not be slow to find the onus discharged, I am unable to find or infer that the tenant here discharged it. It is true that length of absence of itself will not by any means be fatal to the tenant; and it is true also that in this case the tenant continued to pay, and the landlord to receive, the full rent— although it is plain that the tenant's main concern was and is with the business which he has for very many years carried on upon the ground floor. But the oral evidence on the tenant's side consisted of these answers

[1] [1948] 2 K.B. 247; 64 T.L.R. 266; [1948] 1 All E.R. 922.

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on his part and that of his wife. The tenant in cross-examination said: "We took over accommodation a few yards round the corner. "When shop was offered to me"—and that refers to the offer of a shop in Mornington Crescent—"I was content to go on living "where I was. I was quite comfortable where I was living." In re-examination, he said: "I am living round the corner. Very "convenient. I have two lodgers. It would be more convenient "if I lived over the shop."

The tenant's wife said in chief: "We offered him a little bit "more if he would do up the place. He said that was not "enough." In cross-examination, she said: "We wanted to "stay on until new premises built. We have been in present "place five/six years with family. It is comfortable. Rather "be on top of shop. Easier for me. He promised to put a "shop window at house in Mornington Crescent. I did not want "to go on living there"—that is, at 3 Camden High Street—"in the unfit state it is at present. I should like shop and "premises to be remodelled and then go back and live over "the shop." In re-examination, she said: "If the premises "had not deteriorated I would not have left."

In my judgment the inevitable inference from these answers is that the tenant is perfectly contented and established where he is now living and has no more than the idea or belief in his mind that if and when, if ever, No. 3 Camden High Street were sufficiently repaired or renovated he would find it more convenient for his business to live there (over the shop) than where he now is. In my judgment this is plainly not enough. If it were otherwise, then, so far as I can see, a state of permanent stalemate (as Denning L.J. observed) would in this case be achieved. The landlord is under no obligation and does not intend to repair: the tenant, likewise under no obligation, appears to have no expectation that the landlord will repair and has shown no sense of urgency or grievance. I attach, as did the judge, considerable significance to the fact that the tenant departed without any communication then or thereafter (until the present proceedings were imminent) with the landlord—a circumstance all the more remarkable having regard to the natural inference (as I think) of the terms of the letter of June 24, 1943.

In my judgment, therefore, the appeal must succeed and the landlord should have obtained an order for possession on the ground that the tenant had not explained what must, on the facts, be otherwise taken as an abandonment of occupation; that he had not shown any animus possidendi, even if the few items of furniture and clothing could otherwise constitute a corpus possessionis.

For my part I have some sympathy with the tenant who will lose the place in which he has for so long carried on his business. And I desire to add—having regard to the fears expressed by the judge—that my conclusion on the special facts of this case should

in no circumstances be regarded as an authoritative encouragement to landlords to achieve an escape from the Rent Acts by the simple expedient of inactivity in the matter of repairs. As I have said, where a tenant is for practical purposes forced to leave his home by reason of lack of repairs, he should have little difficulty, if such be the fact, in proving that his departure is regarded by him as an unwelcome and temporary removal; and to that end will normally so inform his landlord in no uncertain terms on the occasion of his going. In such a case, even if the landlord is under no contractual obligation to repair and cannot be compelled by statute to do so, he should be left with the realization that he cannot hope to make his passivity the means of getting an order for possession.

DENNING L.J. It would be strange if the tenant here were held to be protected; because it would mean that the dwelling-house would be rendered forever sterile. The tenant cannot live in it because it is not fit for human habitation. The landlord cannot pull it down and rebuild because he cannot get possession. The only people who could end the stalemate would be the local authority by exercising their powers under sections 9 and 12 of the Housing Act, 1936. They could do one of two things: they could either direct the landlord to make the place fit: or they could make a closing order. But there is no sign of their doing either.

In my opinion, however, there is no such stalemate, because in the special circumstances of this case the tenant is not protected. He left the dwelling-house without a word to the landlord. He never protested to anyone about its unfitness. He has been gone so long that he can no longer be credited with an intention to make it his home. He is therefore not protected by the Acts. It would have been very different if he had complained of its unfitness and shown some desire to go back once it was made fit.

I agree that the appeal should be allowed.

ROMER L.J. I agree so fully with the judgments which my brethren have delivered that there is nothing I myself can usefully add.

Appeal allowed.

Solicitors: *Scadding & Bodkin; W. R. Bennett & Co.*

B. A. B.

[COURT OF CRIMINAL APPEAL.]

C. C. A.

1954
Apr. 5.

Lord Goddard C.J., Hilbery and Pearce JJ.

* REGINA *v.* SEYMOUR.

Criminal Law—Larceny—Receiving—Alternative counts—Indictment—Evidence consistent with either—Both counts to be included in indictment—Jury to be discharged from giving verdict on alternative count—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 5 (2).

In cases where the evidence is as consistent with stealing as with receiving, the indictment ought to contain a count both for stealing and receiving. The jury should then be directed that it is for them to come to the conclusion whether the accused was the thief or whether he received the property from the thief and they should be reminded that a man cannot receive from himself. Having found the accused guilty of one offence, they should then be discharged from giving a verdict on the alternative count.

Appeal against conviction.

The appellant, Alfred James Seymour, was charged at Reading Quarter Sessions on January 19, 1954, on an indictment containing one count of receiving a single-barrel shotgun knowing it to have been stolen. He was convicted and sentenced to three years' imprisonment.

The ground of appeal was that the evidence against the appellant was only consistent with his having stolen the gun and, there being no count charging him with stealing, he was entitled to be acquitted.

Leo Clark for the appellant.
K. G. I. Jones for the Crown.

In addition to the cases referred to in the judgment, the following case was cited in argument: *Regina* v. *Langmead.**

Lord Goddard C.J. There is a tendency nowadays where there is no positive evidence that a man stole goods, that is to say, no evidence of seeing him go into a shop or of running away or of finding his fingerprints, but he is found in possession of stolen property shortly after it was stolen so that it can be fairly said that he is in recent possession, to think that that only justifies a verdict of receiving and not of stealing. We tried to correct that view in *Rex* v. *Loughlin*,[1] the headnote to which reads: "Where it is proved that premises have been broken into and "property stolen therefrom, and that very soon after the breaking "the prisoner has been found in possession of that property, it is "open to the jury to find the prisoner guilty of breaking and "entering, and the jury should be so directed." The jury in that case had been directed that they should only find the accused guilty of receiving, and so we quashed the conviction. Similarly,

* (1861) Le. & Ca. 427.

[1] (1951) 35 Cr.App.R. 69.

where it is proved that property has been stolen and that very soon after the stealing the accused has been found in possession of the property, it is open to the jury to find the accused guilty of stealing, and the jury should be so directed.

It is necessary in these receiving cases that it should be explained to the jury that, if the charge against a man is one of receiving, they must be satisfied that he received the property from somebody else. It may very likely be that it cannot be said who the other person was because the thief is not known. For instance, supposing some stolen property is found in the possession of a shopkeeper who deals in that particular property, the jury are entitled to say, "He did not steal the property himself; "but we think he is a 'fence'; he deals in that type of pro-"perty": perhaps he is a jeweller of not unimpeachable character; he is in possession of the property and the jury are entitled to think he has bought the property from the thief. But there are a great many cases where I do not think anybody could have any doubt that the person found in possession of the property was the thief; but if he is the thief he cannot be found guilty of receiving because a man cannot receive from himself.

In the present case, for some reason or another the indictment only charged the appellant with receiving. The evidence was that on November 7 or 8, 1953, a Belgian folding gun was stolen from a hut on an allotment. The next thing known about that gun was that it was in the possession of the appellant a few days after the theft, within such a time that the doctrine of recent possession could be applied to it. The evidence was overwhelming that the gun stolen was the one found in the appellant's possession. Mr. Clark, in his address to the jury, suggested that they might come to the conclusion that the appellant was the thief; but that if he was the thief they could not find him Guilty on this indictment, which charged him only with receiving.

In my opinion the right verdict in this case would have been one of larceny, but the recorder, having put Mr. Clark's case to the jury, said: "Well, members of the jury, there is no evidence "before you that he stole the gun, except, maybe, that it was in "his possession. He was not seen near the premises, and what is "more, of course, you are entitled to take at its face value the "statement that he made to Mr. Green, that his stepson had "received it"—the statement he had made to Mr. Green was that his stepson had received another gun altogether, not the folding gun. Then he went on: "As there has been no explana-"tion by the prisoner of how he came by that stolen gun, you "will probably have little difficulty in drawing the inference that "he knew, when that gun came into his possession, that it was "stolen property." That is simply a direction and a quite proper direction, as far as it goes on receiving and not stealing at all.

The court desires to lay this down: In cases where the evidence is as consistent with stealing as with receiving, the

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indictment ought to contain a count both for stealing and for receiving. The jury should then be directed that it is for them to come to the conclusion whether the accused was the thief or whether he received the property from the thief, and they should be reminded that a man cannot receive from himself. Then, to prevent other difficulties which have sometimes arisen, if the jury come to the conclusion that it is a case of receiving, they should be discharged from giving a verdict on the stealing count. Equally, if they come to the conclusion that it is stealing, they should be discharged from giving a verdict on the receiving count. Sometimes we have had to quash a conviction, say, for receiving because the court has come to the conclusion that the evidence showed that the offence committed was stealing and not receiving. If a verdict has been returned on the stealing count, this court cannot substitute for the verdict of receiving a verdict of stealing, as it can under section 5 of the Criminal Appeal Act, 1907, if the jury have been discharged from giving a verdict on the stealing count. In the present case we cannot alter the verdict from receiving to stealing because there was no charge of stealing in the indictment.

This question came before this court, in addition to *Loughlin's* case,[2] in *Rex* v. *Christ*.[3] It is much better as a rule to put into these indictments both counts, although as the case develops, it may become one either of stealing or receiving. In *Regina* v. *Eden and Melvin*[4] this court was put into a grave difficulty. In that case there had been a serious burglary, and the appellants were caught with a lorry in which was the stolen property. For some reason or another, the jury found them Not Guilty of stealing, but Guilty of receiving. The evidence was that the prisoners stole the property, but we could not alter the verdict because of the verdict on the stealing count. In the present case, although it is a pity that a guilty man should escape the consequences of his crime, the conviction must be quashed.

Appeal allowed.

Solicitors: *Registrar, Court of Criminal Appeal; Sheppard & Fullbrook, Reading.*

J. D. P.

[2] 35 Cr.App.R. 69.
[3] [1951] 2 T.L.R. 85; [1951] 2 All E.R. 254n.; 35 Cr.App.R. 76.
[4] [1953] 1 Q.B. 481; [1953] 2 W.L.R. 274; [1953] 1 All E.R. 294.

[PRIVY COUNCIL.]

* JOHN ADEBAYO . . . . . APPELLANT;

AND

OFFICIAL RECEIVER OF NIGERIA . . RESPONDENT.

J. C.†

1954
Apr. 6.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria)—Company—Winding up—Voluntary—Proposed reconstruction—One-man company—Nominee liquidator—Order for compulsory winding up—Evidence of creditors shut out—Discretion not properly exercised—Companies Ordinance (Laws of Nigeria, 1948, *c.* 38), *ss.* 132 (2), 140.

Company—Winding up.

A limited company incorporated under the laws of Nigeria resolved that it should be wound up voluntarily (with a view to reconstruction), and appointed as liquidator the appellant, who thereafter filed a motion for an order that he might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme for reconstruction. Before that motion was disposed of the Official Receiver, the respondent, presented a petition praying that the company should be wound up by the court under section 132 (2) of the Companies Ordinance, c. 38 of the Laws of Nigeria, 1948. The appellant had in the meantime applied for subpoenas on a number of persons whom he wished to call as witnesses and filed a number of affidavits of creditors who were prepared to give evidence. On the hearing of the petition it was stated by the judge that the company was virtually a one-man company and that the appellant was the nominee of the shareholder who had complete control of the company; that no fraud was alleged by the Official Receiver, but that it would be contrary to public interest and against the interest of creditors generally to allow a company to continue a voluntary winding up in those circumstances; and that he saw no reason to call evidence. He accordingly ordered the company to be compulsorily wound up. On appeal by the liquidator:—

Held, that it did not necessarily follow that, because a company was controlled by one shareholder of whom a liquidator in a voluntary liquidation might be regarded as the nominee, a voluntary winding up could not be continued with due regard to the interests of the creditors. In the light of sections 132 (2) and 140 of the Companies Ordinance and in the circumstances of the present case the wishes of the creditors were relevant matter for consideration, and the liquidator should have been allowed to lead the evidence which he desired to call and, he having been refused that opportunity, it could not be said that the trial judge was in a position properly to exercise a discretion to order a compulsory winding up, and there would be a re-trial of the petition.

In re Medical Battery Company [1894] 1 Ch. 444 distinguished on the ground that the liquidator in that case was clearly not in a position to act impartially in the interests of unsecured creditors.

Judgment of the West African Court of Appeal set aside.

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† *Present*: LORD OAKSEY, LORD KEITH OF AVONHOLM, and SIR LIONEL LEACH.

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Appeal (No. 35 of 1953) from a judgment of the West African Court of Appeal, sitting at Lagos (May 18, 1953), affirming in part a judgment of the Supreme Court of Nigeria (Lagos Judicial Division) (February 6, 1953).

The following facts are taken from the judgment of the Judicial Committee: This appeal arose out of the liquidation of a company under the Companies Ordinance, chapter 38 of the Laws of Nigeria, 1948. The Nigerian Farmers and Commercial Bank Ld. was a limited liability company incorporated under the laws of Nigeria and having its registered office in Lagos. By extraordinary resolutions passed at an extraordinary general meeting held on December 12, 1952, it was resolved: "(1) That the "Nigerian Farmers and Commercial Bank Ld. cannot, by reason "of its liabilities and other difficulties, continue its business and "that it is advisable to wind up the same and that the company "be wound up voluntarily accordingly. (2) That Mr. John "Adebayo, English accountant of No. 4, Coates Street, Ebute "Metta, Nigeria, and Mr. Charles D. Gairdner, chartered account-"ant, of No. 23, Lawrence Lane, London, W.C.2, be and they "are hereby appointed liquidators of the company to conduct the "winding up."

Mr. Adebayo was appointed to act in respect of the assets of the company in Nigeria, and Mr. Gairdner, in respect of the assets in the United Kingdom.

At the statutory meeting of creditors held on December 29, a Mr. Akintola Williams, chartered accountant, was appointed as joint liquidator in place of Mr. Gairdner. Mr. Williams subsequently declined to act. At the same meeting a further resolution was passed that "Whereas it is the opinion of the majority of the "creditors that the said bank should be reconstructed and that it "should resume normal business and that a compromise be "arrived at for the benefit of creditors. Be it resolved therefore "that the aforesaid Nigerian Farmers and Commercial Bank Ld. "in liquidation be reconstructed and that Mr. John Adebayo of "4, Coates Street, Ebutte Metta, and Akintola Williams, char-"tered accountant, liquidators are hereby instructed to convene "special meeting according to law for the purpose of discussing "and approving the scheme of reconstruction and compromise."

A protest was recorded by a Mr. A. M. Ferguson, who represented a number of creditors who had forwarded bills for collection by the bank, on the ground that the minute did not accord with the provisions of section 181 (2) of the Ordinance and was ultra vires, and that the vote was not properly conducted in that creditors by number and value were not identified.

On December 31, 1952, the appellant (hereafter referred to as the liquidator) filed a motion for an order that he might be at liberty to convene meetings of creditors for the purpose of discussing and approving a scheme or schemes of arrangement

(reconstruction) and compromise to be drawn up, and that directions be given as to the method of convening the meeting and for any further order or orders.

Before that motion was disposed of the Official Receiver (the respondent in this appeal) presented a petition to the court praying that for reasons set out therein the bank should be wound up by the court under section 132 (2) of the Companies Ordinance, that the petitioner be appointed liquidator and that Mr. Adebayo be ordered to hand over all books, papers and other documents in his possession relating to the affairs of the company, together with an account of his dealings with the affairs of the company since the date of his appointment. That petition was accompanied by an affidavit of the Official Receiver and various annexures, including a letter dated January 9, 1953, received by the Official Receiver from Mr. Ferguson.

After sundry procedure the motion of the liquidator of December 31, 1952, and the petition of the Official Receiver came up for further hearing on February 4, 1953. In the meantime the liquidator had filed a counter-affidavit and had applied for subpoenas on 36 persons whom he wished to call as witnesses, and filed a number of affidavits of creditors who were prepared to give evidence.

At the hearing on February 4 before Gregg J. counsel for the liquidator asked for an adjournment to hear witnesses, and stated that the whole purpose of the voluntary liquidation was reconstruction. He also stated that he wished Mr. Ferguson to be called. Counsel for the Official Receiver supported his petition and opposed an adjournment. Gregg J. adjourned the petition to February 6, stating that he would give his decision on whether evidence would be taken in this matter or whether the Official Receiver's petition would be granted forthwith on that date.

A motion for the liquidator for leave to appeal against that order was made and refused on February 6. On the same date the judge gave his decision on the adjourned petition. He stated in his judgment that there was no denial of three important averments made by the Official Receiver in his petition. Those were (1) That the directors of the company were Mr. Adebayo Shobayo Olumuyiwa Coker and Mr. Tijani Afolabi Adeosun; (2) that the issued capital of the company was £25,194 made up of 500 preference shares and 24,694 ordinary shares; (3) that Mr. Coker held the whole of the 500 issued preference shares and 24,455 of the 24,694 ordinary shares.

That last averment meant, he said, that the company was virtually a one-man company and that the liquidator was the nominee of Mr. Coker who had complete control of the company. "On these facts," he added, "which are in themselves sufficient, "in my opinion, to justify a winding up by the court, I see no "reason to call evidence; and that being so I do not think it "necessary to allow evidence to be called in relation to other "matters. . . . No fraud is alleged by the Official Receiver;

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"but in my opinion it would be contrary to public interest and "against the interest of creditors generally to allow a company "to continue a voluntary winding up under the circumstances "mentioned." He accordingly ordered the company to be wound up by the court.

Against that judgment an appeal was taken by the liquidator to the West African Court of Appeal (Foster Sutton P., Verity C.J. (Nigeria) and Coussey J.A.). The judgment of the court was given on May 18, 1953, dismissing the appeal on the only point with which the present appeal was concerned, viz., the order for a compulsory winding up. Foster Sutton P., who delivered the judgment of the court, said that it was a well-settled principle that the court would not interfere with an exercise of discretion, as this was, by a lower court unless it had proceeded upon a manifestly wrong ground. In his view the grounds stated by the trial judge were sufficient to entitle him to exercise his discretion in favour of making a compulsory order. He referred to *In re Medical Battery Co.*[1] as illustrating an order made by Vaughan Williams J. on similar grounds. From that judgment the present appeal was taken.

1954. March 23, 24. *Granville Sharp Q.C.*, *T. B. Ramsay* and *E. Gardiner Smith* for the appellant.

R. O. Wilberforce for the respondent.

The following cases were cited in argument: *In re Charterland Goldfields Ld.*[2]; *In re 1897 Jubilee Sites Syndicate*[3]; *In re Haycraft Gold Reduction and Mining Co.*[4]; *In re Gutta Percha Corporation*[5]; *In re E. Bishop & Sons Ld.*[6]; *In re Home Remedies Ld.*[7]

April 6. The judgment of their Lordships was delivered by Lord Keith of Avonholm, who stated the facts set out above, and continued: The proper procedure was for an application to be made to the court for the appointment of Mr. Williams as joint liquidator, but as he subsequently declined to act, and as this matter does not enter into the appeal, their Lordships make no further reference to it.

Their Lordships have arrived at the conclusion, looking to the procedure followed before the trial judge, that the judgments of the Court of Appeal and of the trial judge cannot stand. In their Lordships' opinion the liquidator should have been allowed to lead the evidence which he desired to call and, he having been refused that opportunity, it cannot be said that the trial judge

[1] [1894] 1 Ch. 444.
[2] (1909) 26 T.L.R. 132.
[3] [1899] 2 Ch. 204; 15 T.L.R. 391.
[4] [1900] 2 Ch. 230; 16 T.L.R. 350.
[5] [1900] 2 Ch. 665.
[6] [1900] 2 Ch. 254.
[7] [1943] Ch. 1; 59 T.L.R. 31; [1942] 2 All E.R. 552.

was in a position properly to exercise a discretion to order a compulsory winding up.

Section 132 (2) of the Companies Ordinance is as follows: "Where a company is being wound up voluntarily or subject to "supervision, a petition may be presented by the Official Receiver "attached to the court, as well as by any other person authorized "in that behalf under the other provisions of this section, but "the court shall not make a winding-up order on the petition "unless it is satisfied that the voluntary winding up or winding "up subject to supervision cannot be continued with due regard "to the interests of the creditors or contributories." Reference should also be made to section 140 which reads: "The court may, "as to all matters relating to a winding up, have regard to the "wishes of the creditors or contributories as proved to it by any "sufficient evidence."

In the light of these sections and in the circumstances of the present case it appears to their Lordships that the wishes of the creditors were relevant matter for consideration. It was said that the evidence was intended only to prove a desire by the creditors for reconstruction of the company. Even if this be so, it seems to their Lordships to be immaterial, as the creditors may still prefer reconstruction to be carried out under a voluntary winding up. There may also be other matters arising out of the affidavit and counter-affidavit on which the Official Receiver or the liquidator may wish to lead evidence, including the position of Mr. Ferguson. Their Lordships would leave this entirely open to the parties.

With regard to the ground of judgment on which both the trial judge and the Court of Appeal proceeded, their Lordships would point out that it does not necessarily follow that, because a company is controlled by one shareholder and a liquidator in a voluntary liquidation may be regarded as a nominee of that shareholder, a voluntary winding up cannot be continued with due regard to the interests of the creditors. In *In re Medical Battery Co.*[1] there were circumstances clearly sufficient to disqualify the liquidator from acting as an independent party. The control of the company and of the debenture holders was in the hands of the managing director and his family, and the liquidator was also receiver for the debenture holders. In these circumstances he was not in a position to act impartially in the interests of the unsecured creditors. Their Lordships do not find it necessary to enter more fully into this aspect of the present case or to examine the other authorities cited on this point, as any question of prejudice to creditors will have to be considered anew in the light of all the evidence which may be made available at a new trial.

A question was raised whether the wishes of creditors should not be ascertained by meeting directed under section 209 of the

[1] [1894] 1 Ch. 444.

J. C.
1954
Adebayo v. Official Receiver of Nigeria.

Ordinance. That is not, in their Lordships' opinion, a matter on which they should give any direction. The question will, if raised, have to be considered by the judge who takes the retrial.

In these circumstances their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the orders of the Court of Appeal and of Gregg J., and to order a retrial of the petition. The respondent must pay the costs of this appeal and of the hearing in the West African Court of Appeal. The costs of the hearing before Gregg J. shall abide the decision on the retrial.

Solicitors: *Burchells; Charles Russell & Co.*

C. C.

[QUEEN'S BENCH DIVISION.]

1954
Mar. 31; *Ap.* 1.

Denning L.J. (sitting as an additional judge in the Queen's Bench Division).

*DEVINE *v.* BRITISH TRANSPORT COMMISSION.

PRACTICE NOTE.

Practice and Procedure—Medical report—Agreed report—Attempt to agree—Plaintiff's reports submitted to defendants at defendants' request—Implied understanding for defendants to reciprocate.

The plaintiff was employed by the defendants to operate an electric mincing machine in one of the defendants' canteens. In April, 1950, she fell from a chair on which she was standing while operating the machine and sustained injuries. She sued her employers for damages for personal injuries, alleging negligence.

At the summons for directions under R.S.C., Ord. 30, the usual order was made that unless a medical report be agreed between the parties medical evidence be limited to two witnesses on each side. The report was not agreed.

F. W. Beney Q.C. and *L. I. Stranger-Jones* for the plaintiff. In response to requests by the defendants' solicitors, and in an attempt to obtain an agreed report, the plaintiff's solicitors made their medical reports available to the defendants' solicitors, but the defendants' solicitors refused to show the plaintiff's solicitors copies of the medical reports obtained by the defendants.

R. Marven Everett Q.C. and *H. Tudor Evans* for the defendants. The sending of a medical report does not imply an obligation upon the recipient to exchange his own report. It is sent in the hope that it will be agreed and so the party on whose behalf it is sent will be allowed to discharge the onus of proof upon him without calling medical witnesses. Parties should not be penalized because their advisers have bona fide refused

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[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

to discuss the medical evidence because they consider medical evidence should be called.

DENNING L.J. A question has arisen as to what should happen when one party gives the other a copy of his medical report. Is there any obligation on the other to reciprocate and also show his report? That must depend on the arrangements made at the time, but in the ordinary case where one party, usually the defendant, intimates that he would like to see the plaintiff's medical reports for the sake of attempting to agree them, I am clearly of the opinion that there is an implied understanding that the defendants shall in their turn duly show the plaintiff their medical reports. It would be most unfair that one side should disclose his medical reports and that the other side should not.

There is no suggestion of any intention to act improperly in this case; quite the reverse. Indeed, the solicitor for the defendants, when he refused to disclose his own medical reports, added an undertaking of his own that the defendants would not make use of the information that they had received from the plaintiff. That was done in a praiseworthy endeavour to act quite fairly; but there was nothing to compel the defendants to give such an undertaking and it does not affect the position. The proper course to adopt, if one side produces his medical reports for inspection, is for the other side to reciprocate and do the same. If the reports are agreed, they can be used by the court at the trial and the medical witnesses need not be called. If the reports are not agreed then the medical witnesses must be called. Sometimes the medical reports contain matters which go outside the strict medical issues, such as introductory matters, or a history of the case. When the parties make an attempt to agree, there is no need to include such matters. The medical reports can be confined to the medical issues strictly so called.

I would add that there is no legal duty on the parties under this form of order to attempt to agree. It is a matter for the discretion of their legal advisers. It is to be hoped that in most cases they will attempt to agree for the sake of saving costs and the time of the doctors; but in a serious case it is often of great help to the court to see the medical men themselves.

In this case I think that the defendants ought to have produced their medical reports beforehand, but I will, in the course of the trial, make sure that no prejudice is suffered by the plaintiff by that omission.

Solicitors: *H. R. Hodder & Son; M. H. B. Gilmour.*

[COURT OF APPEAL.]

C. A.

1954
Mar. 10, 11.

Singleton, Jenkins and Hodson L.JJ.

* HEALEY *v.* A. WADDINGTON & SONS LD., C. B. ALLOT & SON (A FIRM), AND NATIONAL COAL BOARD.

[1953 H. No. 144.]

Practice and Procedure—Consolidation of actions—Personal injuries—Order for consolidation on issue of liability—Right of plaintiffs to separate representation preserved—Order for costs for solicitors appearing without counsel—R.S.C. Ord. 49, *r.* 8.

Eight legally aided plaintiffs claiming damages arising from an accident in a pressure chamber during mining operations under the sea issued separate writs against three defendants, who were respectively the contractors employing the workmen killed or injured in the accident, a firm of technical consultants to the occupiers, and the occupiers, the National Coal Board. The defendants applied to the master in chambers for an order for consolidation and trial of all the actions together, and the master made that order, providing that one statement of claim should be delivered on behalf of one of the plaintiffs, to include the special damages of each of the other plaintiffs, with separate issues as to damages. On appeal from that order by one of the plaintiffs, the judge in chambers set it aside and ordered that the action of another plaintiff be tried first as a test action, all the other actions to be stayed meanwhile. On appeal by the technical consultants from that order:—

Ordered, with consent of all the parties, that all the actions should be consolidated until determination of liability, with liberty to each plaintiff to apply in the consolidated action for separate representation if any question arose which appeared to put him or her in a position different from the other plaintiffs; that particulars as to injuries and damage of each plaintiff should be delivered with the consolidated statement of claim; that if the plaintiff succeeded in the consolidated action against any or all of the defendants, the court should fix a date to determine the quantum of damages for each plaintiff, in respect of which each might be separately represented; and that the costs of the appeal should be costs in the cause, and should include special allowances for solicitors attending without counsel.

Order of Gerrard J. varied.

INTERLOCUTORY APPEAL from order of Gerrard J.

On July 4, 1952, eight workmen employed by contractors, A. Waddington & Sons Ld., the first defendants, were carrying out contract work at the Point of Ayr Colliery for the occupiers, the National Coal Board, the third defendants, to whom the second defendants, C. A. Allot & Son, were technical engineering consultants. The work, which consisted in pushing a seam out under the sea, was being done in a sealed pressure chamber, when an accident occurred, resulting in the death of six of the workmen and injuries to the other two. The widows of the six men killed and the two injured workmen issued separate writs against all three defendants, claiming damages in respect of the accident. Four of the plaintiffs were represented by one firm of solicitors, and the other four by four other firms of solicitors.

The defendants applied to Master Baker in chambers for an order that all the actions should be consolidated and tried

together; and on January 12, 1954, the master made an order to that effect, providing "that there be one statement of claim "to be delivered by Messrs. Rhys Roberts & Co. on behalf of the "plaintiff (Dorothy May) Hill, to include the special damages of "each plaintiff; and that there be separate issues as to damages."

One of the plaintiffs, William Healey, appealed from that order to the judge in chambers, and on that hearing, on February 5, 1954, the other plaintiffs supported Healey in contending that it would be preferable not to have the actions consolidated. Gerrard J. thereupon ordered that one of the actions, that of the plaintiff Joyce Marion McPartland, in which all the possible issues on liability appeared to arise, should be tried first as a test action, and that all the other actions be stayed meanwhile. The judge gave leave to the defendants to appeal from that order.

The second defendants appealed. The National Coal Board was represented on the appeal and counsel for the second defendants stated that though the first defendants did not appear they supported his appeal.

Gilbert Paull Q.C. and *Stephen Chapman* for the second defendants. The master's order for consolidation was the correct order. There will be a lengthy trial on the issue of liability, with many facts in dispute, and a number of technical witnesses on the question of causation. There is nothing in the order of Gerrard J. requiring that the other plaintiffs shall be bound by the decision in the test action. The second defendants, who say that they are not liable, are in consequence much perturbed at the possibility of eight separate trials on the issue of liability, possibly at different times and in different places, with different judges trying the issue as to quantum. That might result in an enormous increase in costs. It is desirable if possible to avoid such a contingency, though it is conceded that the right of each plaintiff to be represented by counsel of his or her own choosing on the issue crucial to them, namely, that of damages, must be preserved. R.S.C. Ord. 49, r. 8, provides: "Causes or matters pending in the "same division may be consolidated by order of the court or "a judge in the manner in use immediately before November 1, "1875, in the Superior Courts of Common Law"; and the note in the Annual Practice (1954 ed. at p. 875) on "Con-"solidation of Actions for Personal Injuries" reads: "In *Brady* "v. *McDonald* [1] the Court of Appeal in Northern Ireland consoli-"dated two actions for personal injuries by different plaintiffs "against the same defendant, directing that there should be "separate issues as to damages, and making a special order as "to costs." In that case the court said that it would be right and proper on the separate issue of damages for separate counsel to appear for each plaintiff; though, if the proper order in the present case is for consolidation, the plaintiffs might have to be

[1] [1931] N.Ir. 345.

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content with one counsel putting forward the issues on liability for all of them.

The effect of the order and the note is that the actions should be tried as one action, with one set of pleadings and particulars, one setting down for trial, and one solicitor in charge; and if liability is found against the defendants or any of them, each plaintiff will then be entitled by separate counsel to call any evidence or to address the court on the quantum of damages. That will preserve the plaintiffs' rights, and also do justice to the defendants.

The procedure here asked for has frequently been followed in Admiralty actions on claims for damages for salvage, when everyone who can assist the plaintiff comes into court. That has been done without consent and indeed in the face of opposition. But in neither the Queen's Bench Division nor in the Chancery Division is any authority discoverable for a consolidation order being made or refused in similar circumstances. The matter is wrapped in mystery, though counsel has been informed that an order for consolidation is often made by masters against the wishes of plaintiffs.

[Singleton L.J. There has always been a division of opinion on the point. The general principle is that provided there is adequate protection for the plaintiff there should be consolidation.]

In a consolidated action costs follow the event, and the master has a discretion to allow reasonable costs. As a result of what this court might say, it may be considered reasonable to allow as part of the costs of the action any communication between the solicitors acting for the other seven plaintiffs and the solicitor who puts the figures on the record.

[Jenkins L.J. Compromise arrangements are sometimes made directing that all the actions shall appear in the list on the same day; they are all called on together; everyone hears what is said on liability; and then the individual cases are proceeded with.]

But that would not prevent eight sets of costs running at the same time, with eight counsel being briefed in the whole case, and eight sets of every document, whether necessary or not.

A further possibility arises that different obligations may be owed by the different defendants to different plaintiffs under various statutes, or that there might be a defence available against one plaintiff which is not available against another. That would not necessarily emerge in a test action, but would be brought out clearly in the one consolidated statement of claim. Although it is too early in the present proceedings to know whether that possibility will materialize, it should be a matter for consideration on this appeal.

[Singleton L.J. Unless it is known that the issues are the same, an order for consolidation should not be asked for.]

That was the position under the old order; but now, provided that there are common facts, orders for consolidation are made

even if the issues are entirely different: see *per* Scrutton L.J. on joinder of parties and causes of action in *Bailey* v. *Marchioness Curzon of Kedleston*; *Same* v. *Duggan*,[2] where the causes of action were entirely different.

The appellants would be content to have the actions consolidated up to the point of trial. Before the judge in chambers the chief objection to the consolidation order was that there is no provision in the Legal Aid Act, 1949, and the regulations made thereunder, for such a course, and the plaintiffs are all now legally aided. It would be a strange result if legal aid required eight different actions and eight sets of costs. Moreover, the second defendants would have little chance of recovering costs from the plaintiffs if they were successful.

[JENKINS L.J. Is it not one of the rules that the court shall have no regard to legal aid on the question of costs?]

Yes.

The judge selected a particular action as the test action, because it appeared to be the strongest case on the issue of liability. There is no justification for such a choice, for it may do injustice to the defendants.

The present appellants ask for an order that the question of liability be determined first in an action consolidated for that purpose only; that particulars of damages as claimed by each plaintiff be delivered at the same time as the consolidated statement of claim; and that each separate issue of damages be determined by the trial judge one after the other.

Kenneth G. Jupp for the plaintiff Healey. Gerrard J. chose the particular test action not only because it appeared to raise every possible issue on liability but also because the solicitors for that plaintiff also represented three of the other plaintiffs. The result of consolidation, so far as costs are concerned, will be no different from that of a test action. Even on a consolidated action each plaintiff is entitled to be separately represented.

Counsel present for the plaintiffs before Gerrard J. understood his order as intending that all the other actions should be stayed meanwhile and that no costs would run in respect of them until the test action was decided; that if the plaintiff failed in the test action, the other plaintiffs would fail also unless the judge made an order that the test action had not been a proper trial of the other actions. That procedure might ultimately save costs.

If the actions are consolidated the plaintiffs will have to be satisfied that if there is any differentiation between them on the issue of liability it shall be brought out clearly in the one action.

One of the grounds on which consolidation is allowed is that of convenience. There may be a question of interpretation of the Legal Aid Act and the regulations on how solicitors may appear and be paid 85 per cent. of their costs out of the fund. The certificates now outstanding would have to be revoked and other certificates issued. If solicitors incur any costs on behalf of any

[2] [1932] 2 K.B. 392, 397; 48 T.L.R. 283.

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plaintiff other than their own, they may not be able to recover those from the fund in so far as they affect the other seven plaintiffs. Therefore, it is submitted, a test action is more suitable and convenient.

Michael Parker for the plaintiff Thompson. The balance of convenience is on the side of a test action and against consolidation.

[Singleton L.J. There is much to be said for the principle of separate representation. The court can make an order for consolidation on the issue of liability and separate representation on the issue of damages, and so vary the order of the judge; but it is desirable that if such an order is made it shall be done by consent of all the parties.]

J. R. Pickering for the National Coal Board. The board will agree to the proposal of the court. They would think it right that each plaintiff should have separate representation on the issue of damages in an action of this character.

March 11. The following order was made by the court, the parties having previously agreed the terms thereof:—

"(1) That Actions 1953 M. No. 172; 1953 M. No. 171; 1953 "T. No. 82; 1953 T. No. 81; 1953 D. No. 80; 1953 H. No. 143; "1953 J. No. 960 be consolidated with Action 1953 H. No. 144 "up to determination of liability.

"(2) Liberty to apply in the consolidated action for separate "representation if any question arises which appears to put one "plaintiff in a different position from other plaintiffs.

"(3) Particulars as to injuries and damage of each plaintiff "to be delivered with statement of claim in consolidated actions "within 28 days.

"(4) When liability determined if plaintiff succeeds against "all or any defendants, the court to fix a date to determine "question of quantum of damages for each plaintiff, in respect "of which each plaintiff may be separately represented.

"(5) That the costs of this appeal be costs in the cause, "such costs to include special allowances for solicitors attending "without counsel.

"(6) Liberty to apply in chambers."

Appeal allowed.
Order of Gerrard J. varied, the parties consenting thereto.

Solicitors: *Berrymans for Barrell & Co., Liverpool; Donald H. Haslam; Field, Roscoe & Co. for Isaac Edwards & Owens, Rhyl; Rhys Roberts & Co. for Llewellyn-Jones, Armon Ellis & Owen, Rhyl; Layton & Co. for Wayman-Hales, Chester; Geo. Thatcher & Son for J. Kerfoot-Roberts & Son, Holywell; Robbins, Olivey & Lake for Wilding, Earley & Pegge, Manchester.*

M. M. H.

[CHANCERY DIVISION.]

* PRACTICE DIRECTION (WITNESS LIST).

1954
Apr. 2.

Practice and Procedure — Trial — Witness list — Chancery Division — Length of trial—Date of hearing.

The following practice direction will take effect with regard to witness actions and proceedings set down for hearing on and after Tuesday, April 27, 1954, in substitution for the practice direction dated March 20, 1952, printed in [1952] W.N. 170. It has been framed with a view to ensuring so far as possible that an action comes on for hearing on a definite day related to the date on which it was set down for trial.

1. There will be one witness list only of cases awaiting trial.

2. Within 10 days of setting down an action the solicitors for each party separately represented must lodge with the cause clerk at Room 136 a certificate (signed by counsel if the pleading was settled by counsel) stating the length of time the trial is expected to occupy. This certificate may be sent by post if desired, and a single certificate, signed by all the counsel concerned, should be lodged whenever this course is practicable.

3. An action will appear in the list 23 days after being set down. The date on which it will come on to be heard will be fixed by the court of its own motion, and this date, and the length of time allotted to the case, will be indicated in the list. The date fixed will not be earlier than 21 days after the first appearance of the case in the list.

4. The periods of 10 days (paragraph 2) and 23 days (paragraph 3) will be calculated by reference to the sittings of the courts as prescribed by Ord. 63, r. 1, periods during which the courts are not sitting being excluded.

5. If circumstances affecting the probable length of a case appearing in the list arise, notice of the fact, and, where appropriate, a revised estimate of the length of the hearing, must be given promptly to the cause clerk, who will note it and transmit it to the clerk of the judge in charge of the list.

6. All applications with regard to cases appearing in the witness list are to be made to the judge notified in the daily cause list as the judge in charge of the list. If, upon the settlement of any such case, no order is required, immediate notification of the settlement, signed by the solicitors for all parties, must be left with the cause clerk for transmission to the clerk of the judge in charge of the list, when the case will be struck out of the list.

7. A party intending to apply for an alteration of the date fixed for the trial of a case shall give not less than 48 hours' notice in writing (*a*) to the other parties to the case (other than parties in default against whom he is entitled to move for judgment), and (*b*) to the clerk of the judge in charge of the list.

8. It is to be clearly understood that the dates fixed by the

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Practice Direction (Witness List).

court for the hearing of cases will not be altered except for good cause such, for example, as the illness, or absence abroad, of a party or an essential witness.

9. A proceeding commenced otherwise than by writ which is directed to be heard with witnesses will appear in the list not earlier than seven days after the date on which the order for hearing with witnesses was made or (in the case of a summons adjourned into court) the date on which the papers are received by the cause clerk, and will be allotted as early a date for hearing as is practicable. From the date of its appearance in the list, paragraphs 5, 6, 7 and 8 of these directions will apply to such case.

By direction of the judges of the Chancery Division,

W. S. JONES,
Chief Registrar.

April 2, 1954.

[COURT OF APPEAL.]

C. A.

1954
Mar. 30.

Somervell, Morris and Romer L.JJ.

*THOMAS *v.* BRISTOL AEROPLANE CO. LD.

[1951 T. No. 692.]

Factory—Safe means of access—Transient occurrence—Entrance rendered slippery and unsafe by sudden snowstorm—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 26.

Section 26 of the Factories Act, 1937, requires that "There shall, "so far as reasonably practicable, be provided and maintained safe "means of access to every place at which any person has at any "time to work."

The plaintiff, a man in the employ of the defendants, arrived at the entrance to their factory at about seven o'clock on a Monday morning. Shortly before there had been a sudden fall of snow which froze as it fell and rendered the ramp leading down to the entrance, and a space at the bottom of the ramp, slippery. The plaintiff, in entering the factory, slipped on a piece of ice, fell and sustained injury. The defendants maintained a squad of men, part of whose duty it was to scatter sand should the weather conditions require that precaution to be taken, but the factory being closed during the week-end there was no maintenance man on duty till very shortly after the accident. The plaintiff claimed damages for negligence at common law and breach of statutory duty:—

Held, that to suggest that the employers failed in their duty under section 26 because they did not have a squad standing by on the chance of its being necessary to put down sand or gravel as soon as the surface of the entrance became slippery, would be to impose a higher standard than was imposed either by the Factories Act or at common law. The defendants had done all that they reasonably could be expected to do, in the circumstances, to provide that their entrances were properly maintained.

Per Morris L.J. Even the most perfect system would involve that there must be some interval of time between when the difficult

conditions begin and when measures to cope with them can be put into operation.

Observations of Lord Porter and Lord Tucker in *Latimer* v. *A. E. C. Ld.* [1953] A.C. 543, 654, 658; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449, and of Tucker L.J. in *Edwards* v. *National Coal Board* [1949] 1 K.B. 704, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743 applied.

Decision of Lynskey J. affirmed.

APPEAL from Lynskey J. sitting at Bristol Assizes.

The plaintiff, Charles William Thomas, a workman in the employ of the defendants, the Bristol Aeroplane Co. Ld., suffered injury by slipping on a piece of ice when entering the defendants' Rodney works at about 7 a.m. on Monday, January 1, 1951. He claimed damages from the defendants, alleging negligence at common law and also a breach of section 26 of the Factories Act, 1937, in failing to maintain safe means of access to the plaintiff's place of work. On November 18, 1953, Lynskey J. dismissed the action and the plaintiff appealed.

F. W. Beney Q.C. and *Herrick Collins* for the plaintiff.

Marven Everett and *K. H. Bain* for defendants.

SOMERVELL L.J. The plaintiff slipped on some ice on a frosty morning when he was going to work, and he suffered considerable injury. He brings this claim alleging negligence at common law and breach of statutory duty. Before the judge, sections 25 and 26 of the Factories Act, 1937, were relied upon, but before us reliance was placed on section 26 only.

At the entrance to the defendants' works there is a ramp, at the bottom of which the accident took place. The weather at that time was undoubtedly bad; it had been snowing in the night, but at about 6.45 a.m. there was a further fall, described by two of the witnesses as being unusual. The policeman who was stationed near the gate said: "It was remarkable and I have never "experienced anything like it before; it froze over almost as it "landed; as soon as it was on the ground it became slippery "immediately." One Fisher, who was in charge of maintenance men, said: "There is very little frost that we get that would "make that in the condition it was in on that particular day." The policeman had a box with some lights near the entrance door. He came on duty at 6 a.m. and saw that the slippery condition was developing before 7 o'clock. Though it was not technically part of his duty, he scattered some sand down one side and did his best to warn the men to be careful. From the plaintiff's own evidence, it must have been obvious to the workmen that it was a slippery morning as they came along the road. The plaintiff did not hear the policeman's warning but went down the ramp all right. He said he saw a dark area, which he took to be asphalt, and presumably launched himself on to it without due care and it turned out to be ice and he fell. The judge did not

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accept that, so that the exact circumstances of this accident are not known.

There were maintenance men available to sand or gravel slippery surfaces if and when that was required. Fisher, when he arrived at 7 o'clock, saw that it would be a good thing to gravel or sand this part, and he got his men together and by 7.30 he was sanding those surfaces.

The plaintiff submitted that the employers, by having these maintenance men, had a system for dealing with icy surfaces, but that it was a defective system in that on Monday morning, there being a break from Friday to Monday, the system, as it were, could not be made to work until after the men had arrived. He reinforced his argument by the fact that in the week there was a night-shift of maintenance men, and if there was a slippery surface developing during the night there would be men who could gravel or sand it. Therefore, he says, there was a breach at common law and the employers had not so far as reasonably practicable maintained a safe means of access within section 26 of the Factories Act, 1937.

My approach to this case, which is the same as that of the judge, is that this danger of finding surfaces icy is one of the incidents of winter in our country which everyone encounters, and it is one of those things which one has got to anticipate and take care of. I agree that, just as highway authorities have a system of putting down gravel on slippery roads, it is very right and proper that if the icy condition persists, as it very often does, there should be a system in the works for gravelling or sanding such surfaces, but I cannot think that the mere fact that a man is asked to walk upon an icy surface, which at the moment is uncovered or unsanded, in itself indicates a lack of safe system, or that there has been a failure so far as reasonably practicable to maintain a safe means of access. The present case illustrates rather strikingly what would be necessary if the plaintiff was right. This snowstorm was obviously exceptional, as the judge pointed out, and only started at 6.45 a.m. The men started arriving very soon after 7, and on this day Fisher arrived at 7 o'clock, but to be effective, there would have to have been men there for half an hour or an hour earlier. Although an hour earlier, so far as the evidence goes, there was snow, there was no sort of slipperiness which would require gravel or sand.

To suggest that the employers failed in their duty under section 26 because they did not have a squad standing by on the chance of having to put sand or gravel down as soon as any surface became slippery, is to impose a higher standard than is imposed, in my opinion, either by the Act of 1937 or at common law. The judge said: "I am satisfied here that the employers "did do all they reasonably could be expected to do in the circum-"stances to provide that their passages and gangways 'were of a "'sound construction and properly maintained'"—that is a reference to section 25—"Equally, I am satisfied, as far as

"section 26 is concerned, that they did 'provide and maintain "'a safe means of access'—they did so as far as is reasonably "practicable. I think it is putting the duty far too high to say "that in the circumstances that happened in this case, the "employers ought to provide some form of almost 'insurance' "against ways becoming unsafe." Then he says that in his opinion the duty at common law "is not so high, really, as that "contained in section 26"; that is not a matter I have to decide, but certainly the duty at common law is no higher than that imposed under section 26, and for these reasons I would dismiss the appeal.

MORRIS L.J. I am of the same opinion and I agree with the conclusions as to reasonableness which were reached by the judge. It seems to me that the view that he took of the system that was in operation was the view to which the evidence pointed. A witness, Stone, said: "The instructions we get are that if the "weather should become dangerous, we should immediately "telephone for the job to be done but this happened to be early "in the morning, after Sunday, and there was no night-shift "to take over anything." Fisher's evidence was as follows: Lynskey J.: "Normally, of course, you would have the night-"shift? (A.) Normally there would be two men. (Q.) And as "far as the night-shift was concerned, if it became slippery in "the night they would deal with it? (A.) Definitely. (Q.) And "there is no night-shift on Sunday, and you come in at about "7.30, apart from the cleaners? (A.) Yes. Mr. Collins: Have "the night-shift any instructions to deal with this? (A.) Yes, on "police instructions. (Q.) Do you mean that the police get in "touch with them? (A.) Yes, the sergeant in charge would get "in touch with them. (Q.) Are there no night people on the "Sunday to Monday night? (A.) No. (Q.) Is there nobody who "could give any warning of the ramp or passage being slippery? "(A.) No, other than the police."

The system was, therefore, that the policeman at the gate, if he thought that some action should be taken, would get in touch with police headquarters and they would get in touch with the works department and the necessary steps would be taken. But the system did not provide for having any men available in the period before most of the men came to work on a Monday morning. Mr. Beney for the plaintiff has strongly pressed before us that the system was consequently defective in that there was admittedly that gap in it. It seems to me that the questions which arise, whether approached on the basis of common law obligations or on a consideration of section 26 of the Factories Act, largely turn in this case on what it was reasonable for the employers to do.

In this connexion I think it is important to have in mind some words used by Lord Tucker in his speech in *Latimer* v. *A. E. C.*

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Ld.[1] when he said: " . . . it appears to me desirable in these " days, when there are in existence so many statutes and statu- " tory regulations imposing absolute obligations upon employers, " that the courts should be vigilant to see that the common law " duty owed by a master to his servants should not be gradually " enlarged until it is barely distinguishable from his absolute " statutory obligations." So, viewing the matter from the point of view of the obligations of the employers at common law it seems to me that the question to be considered is as to what action would or should a reasonably careful employer have taken. I do not think that the judge erred in coming to the conclusion that the employers here were not shown to have been remiss. The men coming to work between 7 and 7.30 on a Monday morning would themselves know that there had been no night-shift on the Sunday night. They would also themselves know the conditions that prevailed that morning and, indeed, the evidence of the plaintiff showed that he himself fully appreciated the difficult conditions that existed. In their journeys from their homes to the factory, all the men would have occasion to cope with the results of the troublesome climatic conditions that had rather suddenly developed.

In those circumstances it seems to me that it would be to place an altogether excessive and intolerable burden upon the employers if it were said that they ought to have provided a system which had the result that no part of the approach to the places where men were going to work would be icy or would be difficult to walk upon: for the obligation, if it existed, could not be confined to the ramp or to the space at the bottom of the ramp: it might have been said to extend to other parts along which men would have to walk. Furthermore, even the most perfect system would involve that there would be some interval of time between the moment when difficult conditions began and when measures to cope with them could be put into operation.

It seems to me, therefore, that the risks which resulted that morning at that time from the vagaries of the weather were really no more than the risks which form a part of the ordinary incidents of daily life to which all are subject. I think that a similar approach applies in this case when considering section 26, for the obligation requires that: " There shall, so far as is reason- " ably practicable, be provided and maintained safe means of " access to every place at which any person has at any time to " work." I have in mind what Lord Porter said in his speech in *Latimer* v. *A. E. C. Ld.*,[2] in reference to the statutory definition of the word " maintained ": " It has still, however, to be " determined what it is which has to be in an efficient state. " Does it include the elimination of some matter which is " temporarily superimposed upon the floor or is the requirement

[1] [1953] A.C. 543, 658; [1953] 3 W.L.R. 259; [1953] 2 All E.R. 449.

[2] [1953] A.C. 654.

"confined to the floor itself? To be efficient, the appellant "contended, the floor must be fit for any of the purposes for "which it is intended, e.g., for support and for passing over in "safety. The difficulty of such a view is that it puts an excessive "obligation upon the employer. Indeed, it was conceded that "it could not be carried to the length of saying that a temporary "obstruction, such as a piece of orange peel or the like, would "make it inefficient. Once this concession is made it becomes a "question of the degree of temporary inefficiency which con-"stitutes a breach of the employer's obligation."

As to this part of the case it is also useful to have in mind what Tucker L.J. said in this court in *Edwards* v. *National Coal Board*[3]: " . . . in every case it is the risk that has to be "weighed against the measures necessary to eliminate the risk." Applying those principles, it seems to me that, viewed by the test of reasonableness, it would be to impose an excessive demand upon employers to say that they ought to have provided against the risk of anyone slipping at this place at this particular moment on a Monday morning. It does not seem to me that it is shown that the employers failed either to fulfil their common law obligations, or that they were in breach of their statutory duty under section 26, and I therefore agree that the appeal fails.

ROMER L.J. I also agree. The learned judge, after pointing out that neither at common law nor under section 26 of the Factories Act are employers bound to provide a perfect system, said and, I think, quite rightly said: "The duty of the employer "is not a duty to put in a perfect system which will avoid all "accidents; he has only to take the care of a reasonable, prudent "man in the circumstances of the case." The learned judge, after a careful and well-balanced review of the evidence, came to the conclusion that the employers in the present case had taken that care which he had described. In my view that is the end of the case, and the appeal consequently fails.

Appeal dismissed.

Solicitors: *Pattinson & Brewer, for Lawrence, Williams & Co., Bristol; Peacock & Goddard, for Cartwright, Taylor & Corpe, Bristol.*

A. W. G.

[3] [1949] 1 K.B. 704, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[COURT OF APPEAL.]

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Mar. 17, 18, 19;
April 8.

Evershed M.R., Denning and Romer L.JJ.

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[1952 H. No. 2182.]

Charity—Hospital—Appeal for funds for erection and maintenance of voluntary hospital—Scheme impracticable after National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81).

National Health Service—Hospital—Gift—Appeal to public. Trust and trustee—Resulting trust—Charity—Failure of object.

In 1938 and 1939 an appeal was launched for the improvement of hospital services in South Bucks and East Berks, and in particular for the erection and maintenance of a new hospital at Slough. The appeal was launched by a "council" who issued a brochure calling for subscriptions and donations. This pointed out the serious lack of hospital accommodation in the area, and emphasized at length and in the strongest terms the superior advantages of "the truly British characteristic of making provision, without "force" for medical care in voluntary hospitals. The brochure was accompanied by forms to be filled in by donors and subscribers, of which "document 1" provided for subscriptions in three forms, viz.: "council's discretion: [for a] Windsor Hospital; "Slough Hospital." Another form, "document 2," provided for seven year covenants to subscribe towards the augmentation of the income or capital of (*a*) such hospitals as the council might nominate; (*b*) the Windsor Hospital; (*c*) the Slough Hospital, and (*d*) a hospital nominated by the covenantor.

Substantial sums were received under the terms of these documents, and were also raised locally by concerts, church collections, whist drives, etc.

It never became possible to build the proposed hospital at Slough; first, because of war conditions, and, secondly, because the provisions of the National Health Service Act, 1946, precluded the erection of new voluntary hospitals. A summons was taken out by the Slough trustees for directions as to what should be done with the property in their hands; and in particular for the determination of the questions whether (*a*) any charitable trust formerly affecting the same had failed, and if so (*b*) whether there was a resulting trust in favour of the donors and subscribers. On appeal from Upjohn J.:—

Held (*per* Evershed M.R. and Denning L.J., Romer L.J. dissenting), that on the true construction of documents 1 and 2 and the surrounding circumstances no definable class of donors was entitled to claim the return of their donations. Those donors who had allocated in writing their donations to the Slough hospital showed a general intention to provide a Slough hospital, but it was not of the essence of that intention that the Slough hospital should be a voluntary hospital, and there was a presumption in favour of a charitable intent.

There might, however, be exceptional donations to which special conditions had been attached and inquiry should be directed to discover whether any such gifts had been received.

In re Wilson [1913] 1 Ch. 314 applied.

Decision of Upjohn J., ante, p. 9, varied.

APPEAL from Upjohn J.[1]

Upjohn J. held that the proposal in 1939 to build a voluntary hospital at Slough having become impossible owing to the provisions of the National Health Service Act, 1946, on the true construction of the appeal for funds, the money subscribed was to be devoted to the purposes of a voluntary hospital only, so that the object had become impossible, and that, apart from sums collected by concerts, whist drives, etc., there was a resulting trust in favour of the donors and subscribers.

The facts are set out in the judgment of Evershed M.R.

Geoffrey Cross Q.C. and *Denys Buckley* for the Attorney-General.

S. Pascoe Hayward Q.C. and *Peter Foster* for the Official Solicitor (representing donors and subscribers).

J. L. Arnold for the plaintiff trustee.

In addition to the cases referred to in the judgments the following were cited in argument: *In re Robinson* [2]; *In re Peel's Release* [3]; *Spiller* v. *Maude.*[4]

Cur. adv. vult.

April 8. The following judgments were read. EVERSHED M.R. (read by Denning L.J.): Not long before the outbreak of the second world war a number of public-spirited persons, who formed themselves into the "South Bucks and East Berks "Voluntary Hospitals Council," drew attention to the serious shortage of hospital services in, and in the neighbourhood of, Slough, a town which (largely as a result of the first world war) had enormously outgrown its original dimensions. The council appealed to other public-spirited persons to provide money to meet the needs of the situation, which fell broadly under three heads, namely, (1) enlargement and better endowment of the King Edward VII Hospital at Windsor (which mainly supplied the hospital needs of the whole area, including Slough); (2) general assistance to other and smaller hospitals in the neighbourhood; and (3) the erection of a new hospital in Slough itself. It is to the third of these heads that the difficult problem raised in the present appeal is particularly directed; and the question is whether any, and, if so, what numbers of those whose subscriptions were dedicated to the third of the heads ought now to be repaid their subscriptions, having regard to the impact upon all hospital services of the National Health Service Act, 1946.

The efforts of the council had been so far successful that before the publication and issue in 1939 of the "brochure," which has proved to be by far the most significant fact in the case, a sum of over £6,000 had been collected for the third of the

[1] Ante, p. 9.
[2] [1923] 2 Ch. 332; 39 T.L.R. 509.
[3] [1921] 2 Ch. 218.
[4] (1881) 32 Ch.D. 158n.

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objects I have stated, namely, the erection of a new hospital in Slough; and the council had, with that money, acquired in Slough a piece of land which they had regarded as suitable for the erection of the hospital. It is important to observe that there is no evidence of the particular circumstances in which any individual subscriber to the fund of £6,000 made his contribution beyond the bare facts which I have already stated.

To the terms of the brochure, upon which so much depends, I must make some detailed references, though I am repeating much that is fully set out in the judgment of Upjohn J. The brochure was plainly the climax, before the outbreak of the war, of the council's appeal for funds, and it was widely distributed. On a number of the left-hand pages were printed short but arresting extracts from the speeches or writings of well-known men, both living and dead, which (and the purpose of which) the quotation attributed to the late Rt. Hon. John Burns sufficiently illustrates: "The voluntary hospitals had saved in the course of "a single generation a population equal to that of London or "Australia." The extracts from the report of the Sankey Commission on the future of the voluntary hospitals, which appeared on the last page, I shall later set out fully.

The particular purposes of the appeal, and statement of the means whereby those purposes might be achieved, are set out on the right-hand pages. The first page was as follows: "The "council has been formed to appeal on behalf of Windsor, Slough "and associated hospitals for the funds which are necessary for "extensions, new buildings and annual maintenance. It hopes "to carry out the recommendations of the Sankey Report (report "of the Voluntary Hospitals Commission, 1937), to avoid over-"lapping and wastage. By working in close contact with local "and country administrative authorities it is hoped that an "atmosphere of goodwill and mutual assistance will be estab-"lished between such authorities and the voluntary hospitals, "and that as a result really efficient, well organized hospital "services will be made available for all the people of South "Bucks and East Berks. Our voluntary hospital system is the "envy of the world. The truly British characteristic of making "provision, without force, for those in need of medical care is "worthy of preservation. Without adequate finance the work "of the honorary surgeons and physicians cannot go on. It is "hoped that all will play their part in helping us to attain the "objects that are detailed in the following pages. This booklet "is intended to explain the work of the council and to make "residents in this district individually conscious of the value of "the voluntary hospitals. Will you therefore please read its pages "and then consider how you can help us in our work?"

The second page stated the three aims or heads of appeal already noticed, under the three headings "King Edward VII "Hospital, Windsor," "The Slough Hospital" and "The smaller "hospitals in the area." I need only cite what appeared under

the second heading (the Slough Hospital): "The rapid industrial "growth of Slough has thrown a heavy extra burden upon King "Edward VII Hospital. The population has doubled in recent "years and is still rapidly growing. To relieve the established "hospital and to provide this industrial area with a hospital near "at hand it has been decided to erect a new building at Slough "on a site already purchased. The hospital, which will have "sixty beds at its commencement, will be worked in close co-"operation with King Edward VII Hospital, and will supply a "further urgently necessary addition to the hospital services of "the whole area. £45,000 is the estimated cost of the new "hospital, and it will cost approximately £13,000 per annum "to maintain."

On the seventh page was indicated a number of forms which donations might take; for example, endowment of a bed, defraying the cost of special equipment and so forth. From this page it appeared plainly that special collections were to be organized at clubs, by dramatic societies, and so forth; and, as will be seen, numerous, though relatively small, sums were in due course received from such sources.

I now set out in full—because of the significance attached to them in argument—the extracts from the Sankey Report printed on the last page of the brochure: "The strength of the volun-"tary hospital system arises from two main causes; the first, "the spirit that inspires it; and the second, the freedom that it "possesses. The spirit that inspires it is the glory of the volun-"tary system. It has enabled all classes to come together in "order that the more fortunate should help and give encourage-"ment to their less favoured fellow citizen. This help has "consisted, on the material side, in collections and gifts of large "sums of money to found, equip and maintain the hospitals "themselves. Complementary to this, there has been the willing "service of generation after generation of doctors to serve the "sick without fee and without reward. Further, there has been "the co-operation of men and women of all classes and creeds "to assist in the finance, the management and the carrying on of "this great work. It would be a national loss if the country "were deprived of this voluntary association of individuals with-"out distinction of class, creed or politics, and if they were no "longer to work together to achieve an end for the benefit of "humanity. The freedom of administration which the voluntary "system permits is also of fundamental importance; such free-"dom is an example of the dislike of over-control and bureau-"cracy which is inherent in the genius of our race. Another "asset of the voluntary hospital is that it has been responsible "for medical education for many generations; medical education "flourishes best in the atmosphere of freedom inherent in "the voluntary hospitals. Co-ordinating Authority suggested. "Almost without exception the witnesses who gave evidence "stressed the advisability of co-ordination in hospitals, *so that*

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"*not only cottage hospitals but also special hospitals should be* "*linked up with general hospitals.* The commission, therefore, "conclude this general survey with an emphatic expression of "their opinion that the continued existence of the voluntary "system depends upon the voluntary hospitals of the country "forming themselves into an association, regionally organized, "which would be able on all matters of policy to express the "considered views of its members and rely upon their loyal "acceptance of its decisions."

There was a pocket or folder in the cover of the brochure containing (besides an envelope) three forms. The first (which Upjohn J. called "document 1," and to which he attached great importance) was a form to be filled in and signed by the intending donor whereon he could indicate his choice of object "as below." There were three columns headed respectively "Capital Dona-"tion", "Maintenance Donation" and "Annual Subscription"; and under each heading were the three possibilities for selection: £ s. d., Council's Discretion; £ s. d., Windsor Hospital; £ s. d., Slough Hospital.

We are concerned in this case with those benefactors who, by the appropriate erasures, indicated that their gifts were for the Slough Hospital—either as a capital donation, maintenance donation, or annual subscription.

On the remaining two forms less attention was directed in argument; but I regard them as not insignificant. They were designed for use (by appropriate deletions) by those who wished their donations to be allocated by the endowment of a bed or cot, or towards the provision of special equipment *either* at the Windsor Hospital *or* at the (intended) Slough Hospital.

There was no evidence as to the numbers of these latter forms which were used. For the purposes of this case it must, I think, be taken that any persons who, using these forms, struck out the word "Windsor" and left the word "Slough" have been equated with those who, using "document 1," allocated their donations to the Slough Hospital; though the result is not, as I shall hope to show, entirely helpful to the respondents.

There was, finally, a form referred to by Upjohn J. as "docu-"ment 2," appropriate to those who were willing to sign deeds of covenant for years in the form commonly used in the case of charitable donations. The covenantee, according to the form, was the secretary of the council; and the form provided that the covenanted sums should be "applied in such proportions as the "council shall direct on my/our behalf for the augmentation "of the income of the following: (*a*) Such hospital or hospitals "in South Bucks and/or East Berks as the council may from "time to time nominate on my/our behalf; (*b*) King Edward VII "Hospital at Windsor; (*c*) the Slough Hospital at Slough; "(*d*) the . . . hospital at . . ." In the margin opposite the items (*a*), (*b*), (*c*) and (*d*) were the words: "N.B.—Delete and "initial the alternatives not desired." A number of persons who

made use of the form, document 2, and entered, accordingly, into deeds of covenant, deleted the whole of (*a*), (*b*) and (*d*) (supra) and so left (*c*) only extant. I assume that the effect of so doing was to render of no effect the preceding words in the deed "in "such proportions as the council shall direct." In any case Upjohn J. treated the persons who so made use of the deed of covenant as being in consimili casu with those who made use of document 1, erasing all the appropriate words other than the reference to "Slough Hospital."

In this court it became obvious that the treatment of the two classes above mentioned as (for relevant purposes) indistinguishable was open to the serious objection that there was, upon the evidence, no ground for holding that those who signed deeds of covenant—a copy of the form of which had not been included in the pocket or folder—had ever seen the brochure.

From what I have recited it follows that those who had given moneys to "the Slough Hospital" (that is, for the purposes of the intended Slough Hospital as distinct from the King Edward VII, Windsor, Hospital, or other objects of the appeal) may be broadly grouped into the following classes: (i) those whose subscriptions had made up the £6,000-odd collected before the publication and issue of the brochure; (ii) those who had contributed to special collections made at sporting occasions, entertainments and the like; (iii) those who had signed deeds of covenant (in the form of the so-called "document 2"); and (iv) those whose subscriptions had been accompanied by forms of the so-called "document 1" with appropriate deletions; to which must be added those (if any) who made appropriate use of the other two forms enclosed in the pocket of the brochure.

The effect of the judgment of Upjohn J. was to hold that persons in the first two classes had no right, or interest in, or to a return of their donations; but that persons in the third and fourth classes were, in the events that had happened, entitled to a return of the sums contributed by them.

It is, however, reasonably plain that the classification above made would prove, upon the fullest analysis, an over-simplification. Apart from those (and there are likely to have been at least some) who accompanied their gifts by some kind of special letter, and those (and, again, there will have inevitably have been some) who failed to make correctly the deletions which document 1 suggested, there would be donors who preferred to remain anonymous and donors, in addition to contributors to collections, who accompanied their gifts by no written communication of any kind. Partly, no doubt, having regard to the limits of administrative convenience, Upjohn J. resolved these problems, in effect, by confining the class of persons entitled to recover their donations to those strictly falling within the last two heads already enumerated. Thus, the relevant declarations in his order were as follows: "And this court doth declare that the assets now

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"representing the funds subscribed (otherwise than anonymously) . . . which were at the time of such subscription allocated in writing by the donors thereof for the said projected hospital now belong to the subscribers of such funds in the proportions in which they subscribed the same. And this court doth declare that the assets now representing the funds subscribed . . . for the purposes of the said projected hospital but which were not allocated thereto in writing signed by the donors thereof at the time of their subscription or were subscribed anonymously do not belong to such donors and that such donors now have no interest in the said assets."

There has been no appeal on the part of those excluded from the benefit of the order by its first recited paragraph. We have also been informed that the Treasury Solicitor makes no claim to any of the moneys as belonging to the Crown as bona vacantia. The only question before us has been whether the declaration in favour of those persons comprehended by the first recited paragraph of the order was rightly made.

Before proceeding to consider the grounds and validity of the conclusion of Upjohn J. I will add some further facts relating to the history of the appeal. The total sum collected from all sources for "the Slough Hospital" has amounted to approximately £50,000. Of this sum approximately £30,000 is represented by donations falling under heads (ii), (iii) and (iv) above stated, and of that figure about one half (£15,000) represents payments made under deeds of covenant in the form of document 2. It appears that the land acquired out of the original £6,000 was later sold (at a profit). The council, or trustees on their behalf, proceeded as late as the year 1948 (but before the coming into operation of the National Health Service Act, 1946), to buy another substantial estate (for the sum of £30,000) on the outskirts of Slough, and this property was (as to the greater part of it) let to, and is now held by, an institution called the Canadian Red Cross Memorial Hospital, which is, in fact, a general hospital now vested in the Minister of Health, upon a yearly tenancy. The trustees also acquired (for approximately £11,500) a further property which is let to an institution known as the Slough Industrial Health Service Ld., and is used to provide accommodation for doctors, nurses and physiotherapists engaged in the health services of the area. The figure of £50,000 above mentioned included the profit made on the sale of the original property, and also the cost price of the two properties later bought.

The question of the rights of subscribers is, no doubt, not to be determined by reference to what the trustees may, or may not, have done in purported exercise of their powers as trustees—save to the extent that their actions might be said legitimately to reflect the intention of the donors, among whom the trustees were themselves numbered. The facts recited might, however, have been suggested to bear upon the question whether the purposes

for which the moneys were subscribed had, in any event, been wholly frustrated; and might also give rise to difficult questions of the exact rights of any subscribers where the investment of their subscriptions had resulted in a gain or a loss. No point was made during the argument of any of the kinds suggested. But I have referred to the facts as showing that the case is, to my mind, at least in some respects distinguishable from such a case as that of the *University of London Medical Sciences Institute Fund,*[1] where the project for the intended Medical Sciences Institute having been totally abandoned as impracticable, no application (save for temporary investment) had ever been made of the funds subscribed, and such funds remained intact in the trustees' hands.

I add at this point that (as appears from the evidence in the case) donations under the second and fourth (at any rate) of the above stated categories continued to be received, though in relatively small amounts, in the years 1947 and 1948, that is, at a time when it must be assumed that the effects of the Act of 1946 had become generally known; though there is no evidence of any receipts after the vesting date, July 5, 1948.

The basis of Upjohn J.'s decision in favour of those categories of subscribers whom he regarded as entitled to a return of their contributions (that is, categories (iii) and (iv) above) is that, upon a proper interpretation of the documents amended and signed by the donors themselves, when read in the light of the brochure which invited their contributions, the intention of the givers was to give for the single and exclusive purpose of contributing to the cost of erecting a voluntary hospital (as this term is commonly understood) and no other kind of hospital. As regards category (ii) Upjohn J. was of opinion that the circumstances in which the contributions were made (that is, on occasions such as collections at a club or dance), including the circumstance of anonymity, the givers cannot have intended to reserve any right to a return of their contributions in any event whatever. In the case of this class of persons the judge followed particularly the reasoning of P. O. Lawrence J. in *In re Welsh Hospital (Netley) Fund*[2]; but he did not think that in the present case (as had been held in the *Netley Hospital* case and also later by Wynn-Parry J. in *In re North Devon and West Somerset Relief Fund Trusts* (the *Lynmouth* case[3]), that the circumstances and conclusions relating to gifts in the second category could have any material bearing on the intention, or presumed intention, of donors falling within the third and fourth categories.

I have said that there has been no appeal against the judgment so far as it related to any categories of donors other than those falling within the third and fourth categories. But as regards these last it has been contended on behalf of the Attorney-General,

[1] [1909] 2 Ch. 1; 25 T.L.R. 358.
[2] [1921] 1 Ch. 655.
[3] [1953] 1 W.L.R. 1260; [1953] 2 All E.R. 1032.

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as appellant, that the view of Upjohn J. unduly emphasized the significance of the references in the brochure to the "voluntary" character of the proposed new hospital; and that on a true interpretation of the brochure and of the forms used and signed by the donors (as amended by their erasions) and in the light of all other relevant and admissible circumstances, the donors of categories (iii) and (iv) did not intend their gifts to be exclusively referable to the erection of a voluntary hospital so as to make them, in effect, conditional upon such a hospital being erected; but rather that they intended to give their money for or towards the establishment of a hospital or for hospital services in and for Slough. Alternatively, counsel for the Attorney-General contended that if these donors intended, in giving, to assist in the erection of a voluntary hospital at Slough, there was, nevertheless, in their minds a more general charitable intention—that is, the intention of promoting hospital services generally in the area, the proposed new hospital being but a preferred manifestation of that more general object.

As I have already sufficiently intimated—and notwithstanding the somewhat special facts already narrated in regard to the application in fact of the trust moneys—I assume that the project of erecting or establishing a voluntary hospital at Slough was never capable of being carried out, and is now wholly impracticable, Mr. Cross drew attention to the fact that there is nothing in the Act of 1946 to prohibit the execution of such an enterprise or to cause automatic vesting in the Minister of a hospital "voluntarily" erected or established after July 5, 1948. But I agree entirely with Upjohn J. that "it would now be quite "impracticable for a voluntary body of persons to undertake the "erection and maintenance of a voluntary hospital"; though I agree also with him when he added "but it is equally plain that "not only is it possible, but it is contemplated, that a new "hospital will be erected in the Slough area by the Ministry of "Health, and that work is, of course, as much a charitable work "as is the erection of a voluntary hospital . . ."

The question is, in the end, a matter of emphasis, when the relevant documents are examined and all relevant circumstances considered. Did the charitably-minded subscriber respond to the request: "Please join with other volunteers in combining to "build, ourselves and out of our own resources, a hospital of our "own at Slough"? or to the request: "Please help to make "good the absence of a hospital at Slough—and remember that "our voluntary hospital system is one of the most characteristic "and beneficent of all English institutions"?

When the case was first opened to us and the terms of the brochure were read, I confess that my inclination was somewhat strongly towards interpreting its appeal in the first of the two senses I have tried to express. But after hearing the whole argument I have reached, eventually, the opposite conclusion. In

any case involving the existence of a charitable intention overriding a single specified objective I take as my guide the language of Parker J. in *In re Wilson*,[4] which was applied and adopted in the two cases already mentioned of the *Netley Hospital*[5] and *Lynmouth* charities.[6] Substituting the word "donor" for "testator," is "the paramount intention . . . to give the "property, in the first instance, for a general charitable purpose "rather than a particular charitable purpose, and to graft on to "the general gift a direction as to the desires and intentions of "the donor as to the manner in which the general gift is to be "carried into effect?" In the present case, the appeal was a single appeal "on behalf of Windsor, Slough and associated "hospitals," so that "really efficient well-organized hospital "services will be made available for all the people of South Bucks "and East Berks" (see the brochure already set out): and the subscriber, invited to "help the council" in one or other of the ways specified, was told: "You can earmark your "help for either of the hospitals, although you may send to the "council." In my judgment there is, at least, a strong argument for the view that the "earmarking" by means of the appropriate use of document 1 was no more than a "grafting on to" a general gift in favour of the whole subject-matter of the appeal of "a "direction as to the desires and intentions of the donor as to the "manner in which the general gift" was to be carried into effect; a view to which the other circumstances later mentioned tend, in my judgment, to support.

But it is no doubt a striking and significant feature of the present case that those who availed themselves of document 1 and struck out all references other than "Slough Hospital," may thereby be said not merely to have indicated a preference, but rather to have expressly negatived all other intentions except that in favour of the "Slough Hospital." It was this aspect of the matter which most strongly impressed Upjohn J.; and I, therefore, prefer to rest my conclusion upon the first head of the argument on the Attorney-General's part, namely, that though the donors gave their money for the establishment of the Slough Hospital (and not, I will presume, for the expansion or endowment of the Windsor Hospital, or the other smaller hospitals, or as the council should, in their discretion, distribute it); still it was not of the essence of their gifts or their intention that the Slough Hospital should be a "voluntary" hospital. The point may, perhaps, be put another way—if and so far as the donor intended to support a "voluntary" hospital, that was but the manner, the only manner then available, of giving effect to the more general intention of contributing to the provision of a hospital in and for Slough. So put, this head of the appellant's argument only differs from the alternative head in the character of the "general

[4] [1913] 1 Ch. 314.
[5] [1921] 1 Ch. 655.
[6] [1953] 1 W.L.R. 1260.

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"charitable intention" which, in this case, is a general intention to provide a Slough hospital, but in the other is a general intention to support hospital services in the whole area covered by the appeal.

In judging of the emphasis properly to be given to the word "voluntary" used in the appeal, it is, in my judgment, essential to bear in mind that, at the relevant date, all hospitals (other than those established and maintained by local authorities) were "voluntary"; so that to describe a proposed new hospital to be erected, otherwise than by a local authority, as "voluntary" was, prima facie, to do no more than state one of its inevitable characteristics. To emphasize, therefore, the obvious and inevitable characteristic in an appeal of this nature, and the virtues of the existing "voluntary hospital system," *may* (at any rate) be fairly regarded as doing no more than to give cogent reasons why a "hospital appeal" should excite the generosity of those to whom it was addressed. In support of this interpretation the Attorney-General particularly relied, for example, on the second half of the first paragraph on p. 1 of the brochure which emphasized the need, in the interests of efficient economy, of goodwill and co-ordination between the general "voluntary" hospitals in the area with the hospitals established and maintained by the local authorities. The appellant likewise stressed the fact that the proposed hospital was described (for example on p. 3 of the brochure and in the all-important document 1) as "the Slough Hospital" rather than "The Slough *Voluntary* Hospital"—its voluntary character being assumed, but not put forward as the essential object or condition of the solicited donations. And Mr. Buckley added that if the voluntary character of the new hospital was of the essence of the matter in the sense I have indicated, then it is noteworthy that Sir Noel Mobbs, the surviving member of the council and himself a substantial donor, nowhere so stated in his affidavit.

In my judgment, therefore, the emphasis on the "voluntary" character of the proposed hospital was not such as to give to the appeal, in this respect, what Mr. Buckley called a "partisan" quality, and I cannot, for my part, construe the cited extracts from the report of the Sankey Commission, and particularly the reference to "the dislike of over-control and bureaucracy which "is inherent in the genius of our race," as giving, in their context such a partisan colour to the brochure as a whole.

I think, moreover, that other legitimate considerations support the view which I have formed. Thus, if the view of Upjohn J. is right, the result is to create a class of benefactors somewhat artificially distinguished from the rest—namely, that class (and that class alone) consisting of persons whose donations were accompanied by documents in the form of document 1 whereon references, other than one or other of the references to the

Slough Hospital, had been erased. The right or privilege of the class thus defined was not, in the first place, shared by those who had contributed the £6,000 originally collected by the council—the first of the four categories which I have earlier specified; for it is not shown what were the circumstances in which these contributions were made. Nor, in my judgment, was it shared by the signatories of deeds of covenant, the third of the stated categories, for although the members of this class of donors, by making the appropriate deletion, indicated their intention of benefiting, exclusively, "the Slough Hospital at Slough," it is not established that they did so under the impulse of the brochure; and unless read with the brochure the wording of the deeds of covenant cannot be said to have emphasized the voluntary character of the Slough Hospital so as to justify the inference that their gifts were conditional upon the projected Slough Hospital being a voluntary hospital. Mr. Pascoe Hayward for the Official Solicitor did not indeed press us to the contrary in the course of his argument, and, in the result, the covenantors must, in my view, be in any case excepted from the first of the declarations which I have cited from the judge's judgment, reducing its scope, in value, by a half. Thirdly, the privilege or right is not shared, according to the terms of the judgment itself, by those who gave anonymously or without the accompaniment of a document in the form of document 1; for apart from the administrative difficulty created by anonymity, the intention necessary to support the inference of a resulting trust required the combination of a signed and duly-completed document in the form of document 1 and the terms of the brochure. For this reason I think there must also be excepted from the benefit of the judge's declaration those (if any) who made use of either of the two forms, other than document 1, which were enclosed in the pocket or folder of the brochure; for in these cases there is absent the express exclusion of the council's discretion upon which Upjohn J. particularly relied, and I find it difficult to suppose that a resulting trust arises, or does not arise, according as the donor struck out the word "Windsor" or the word "Slough." Fourthly and last, there is excluded from the right or privilege (as the judge held in his second declaration) those contributors to collections who constitute the second category above specified; for, apart from the almost insuperable administrative difficulty in the way of making a return to these persons occasioned by the circumstances of their gifts, and particularly their anonymity, it has been conceded that persons giving to such collections must be taken to have intended to part, out-and-out, with their money in any event —an inference inconsistent with an intention to benefit a limited and exclusive purpose, or with any but a general charitable intention.

The fact that there had been collections of this nature strongly assisted P. O. Lawrence J. to the conclusion he reached in the

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Netley Hospital case [7] as regards other individual and named subscribers; and the same is true of the *Lynmouth* case.[8] It is clear that Upjohn J. did not regard as impressive an analogous argument in the present case—more particularly since in the *Netley* [9] and *Lynmouth* [10] cases the question had arisen only in regard to the surplus remaining after full effect had been given to what was, admittedly, the special object of all the contributors. I agree with Upjohn J. that if the particular circumstances in which one donor has made his donation—including his own written statement at the time of making it—lead to a clear conclusion on the question of his intention, that that conclusion cannot be changed because other persons giving to the same cause in different circumstances must be taken to have had a different intention. But where, as I think in the present case, the circumstances affecting the presumed intention of the first donor are, at best, equivocal, then, as it seems to me, it is a relevant and admissible fact in determining his true intention that when he contributed to the fund, he must be taken to have known that his contributions would be mingled with thousands of others, substantial numbers of whom were contributing in circumstances which negatived any right or expectation on their part to any return of their money in any circumstances. I am, indeed, stating in another form what I have said already, namely, that, if Mr. Pascoe Hayward is right, then there emerges a class of contributors whose isolation from their fellow contributors appears (to my mind, at any rate) to be not only unreal and contrary to common sense, but also unjust; for whatever emphasis can legitimately be placed on particular passages in the brochure and on the use of document 1, it is not in doubt that the appeal which brought in the whole of the £50,000 collected was a single appeal addressed to all who would lend their ears to it.

It will be appreciated that the process of elimination which I have employed will in any case have left in the class entitled to the benefits of the first declaration of Upjohn J. considerably less, in value, than half the total of the benefactors. But there remain two further matters of fact still legitimately, in my judgment, to be considered. First, the donors who made use of document 1 include, as I have already stated, some at least who contributed at dates after, as it must be assumed, the effect of the National Health Service Act, 1946, already passed, had become clearly apprehended, and on the part of whom therefore (on precisely the same material as is pertinent to the cases of earlier donations of the same category) a presumed intention to subscribe only towards the erection of a voluntary hospital cannot sensibly or easily be discerned. Second, when the present question came to be brought before the court, and when advertisement was made for any donor to permit his name to be joined as representing those donors who might claim to be entitled to a return

[7] [1921] 1 Ch. 655.
[8] [1953] 1 W.L.R. 1260.
[9] [1921] 1 Ch. 655.
[10] [1953] 1 W.L.R. 1260.

of their donations, none was found ready to come forward and make such a claim. I make every allowance for natural embarrassment; but if (as the argument has suggested) donors were moved to give to the projected voluntary hospital at Slough from "the dislike of over-control and bureaucracy which is inherent in "the genius of our race," I find it difficult to suppose that none was found whose feelings in this regard were insufficient to overcome (without risk as to costs) mere shyness or diffidence.

Regarding, therefore, as I do, the language of the brochure, even when taken in conjunction with document 1, suitably employed, as at best in some degree equivocal, I come to the conclusion that the various other facts which I have enumerated are relevant and admissible for consideration and render it impossible to find or presume, as regards any class of donors, an intention such as to entitle them, in the events which have happened, to a return of any part of their donation. In my judgment, there is no good answer to the summary of his argument which Mr. Cross put before us, which was to this effect: It is sought to find a common intention, limited to a single and specific object, among all givers of a particular category; the particular category put forward is that of donors who, in response to the brochure, made use of document 1 to specify the Slough Hospital; but whatever might be the interpretation properly put upon these documents, as it were, in vacuo, the fact is that the category selected not only included persons who subscribed after the passing of the Act, but also consisted of persons who must be taken to have been aware of the pre-brochure contributions, and aware also of the fact that their gifts would be intermingled with those of others who would not in any circumstances expect, or be entitled to claim, a return of their money; and, therefore, no such intention can be found common to donors of a particular category differentiating them from the rest of the contributors on whose part no claim for any return could be substantiated. More briefly, but, in my judgment, no less correctly, the matter was thus put by Mr. Buckley in reply when he said that where there are many sources of contribution to a charitable fund, then all contributions should, in the absence of special circumstances, be taken to contribute on terms common to all; and the only such terms possible in the present case deny any right to a return of their money to all contributors.

To this general conclusion, however, it is, I think, necessary to make one exception; though for reasons which (because of the importance and complexity of the case, and because I am differing from Upjohn J.) I have stated fully, I am of opinion that the facts proved do not suffice to entitle any definable class of donors to claim a return of their donations, it clearly remains possible that some individual donor may have attached to his gift such special terms as would enable him, distinguishing himself from his fellow contributors, to claim now a return of his money. I see no reason, on administrative or other grounds, why (if necessary) an inquiry

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should not be directed for that purpose, though, having regard to my general conclusion and to the absence of any individual claimant, so far, I do not regard it as likely that any such individual claims would be put forward, or could be successfully made. On the other hand, I see no reason to exclude their possibility.

In my judgment, therefore, this appeal should be allowed and a declaration made that the assets now representing the funds subscribed for the projected hospital at Slough do not belong to the donors thereof, and that such donors have now no interest therein; provided that such declaration is made without prejudice to the right of any individual to prove to the satisfaction of the trustees or (if necessary) the court, that he is now entitled to a return of his donation on the ground that the same was made and intended by him exclusively for the purpose of the erection of a voluntary hospital at Slough. Subject to what counsel may wish to say upon the form of the order, it seems to me that the case should be referred back to chambers for the purpose of any necessary inquiry or directions, including the settlement of a scheme for the cy-près application of the said assets.

Denning L.J. When an appeal was made to the public in 1939 for money to build a new hospital at Slough, the only hospital in mind was a voluntary hospital. Naturally enough, those who made the appeal stressed the benefits of the voluntary hospital system. A large sum of money was collected in amounts, large and small. The large amounts by donations and seven-year covenants. The small amounts by church collections, collecting-boxes, and so forth. The trustees with some of the money bought a suitable site for a hospital, but they have never been able to build it. The coming of the National Health Service has made it practically impossible now to start a new voluntary hospital. So the question is, what is to happen to the money which the trustees have collected? Upjohn J. has drawn this distinction: he has held that those who made gifts in writing in favour of the Slough Hospital get their money back; but those who put nothing into writing do not. I do not think this distinction is well founded.

Let me first state the law as I understand it in regard to money collected for a specific charity by means of a church collection, a flag day, a whist drive, a dance, or some such activity. When a man gives money on such an occasion, he gives it, I think, beyond recall. He parts with his money out-and-out. He can, of course, insist on it being used for the named purpose. If the trustees of the charity do not apply the money for that purpose when they could well do so, the giver can set the law in motion. He can get the Attorney-General to bring proceedings to see that the trustees do their duty, but he cannot get his money back.

The question is, what is to happen when the trustees cannot apply the money in the way intended? Suppose, for instance, they have got more than enough, what is to happen to the excess? It is, I think, well settled that if the money received by the trustees is more than is needed for the named purpose, they do not have to return the surplus to the givers. They must apply it under the directions of the court for a purpose as near as may be to the original purpose. The reason is not solely on the ground of inconvenience. It is not merely because it is practically impossible to find out who gave the money or to check the claimants. It is because they all gave their money without reserve; and no reserve will be imputed to them. It is useless to ask what was their intention; for a situation has arisen which they did not contemplate, and for which they did not provide. They had formed no relevant intention. So the law must provide. The law must say what is to happen to the money. It does it by making presumptions in favour of charity. It presumes that those who gave the money would wish that any surplus should be devoted to a charitable purpose as near as may be to the original purpose: *In re Monk, per* Sargant L.J.,[11] and the *Lynmouth* case,[12]; *In re British School of Egyptian Archaeology, per* Harman J.[13] Next suppose that the specific charity fails before the money is spent at all. The trustees have the money in their hands, but the purpose cannot be fulfilled. What is to happen to the money which has been collected in church, on flag days, and so forth? The answer is, I think, the same as in the case of a surplus. The money has been given out-and-out. No one of those who gave it ever intended that it should be returned. If any one of them had been asked what was to happen to the money if the named purpose became impossible of fulfilment, he would have said: "If that should happen I will expect you "to use it for some other good cause, but I will not expect it "back." The law gives him credit for the best of intentions and presumes that he would have wished it so.

Let me turn from the church collections and flag days to the donations by cheques and deeds of covenant. These were allocated in writing by the donors, and Upjohn J. has held that they are entitled to their money back. He has refused in their case to make a presumption in favour of charity. This seems to me to take a rather harsh view of the donors. I do not myself think that the donors of large sums would wish to get their money back when those who give small sums do not. Those who give of their abundance are just as charitably minded as the poor widows who give their mites; and all should be treated alike. All know that their moneys are given for the same purpose. All know that the moneys are held on the same trusts, whatever the form in which they are given, whether in pence in the church collection or in

[11] [1927] 2 Ch. 197, 211, 212; 43 T.L.R. 256.
[12] [1953] 1 W.L.R. 1260.
[13] [1954] 1 W.L.R. 546, 553; [1954] 1 All E.R. 887.

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cheques from the wealthy industrialists. The law in all cases should make a presumption in favour of charity. It should impose on the trustees the same trust for all the money they receive, namely, to apply the money for the named purpose or, that failing, to apply it for a charitable purpose as near as may be to the original purpose: see the *Netley Hospital* case.[14]

There may be some exceptional cases where the donor makes it clear that if the main purpose should become impossible, he will want his money back. I regard the *University of London Medical Sciences Institute Fund*,[15] as such a case. But in the absence of some such evidence, the law will, I think, make in every case a presumption in favour of charity.

The present case shows how right the law is to make this presumption. Before the matter was brought before the court, the trustees issued many advertisements in the local papers inviting people to claim their money back. No one did so. The trustees even invited some of the larger subscribers to be parties to friendly proceedings to claim their money back; but none of them was willing to claim it. As no one was forthcoming, there was nothing left to be done except ask the Official Solicitor to represent the donors, and he has done so. And it is significant that, even now, not a single person has come forward, not a single affidavit has been made, to rebut the presumption of charity. I cannot help thinking that all of them would prefer the court to apply the moneys for some charitable purpose as near as may be to the original; and that is what I think the court should do.

I confess that when the present case was opened to us, I had a different impression. It looked as if these moneys were given specifically for the building of a voluntary hospital at Slough, and that the Crown was seeking to take them for a State hospital. In short, the Crown wanted to apply it for a purpose directly contrary to what the givers intended. But that is not correct. Our ruling today does not mean that the moneys must of necessity go to a State hospital. In applying the money cy-près, the court will bear in mind that the money was provided not only for a hospital at Slough, but also for a voluntary hospital; and will seek out some purpose as near as may be to the original intention. The trustees have put forward a scheme which has the approval of the large subscribers. The proposal is that the piece of land (which the trustees acquired for the purpose of a hospital) should be handed over to the Minister of Health so that he can build a new hospital there; and that the rest of the money should be used for voluntary hospital services. That seems to me to be a very appropriate way of using the money and, indeed, to be a way which the donors would have wished. I would allow this appeal so that this can be done.

[14] [1921] 1 Ch. 655, 660. [15] [1909] 2 Ch. 1.

ROMER L.J. It is with regret that I find myself at variance with my brethren in the conclusions which they have expressed, but, for my part, I am not persuaded that the decision of Upjohn J. was incorrect. I think that in one respect the order which he made went too far, but that was due to the assumption, which has since been shown to be unwarranted, that the persons who signed the covenants had received a copy of the brochure. The terms of these covenants are not, in my opinion, sufficient in themselves to disclose the existence of a particular charitable intent and nothing more, on the part of those who signed them, and it was not proved that the brochure was sent to these covenantors or that they ever saw them. Mr. Pascoe Hayward's argument before us was confined to establishing that donors who did receive the brochures, and made their gifts to the Slough Hospital in response to the appeal which they contained, are, in the events which have happened, entitled to have their money back. In my opinion, Mr. Hayward was right in so limiting his case, because there is no guide (as distinct from guesswork) to show what the intentions of the other contributors may have been.

The question is, accordingly, a narrow one and depends on the intention which is reasonably to be attributed to persons who received the brochures and earmarked their donations to the Slough Voluntary Hospital by an appropriate use of one of the forms which were enclosed in the pocket of each brochure. On behalf of the Attorney-General it is said that the intention of these persons was to promote the establishment of a hospital in Slough, and if it was a voluntary hospital, so much the better. The respondents' contention is that the intention was to promote a voluntary hospital in Slough and nothing else.

It is, in my opinion, a legitimate inference that these particular donors read the brochure which they received and made their gifts as a result of the appeal which it contained. Such an inference was, at any rate, drawn in *Fowler* v. *Attorney-General*,[16] to which I refer more particularly hereafter—and is, as I venture to think, a natural one. In my quest, therefore, for the probable intention of these particular contributors I look to the terms of the brochure to see what the proposal was to which they were being asked to subscribe. It was issued and distributed from 1939 onwards by the South Bucks and East Berks Hospital Council, which had its headquarters in Slough. By way of preface to what follows afterwards is a commendation by the council to the residents of South Bucks and East Berks of the following excerpt from a speech which Lord Horder had made at Liverpool in November, 1938: "I believe that the voluntary hospital is as essential to this "country's wellbeing today as ever it was. It still stands as a "fortress of teaching, of research and of efficient treatment; "and as a centre where the spirit of medicine can live in

[16] [1909] 2 Ch. 1.

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"freedom, owing no allegiance to political doctrine nor State "expediency." These features of the voluntary hospitals which Lord Horder emphasized were also stressed in the Sankey Report, the recommendations of which the council hoped (as stated in the brochure) to carry out, and extracts from which are printed as a conclusion to the appeal. I will not repeat them, but would draw attention to the following passages: "The freedom "of administration which the voluntary system permits is also of "fundamental importance; such freedom is an example of the "dislike of over-control and bureaucracy which is inherent in the "genius of our race. Another asset of the voluntary hospital is "that it has been responsible for medical education for many "generations; medical education flourishes best in the atmos-"phere of freedom inherent in the voluntary hospitals . . . The "Commission, therefore, conclude this general survey with an "emphatic expression of their opinion that the continued exist-"ence of the voluntary system depends upon the voluntary "hospitals of the country forming themselves into an association, "regionally organised, which would be able on all matters of "policy to express the considered views of its members and rely "upon their loyal acceptance of its decisions." The appeal, accordingly, both opened and closed with reasoned tributes to the advantages in the way of medical teaching, freedom of administration and otherwise which derived from the voluntary system as distinct from what some people regard as the dead hand of "over-control and bureaucracy." In addition to the passages which I have cited there are eulogistic references on almost every page to the voluntary hospital system, amongst which I will only quote Mr. John Burns's dictum that "the voluntary hospitals "had saved in the course of a single generation a population equal "to that of London and Australia."

In my judgment, the brochure is in pith and substance an appeal for the establishment of a hospital which is to possess an essential quality, namely, the quality of freedom of management as opposed to the control of bureaucratic officialdom. The local philanthropists to whom the appeal was sent were being asked for funds to provide a hospital enjoying the freedom of administration which the Sankey Report described as fundamentally important, and from which alone could spring the benefits upon which Lord Horder and the report itself laid so much stress. Such a hospital would be, at all events potentially, an additional unit in the association of voluntary hospitals which the Sankey Report envisaged as essential to the continued existence of the voluntary system itself.

In my opinion, the particular character of the purpose in aid of which the council set forth their call for funds was of the essence of the appeal, and would be regarded as such by those who responded to it; and I think that it is a legitimate and reasonable inference that those persons who disclosed their preference, on any one of the forms provided, for the voluntary

hospital at Slough would anticipate that their money would be devoted to the projected institution at Slough which was described in the appeal, and to that alone. If that project should become abortive, as in fact it did, these subscribers would, as I think, both expect and intend that their contributions would be returned so that they themselves could decide to what other purpose, charitable or otherwise, their money should be applied. It is difficult to suppose that a man whose "dislike of over-control and "bureaucracy" was deep and fundamental would view with equanimity the diversion of his gift, without reference to himself, to a hospital controlled by the Ministry of Health; and such is the proposal in relation to Wexham Park. The feelings of such a man might well be compared to those of one who subscribes to a movement for liberating wild birds which are kept in captivity and finds his gift applied to the establishment of a municipal aviary.

I appreciate, I hope, the arguments which are urged against my view, but I do not, with respect, think myself that they convincingly support the appellants' case. It is said that the public continued to subscribe even after the health scheme loomed upon the horizon. It is true that they did (though in markedly diminished numbers), but there is no evidence to show that the council continued to send the brochures out after it was known that the voluntary system was doomed; moreover, those who did know something of the proposals which were eventually embodied in the Act of 1946 did not necessarily appreciate that they involved the appropriation of the voluntary hospitals by the State. Then it is said that as all hospitals which the public were asked to assist were voluntary at the time when the appeals were sent the references in the brochures to the voluntary system were merely exhortatory. I do not take this view myself. In my opinion these references were the very foundation of the appeal and were designed to secure the preservation and the development of the voluntary system and the avoidance of a bureaucratic system taking its place. It is further urged that the brochure revealed that funds would be raised by such means as the organisation of special efforts among sports clubs, dramatic societies, and so forth, and that persons who responded to such efforts would in no circumstances expect to recover what they gave. This, of course, is perfectly true, but I find it difficult to see how it really affects the matter. If a man contributes £5,000 towards the promotion of some particular purpose, his intention of getting back his money if the purpose fails is not lessened, I should have thought, by the knowledge that the organizers are also approaching the general public for coins through the medium, for example, of collecting-boxes in the streets.

Finally, reliance is placed upon the fact that none of the donors has asked for his money to be returned, or been willing to be made a representative defendant in these proceedings. I am not greatly impressed by this, for it needs some moral courage

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to ask for the return of money already subscribed, and still more to play the role of Shylock (for some people might so regard it) in litigation which is of considerable local interest.

In a recent case (*In re British School of Egyptian Archaeology* [17]) Harman J. observed in effect that in this field of law one case is not usually of much assistance in another, and I agree with him; for each case has to be decided upon its own particular circumstances. The *Netley Hospital* case [18] and the *Lynmouth* case [19] were different from the present in at least two important respects. First, in neither case was it shown that the donors, nor any particular class of donors, had signed documents which disclosed so narrow and specific an intention as those which the donors in question signed in the present case. Secondly, each of those cases was concerned only with the surplus which remained after the primary purpose had been achieved; and in my opinion there is far less reason to suppose that a donor expects to receive back some small fraction of such a surplus than there is to suppose that he expects to get his contribution back if the whole object of his bounty fails before any money is spent on it at all.

In so far as an earlier authority does assist, it seems to me that *Fowler* v. *Attorney-General* [20] has some bearing on this case. There the University of London resolved that "steps be taken "to secure a site and funds to enable the senate to establish an "institute of medical sciences in the near neighbourhood of the "university." Appeals were, it seems, accordingly made to certain members of the public to assist financially in the project, but the proposal failed to take effect, for various reasons, and came to nothing. The senate thereupon returned to the subscribers the contributions which they had made, and both Joyce J. and the Court of Appeal expressed the view (it was not an actual issue in the proceedings) that the senate had acted correctly. Upon this point Joyce J. said "that contributions towards a "scheme which it is found cannot be carried out are returnable "to the donors is a matter of course"; and Farwell L.J. said: "I do not think that anybody who was not a lawyer could for "one moment doubt that the university were bound to return at "once to the living subscribers the moneys which had been sent "to them for a scheme which they had abandoned."

There is, in my opinion, nothing illogical in holding that the persons who received the brochure and earmarked their contributions to the Slough Hospital are entitled to repayment, although other subscribers are not; for it is a matter of ascertaining the intention of the donors, and it is only in relation to these particular subscribers that an intention can be discovered, as I think, from the terms of the appeal and the forms which they filled in so as to give expression to their wishes. If in fact any other donor,

[17] [1954] 1 W.L.R. 546.
[18] [1921] 1 Ch. 655.
[19] [1953] 1 W.L.R. 1260.
[20] [1909] 2 Ch. 1.

whether large or small, could prove that his intention was the same, even though he had not seen the brochure, he would be entitled to the same relief; but there is no evidence, on the material before us, from which a similar intention on the part of other donors can be inferred.

For the above reasons I would dismiss the appeal (subject only to the question of the covenantors), but as my brethren take a different view the appeal will be allowed.

Appeal allowed.

Solicitors: *Treasury Solicitor; Official Solicitor; Kenneth Brown, Baker, Baker.*

E. D.

[QUEEN'S BENCH DIVISION.]

* CILIA *v.* H. M. JAMES & SONS (A FIRM). SPARK (THIRD PARTY)

1954
Mar. 29, 30.

Byrne J.

[1952 C. No. 3891.]

Negligence—Safe system of work—Dangerous premises—Employer's duty—Employee required to work on premises not in the occupation of the employer—Faulty electrical conduit—Employee electrocuted—Duty of employer to his workman.

A young man, employed as a plumber's mate by the defendants who were building contractors, was working on the ground floor of a private dwelling-house installing some sanitary equipment, when the water tank in the loft began to overflow. He went to the loft, where, due to a defective electrical conduit, a steel sheet lying near the tank had become electrified, and he was electrocuted. In an action under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934:—

Held, that as the employers were not the occupiers of the premises on which the deceased was working, they were under no duty to take reasonable care to see that the premises were safe.

Taylor v. *Sims and Sims* (1942) 58 T.L.R. 339; [1942] 2 All E.R. 375 applied.

Observations of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ld.* [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39, C.A. considered.

Held, further, that even if the defendants were under a duty to take reasonable care to see that the premises were safe, the cause of the accident was not forseeable and the danger was not one of which a reasonable employer would know or ought to have known; it was not an employer's duty to carry out a complete inspection of the premises to see that the whole of the premises were safe before his workmen began work.

ACTION.

The plaintiff, Mrs. Gladys Ruby Cilia, a widow, as administratrix of the estate of her deceased son, brought an action under

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the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions Act, 1934, against her son's employers, H. M. James & Sons.

On January 10, 1952, the deceased, a man of 21 years of age, employed by the defendants, a firm of builders and contractors, as a plumber's mate, went to a private dwelling-house with the plumber, to carry out some work in connexion with the installation of sanitary equipment on the ground floor of the house. The house was unoccupied, but negotiations for the purchase of the house by the third party, Cecil Spark, were taking place. The owner had allowed the third party entry to have some alterations effected, which were the subject of a contract between the third party and the defendants. While the deceased was working on the ground floor, the storage tank in the loft began to overflow. The plumber told the deceased to go to the loft and attend to the matter, which he did. Shortly afterwards, the deceased was found dead, lying across the tank with one of his arms in the water. It appeared that during the war, some sheets of steel had been laid across the floor of the loft. One of the sheets, lying to the right of the tank, was resting on an electric conduit, which had become defective, as a result of which the steel sheet was charged with electricity.

The plaintiff alleged that the defendants were negligent and were in breach of their common law duty to take reasonable care to see that the premises in which their workmen were required to work were reasonably safe.

The defendants denied that they were under such a duty.

Philip Goodenday and *David Sullivan* for the plaintiff.
Bernard Finlay for the defendants.
F. S. Laskey for the third party.

The following cases were cited in argument: *Taylor* v. *Sims and Sims* [1]; *Hodgson* v. *British Arc Welding Co. Ld. and B. & N. Green & Silley Weir Ld.* [2]; *Christmas* v. *General Cleaning Contractors Ld. and Caledonian Club Trust Ld.* [3]; *London Graving Dock* v. *Horton* [4]; *Garrard* v. *A. E. Southey & Co. and Standard Telephones and Cables Ld.* [5]; *Harris* v. *Brights Asphalt Contractors Ld.* [6]; *Knight* v. *Demolition and Construction Co.* [7]

Byrne J., having stated the facts and found that the deceased met his death as a result of an electrical shock passing through his body, continued: The negligence relied on by the plaintiff is set

[1] (1942) 58 T.L.R. 339; [1942] 2 All E.R. 375.
[2] [1946] K.B. 302; 62 T.L.R. 275; [1946] 1 All E.R. 95.
[3] [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1951] 1 All E.R. 39 (C.A.); [1953] A.C. 180; [1952] 2 All E.R. 1110 (H.L.).
[4] [1951] A.C. 737; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.
[5] [1952] 2 Q.B. 174; [1952] 1 T.L.R. 630; [1952] 1 All E.R. 597.
[6] [1953] 1 Q.B. 617; [1953] 1 W.L.R. 341; [1953] 1 All E.R. 395.
[7] [1954] 1 W.L.R. 563; [1954] 1 All E.R. 711n.

out in the statement of claim as follows: "The said accident was "caused by the negligence of the defendants and the breach by "them of the obligation and duty referred to in paragraph 3 "hereof in that they failed to inspect the said loft prior to the "deceased working therein and nevertheless required the said "deceased to work therein without removing the said steel plate "or taking any other steps to remedy the said dangerous con-"dition of the said premises, and failed to take any steps or take "reasonable care to see that the premises were safe, though they "knew or ought to have known that the said premises were "dangerous as aforesaid."

Mr. Finlay, on the other hand, has submitted that there is no duty on an employer, who is not the occupier of premises, to see that the premises where his workmen are required to work are reasonably safe. He accepts the position, of course, that the employer is under a duty to see that he devises a safe and proper system of work and that he is also under a duty to supply his workmen with suitable plant and material; but he submits that beyond that the employer is under no duty with regard to the safety of the premises.

Mr. Finlay relies on two cases: the first is *Taylor* v. *Sims and Sims*,[1] which was tried by Lewis J. who, in his judgment, dealt with this question of the duty of an employer to ensure that reasonable steps are taken for the safety of his workman in a case in which the workman is working in premises which are not occupied by the employer. Lewis J. said[2]: "The argument of "counsel for the plaintiff is this. This is a matter of common "law negligence and involves the question of the duty of an "employer towards his employee. I have no doubt that when "counsel for the plaintiff put that forward he had in mind the "case which has been cited to me and which justifies that "position, namely, *Naismith* v. *London Film Productions Ld.*,[3] "which was not by any means on all fours with this case, "but it has a bearing on this matter which is perhaps worth "mentioning."

The judge dealt with the facts of the *Naismith* case[3] and then proceeded to deal with that case when it was before the Court of Appeal, and said[4]: "It was held that the direction to the jury "[that the obligation which the defendants owed to the plaintiff "was that owed to an invitee] was wrong. Goddard L.J., who "was a member of the court, agreed with Sir Wilfrid Greene, "M.R. and said[5]: 'In the first place, the standard of duty was "'not correctly stated to the jury, though it is only fair to point "'out that *Wilsons and Clyde Coal Co. Ld.* v. *English*,[6] which "'has done so much to clarify the law on that point, was not "'cited to Lord Hewart L.C.J. The relationship of the parties

[1] [1942] 2 All E.R. 375.
[2] [1942] 2 All E.R. 375, 377.
[3] [1939] 1 All E.R. 794.
[4] [1942] 2 All E.R. 375, 377.
[5] [1939] 1 All E.R. 794, 797.
[6] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628..

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" ' was not that of invitor and invitee, but that of employer and " ' employee, and it follows that the jury should have been " ' directed that the defendants' duty was not merely to warn " ' against unusual dangers known to them, and not to the plain- " ' tiff, but also to make the place of employment, and the plant " ' and material used, as safe as the exercise of reasonable skill " ' and care would permit.' " Lewis J. went on to say [7]: " It " seems to me that, if in that case Goddard L.J. was saying that " the position was not that of an invitor and an invitee although " the premises upon which the accident happened belonged to the " invitor or were in the occupation of the invitor, it can hardly be " said that the position of invitor and invitee arose where, in my " view, the defendants were not the occupiers of the premises " where the accident happened. That case, as I have said, is a " case exemplifying the doctrine that an employer has got to see " that the plant which he asks his employees to use is reasonably " safe, or, in other words, to take reasonable precaution to see " that it is safe. In my view *Naismith* v. *London Film Produc-* " *tions Ld.*[8] is, as Goddard L.J. clearly said, a case like *Wilsons* " *and Clyde Coal Co.* v. *English*,[9] where the defendants were " found to be liable because they had not taken reasonable care " to see that the plant—if I may use that expression with regard " to a lady's dress—which the employee was told to use at the " performance was proper equipment. When I say that there was " a duty upon the defendants to provide proper equipment, the " equipment in such a case may be a dress but in other cases in " which the expression ' defective plant ' has been used the plant " has been a crane or some sort of tool which the employee had " been called upon by the employer to use. Therefore this case " falls to be decided upon what are the duties of the defendants " in the circumstances of this case towards the plaintiff. The " words I have just read from a judgment of Goddard L.J. in " that case and also the words of Goddard L.J. in *Paine* v. *Colne* " *Valley Electricity Supply Co. Ld. and British Insulated Cables* " *Ld.*,[10] would seem to bear out this proposition. The common " law duty of an employer towards his employees is to provide a " safe place for their work. In other words, having in mind " similar expressions by other judges, which I need not go into " —and with this counsel for the plaintiff agrees—it is to take " reasonable care to see that the premises are safe.

" I confess that I am very troubled as to whether, when " Goddard L.J. used the expression ' provide a place which is " ' safe ' and the other expressions used in the cases, that means " anything more than that the premises belonging to or occupied " by the employer upon which the employee is to work ought to " be safe. Of course I leave out of consideration, in saying that, " that it is long settled that, if an employee is asked to work

[7] [1942] 2 All E.R. 375, 377.
[8] [1939] 1 All E.R. 794.
[9] [1938] A.C. 57.
[10] (1938) 55 T.L.R. 181; [1938] 4 All E.R. 803.

"with defective tools or tools as to which the employer has not "taken reasonable care to see that they are efficient, the employee "has a cause of action although he may be working with those "tools or plant quite away from the employer's premises. "Similarly, of course, *Wilsons and Clyde Coal Co. Ld.* v. "*English* [11] makes it perfectly clear that, if an employer working "on somebody else's premises, asks his workmen to do their work "on an unsafe system, it does not matter where the premises are "or to whom they belong upon which the workmen are asked to "work. I confess, however, that I see very great difficulty in "saying that there is a duty upon the employer to see that "premises are reasonably safe upon which he asks his workmen "to work when he has no control over those premises whatever. "I have asked counsel to refer me to any case in which it was "held that the plaintiff was liable for unsafe premises, quite "apart from faulty system or unsafe plant, in which those "premises were not in the occupation of the employer, that is to "say, were not the employer's own premises, and the researches "of counsel on each side, I understand, have been unable to find "any such case."

Then the judge went on to say [12]: "Applying, I hope, the "common sense test, it does seem to me a very curious proposi-"tion that, when a householder asks a contractor to come in "and paint his house, unless the contractor goes over the whole "house to see that every floor is safe or takes reasonable steps "to see that the house is safe, he, the contractor, is liable if "the floor collapses and one of his workmen is injured. It may "very well be, of course, that in those cases the occupier of "the house is personally liable by reason of an unusual danger, of "which he knew or ought to have known and failed to warn the "contractor or his workmen. All I can say is that it seems to me "a great extension of the doctrine of reasonable care which an "employer has got to take with regard to his men that, where-"ever they are sent out to work, he has got to go and see that "the premises are reasonably safe for them to work upon. I "have, therefore, as a proposition of law, very grave difficulty "in seeing that there is any liability upon the employers in this "case. If there be any such liability and it is the duty of the "employer to take reasonable steps to see that the premises are "safe although they are not his premises, I have to consider "whether or not any such reasonable steps were taken in this "case, assuming my view of the law is erroneous and that there "was a duty." I entirely agree with that view of the law as stated by Lewis J. The question is whether I am entitled to take that view, having regard to some observations of Denning L.J. in *Christmas* v. *General Cleaning Contractors Ld.*,[13] to which I will refer hereafter.

[11] [1938] A.C. 57.
[12] [1942] 2 All E.R. 375, 378.
[13] [1952] 1 K.B. 141; [1951] 2 T.L.R. 1218; [1952] 1 All E.R. 39.

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The other case relied on by Mr. Finlay is *Hodgson* v. *British Arc Welding Co. Ld. and B. & N. Green & Silley Weir Ld.*,[14] in which Hilbery J. said[15]: "On the evidence, I cannot find that "any case is made out against the first defendants, the plaintiff's "employers. The work in question was to be done by them in "premises over which they had no control whatsoever. They "were not occupiers of the premises. They were only a firm of "contractors employed to do certain work in a ship which was "then in the hands of the shipwrights for repairs, and they "contracted to do that work for the shipwrights", and the judge dealt with the case on that basis, there being, of course, a difference to some extent between the facts there and the facts in the case with which I have to deal, because in *Hodgson's* case the defendants made use of (as was the custom) various tackle, scaffolds and so forth that had been placed in position by other contractors.

Mr. Goodenday, on behalf of the plaintiff, relies upon *Christmas* v. *General Cleaning Contractors Ld.*,[16] in which Denning L.J. first of all disposed of *Taylor* v. *Sims and Sims*,[17] indicating that he was not in agreement with it. He said[18]: "The next question "is whether the contractors are liable to their workman, the "plaintiff. Mr. Nelson, for the contractors, argued that em-"ployers who send their men out to work on the premises of other "people have no responsibility for the safety of those premises, "and he cited *Taylor* v. *Sims and Sims*[19] in support of that "proposition. He said that it was for the occupier to see that "the premises were safe for the workman and not for the employer "to do so. I cannot agree with that proposition. Until recently "many people thought that an occupier was bound to use reason-"able care to see that his premises were safe for workmen he "invited on to them: but that is no longer true. The decision of "the House of Lords in *London Graving Dock* v. *Horton*[20] shows "that an occupier can allow his premises to remain defective and "dangerous with impunity so long as he gives the men warning "of the risk, or the danger is so obvious that they must be aware "of it. If this is so, then I think it must follow that it is for the "employer, who sends his men to the premises, to take reason-"able care to see that the premises are safe for the men or else "take proper steps to protect the men from the dangers to which "he sends them. There is a difference between a masterman and "a journeyman. A masterman, working on his own account, who "knows of the dangers, has a choice before him. He need not "do the work if he does not wish to run the risk. But a journey-"man, working for another, has no such easy choice. He has "been sent to do the work and he may well feel that do it he "must, even though he knows that it involves risk. If such a

[14] [1946] K.B. 302.
[15] [1946] K.B. 302, 304.
[16] [1952] 1 K.B. 141.
[17] [1942] 2 All E.R. 375.
[18] [1952] 1 K.B. 141, 148.
[19] [1942] 2 All E.R. 375.
[20] [1951] A.C. 737, 747, 756.

"man has no remedy against the occupier—and *Horton's* case[20] "shows that he has none—then it must be the duty of his "employer to take reasonable care to protect him. This seems to "me to be implied in the observations of Lord Porter and Lord "Norman in *Horton's* case.[20]"

The facts of *Christmas* v. *General Cleaning Contractors Ld.*,[21] as stated in the headnote, were: "An occupier of premises con-"tracted with a window cleaning company to clean the windows "of his premises once a fortnight. An employee of the company "stepped out on to the sill outside a window of the pre-"mises, 6¼ inches wide, and holding on to the bottom cross-"piece of the top and outer sash with his right hand he "pushed it up to the top of the window frame. The lower "sash, which was raised a few inches from the bottom of the "frame, without being touched by the window cleaner, by "reason of its weights being ill-balanced then came down upon "his hand, so that he lost his balance, fell and was injured. "Safety belts had been provided by the employers, but the "plaintiff did not use one, because no hooks were fixed in the "structure of the club's premises to which a safety belt could "be attached. No complaint about the window had been made "by anyone. The window cleaner sued his employers and also "the occupier, claiming damages for his injury." It was held that the occupier was not responsible, and it was said: "That "it was the duty of the window cleaning company, who sent their "employees to the premises, to take reasonable care to lay out "the work carefully, to see that the premises were safe for their "employees or else to take proper steps to protect them from "the dangers to which they were sent."

It is to be observed that Hodson L.J.[22] in that case did not state the proposition with regard to the obligation of the employer to see that the premises are safe that had been stated by Denning L.J.; and Lloyd-Jacob J., who was a member of the court, expressed the matter finally in this way[23]: "As against "the first defendants, on the judge's findings the only question "is whether they took reasonable care to provide a safe system "of work for their servant. They admittedly required him to "stand upon a ledge 6¼ inches wide and 27 feet from the ground "with no protection from a fall . . ."

That case went to the House of Lords[24] and it is to be observed that in the House of Lords the duty of the employer with regard to the safety of the premises was apparently only referred to, and indeed in their various speeches the Law Lords appeared to base their judgments on the observation of Lloyd-Jacob J. in the Court of Appeal, and based them entirely on the question of the system of work. Mr. Goodenday says that the observations of Denning L.J. in which he disposes of the case of

[20] [1951] A.C. 737, 747, 756.
[21] [1952] 1 K.B. 141, 142.
[22] [1952] 1 K.B. 141, 150.
[23] [1952] 1 K.B. 141, 153.
[24] [1953] A.C. 180.

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Taylor v. *Sims and Sims*[25] is not obiter dictum, but is part of the ratio decidendi. Mr. Finlay, on the other hand, submits that it is obiter, and I agree with Mr. Finlay's contention. I do not think, for the purposes of that case, that the observations of Denning L.J. were necessary, and treating them, of course, with the greatest possible respect, I find that on the consideration of the whole case and on what took place in the House of Lords I am not bound by what the Lord Justice said with regard to the case of *Taylor* v. *Sims and Sims*.[25]

Furthermore, in *London Graving Dock* v. *Horton*,[26] referred to by Denning L.J., the question for decision was the duty of an employer to an invitee. As I understand *Horton's* case the invitor fulfils his duty by warning of danger, but an employer has to go further than that with regard to his employee. I therefore adopt the reasoning given by Lewis J. in *Taylor* v. *Sims and Sims*,[27] and in my view, in the circumstances of the present case, the employer was under no duty, having regard to the fact that his workman was not to work on premises occupied by the employer, to take all reasonable steps to see that the premises were reasonably safe.

But in case I am wrong with regard to that view of the matter, I think it would be right for me to consider the case on the basis that the employer is under that duty, although the premises are not occupied by him. The question then arises whether the evidence indicates that the employer has fulfilled his duty which is stated by Mr. Goodenday—and there can be no doubt as to the accuracy of the proposition of law—to take reasonable care and to direct his mind to prevent foreseeable dangers of which he knew or ought to have known.

What is the evidence with regard to that duty owed by the employer, assuming that he owes that duty, in the case of premises which he does not himself occupy? The evidence before me is that this steel plate was "live," that it was in this loft where it had been, so far as one could tell, for a number of years; it was put in by the occupier when there were fire bombs falling. The premises were a dwelling-house. The defendants were local builders and contractors who would be expected to know something of the property in the neighbourhood. The work that the defendants had to do was plumbing work on the ground floor. They also had some electrical work to do, it is quite true, and they employed for that purpose a sub-contractor; but this accident happened when they were carrying out their plumbing contract.

Evidence has been given (which, of course, is not necessarily conclusive, but evidence from people in the trade) to the effect that this was a most unexpected thing to occur. [His Lordship referred to the evidence of Mr. James, a member of the defendant firm, who had been in the trade for 40 years, and who said that he looked round the lower floor of the house and, having regard

[25] [1942] 2 All E.R. 375.
[26] [1951] A.C. 737.
[27] [1942] 2 All E.R. 375.

to the work that was going to be done, there was no reason to suspect any kind of danger. According to his experience in the building trade it was not normal practice to carry out a preliminary inspection of premises, unless the premises appeared to be dangerous. His Lordship continued:] Obviously if the builder is asked to do work on a house which is in imminent danger of tumbling down, then, if the builder knows that, it would be his business, by looking, to observe it. If he knows that or ought to have known it then, of course, his duty is not to subject his workmen to unnecessary risks and he would have to devise, according to the work that was required to be done, a system of work having regard to the dangers that were present. But Mr. James said that the house was apparently a perfectly ordinary and normal dwelling-house, and it was not normal practice to carry out a preliminary inspection. He had never heard of an inspection to find electrical faults, and if a plumber was to work on a tank it was not normal to cut off the electric current.

All that sounds to me like common sense. I cannot imagine that we have yet reached the stage, if a householder finds that his storage tank in the loft is overflowing and there is obviously something wrong with the ball-cock or the valve, and he sends for his builder and tells him that he wants a plumber to attend to this, that a builder would then have to come into the house and test every electrical point and perhaps see whether the roof of the loft was quite safe and whether the roof was likely to fall in while the plumber went up to attend to the job. Among other things it would, I should have thought, make attention to a ball-cock a prohibitive item for any householder. I have to determine whether there is evidence here which demonstrates that the defendants failed to take reasonable care and to direct their minds to prevent foreseeable danger, of which they knew or ought to have known. If the defendants did not know of this danger, nobody did, and even the electrician, the contractor employed by the defendants, who went up into the loft, said that he did not see this steel plate lying on the floor. It is quite true, he said, that if he had seen it he would have removed it, because he said that undoubtedly the condition of the loft was dangerous. Everybody knows that that is, unfortunately, only too true, but it is like locking the stable door when the horse has departed. He said: "The condition of the loft was dangerous. There is always a "possibility of leakage from conduit pipes"; I suppose that is a truism also. He said that steel plates on the conduit pipes are dangerous, and this plate should have been moved.

But all those observations are, of course, counsels of perfection. What I have to ask myself is: Would a reasonable employer, exercising due care for the safety of his workmen, be expected to foresee such a remote possibility as a steel plate lying on top of a conduit pipe which has become defective and is therefore sending a charge of electricity through the plate, when all that he is required to do by the terms of the contract is to attend to

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some matters of a plumbing nature on the ground floor, with, of course, the possibility, I suppose, that some attention might have to be given to the tank in the loft? I cannot find myself able to say that it was a foreseeable matter, or that a reasonable employer would know, or ought to have known, of any such danger as this. Neither am I able to say that it was his duty to carry out a complete inspection of the premises in order to say that all was absolutely safe before his workmen began to work.

In the unusual nature of this accident—the remote possibility of such a state of affairs existing—I find it quite impossible to think that it could have been present to the mind of any employer, no matter how he was trying to foresee the possible dangers in which his workmen might be required to work. For all those reasons this action must fail.

Judgment for the defendants.
Judgment for the third party.

Solicitors: *Fielder, Jones & Ball; Davies, Arnold & Cooper; F. C. Yates.*

C. J. E.

[COURT OF APPEAL.]

Q. B. D.

1954
April 2.

Lord Goddard C.J. and Hallett J.

* *Ex parte* FRY.

Crown Practice—Certiorari—Inferior tribunal—Fire service—Offence against discipline—Case heard by chief officer—Caution administered—Complaint of manner in which hearing conducted—Whether certiorari would issue—Administration of Justice (Miscellaneous Provisions) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 63) *s.* 7 (2)—*Fire Services Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 41), *s.* 4—*Fire Services (Discipline) Regulations,* 1948 (*S.I.* 1948, *No.* 545), *regs.* 1, 2, 5.

Fire Service. Military law — Court-martial — Certiorari — Whether subject to.

The applicant, a fireman, on being ordered to clean the uniform of an assistant divisional officer of a fire brigade, refused to do so. Thereupon he was suspended from duty and charged under the Fire Services (Discipline) Regulations, 1948, reg. 1, with disobedience to orders. The chief fire officer heard the matter and held that the applicant was guilty of disobedience to orders and punished the offence by a caution, that being the least of the punishments laid down in regulation 13 of the regulations of 1948. The applicant applied to the Divisional Court for leave to move for certiorari to quash the order of the chief fire officer.

The Divisional Court refused leave, holding that a chief officer of a force governed by discipline, such as a fire brigade, in exercising disciplinary authority over a member of the force, was not acting judicially or quasi-judicially. Certiorari went to courts or to some body which could fairly be said to be a court. The court would not interfere with the discipline of police forces, fire brigades or

similar bodies which in their nature must be generally known as disciplined services and where the chief officer was simply acting as an officer in the matter of discipline. On appeal:—

Held, that the court, in its discretion, should refuse the application. The applicant had deliberately disobeyed the orders given to him by a superior officer. If he felt that he had been ordered to do something which he thought he ought not to be ordered to do, there were proper means of bringing his complaint to the Fire Authority.

Regina v. *Metropolitan Police Commissioner, ex parte Parker* [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717 considered.

MOTION for leave to move for an order of certiorari.

The applicant, Ronald Alexander Fry, was a fireman in the County of Glamorgan Fire Brigade. He sought an order to quash a decision made by the chief fire officer of the brigade under the Fire Services (Discipline) Regulations, 1948,[1] made pursuant to the Fire Services Act, 1947. In his affidavit in support of his application he stated: "2. On March 5, 1954, I "was ordered by leading fireman Parker to clean the uniform of "Assistant Divisional Officer Evans. I considered that this order "was not a lawful order, because the orders issued to the said "fire brigade preclude an officer from giving such an order to a "fireman and I therefore declined to comply with it. 3. Later "the same day I was notified that I had been suspended from "duty on half pay because of my action and I was escorted off "the fire station. 4. On March 9, 1954, I was charged under

[1] The Fire Services (Discipline) Regulations, 1948, Part I, reg. 1: "A member of a fire brigade commits "an offence against discipline (hereafter in these Regulations referred "to as an 'offence') if he commits "one or more of the offences set out "in the schedule hereto."

Reg. 2: "(1) The chief officer, if "he decides that a member of the fire "brigade shall be charged with an "offence, shall as soon as possible "cause him to be informed in "writing of the charge together with "such particulars as will leave the "accused under no misapprehension "as to the precise nature of the "allegations on which the charge is "based. (2) The accused shall also "be given as soon as possible copies "of any report, complaint, or other "written allegation on which the "charge may be founded and any "reports thereon, notwithstanding "that they may be confidential."

Reg. 5: "(1) The fire authority "may direct that any class or "description of case shall be heard by "them, but subject to any such direction the chief officer may decide "either to hear the case himself or "order the case to be heard by a "tribunal consisting of one or more "officers not being below the rank of "Divisional Officer, Grade III. (2) If "the chief officer decides to hear the "case himself, he may order an officer "or officers of the fire brigade to "assist him to hear the case as "assessors. (3) The chief officer or "the officer or officers ordered by him "to hear the case are hereafter in "these Regulations referred to as the "disciplinary tribunal."

Reg. 8: "(5) The accused may, "within three days of the notification "to him of a decision of the disciplinary tribunal to impose a punishment other than a caution, appeal "to the fire authority by giving "notice in writing to that effect to the "chief officer, and, where the decision "is one which under paragraph (1) "or (2) of this Regulation would have "required confirmation, it shall, subject to this appeal, have effect without confirmation."

Part II, Punishments. Reg. 13: "An offence may be punished by— "(*a*) dismissal; (*b*) being required to "resign as an alternative to dismissal "forthwith or at such later date as "may be specified; (*c*) reduction in "rank; (*d*) stoppage of pay; (*e*) reprimand; (*f*) caution. . . ."

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"paragraph 1 of the Fire Services (Discipline) Regulations, 1948,[1] "with disobedience to orders in that I on March 5, 1954, "failed to carry out a lawful order given to me to clean the fire "uniform of an officer attached to Station C. I., Pontypridd. I "denied the said charge and nominated leading fireman Gunter "(hereinafter called 'Gunter') as my accused's friend. 5. I "appeared with Gunter at the hearing of the case before D. W. "Bates the chief officer of the said fire brigade (hereinafter called "'the chief officer') on March 19, 1954. The hearing was con-"ducted by the chief officer in such a way that I was denied "a fair trial. 6. Divisional Officer Hogg, the complainant, acted "as presenting officer and made a speech opening his case. "Before any witnesses were called Gunter said that the proceed-"ings were out of order because I had not been supplied with "copies of any report, complaint or other written allegation on "which the charge was founded as required by paragraph 2 (2) of "the said regulations. The chief officer swept this aside without "considering it. 6. Gunter next said that he submitted that "there was no case to answer on the grounds that the said order "was unlawful because it was an order to do something which "was outside the scope of a fireman's duties and because it "contravened National Fire Service Instruction No. 45/1942, "which instruction held good in the said fire brigade. A copy of "the said instruction, which prohibits firemen being employed as "personal servants of officers and precludes an officer from having "his uniform looked after by a fireman, except as a purely "private arrangement in certain circumstances, is now produced "and shown to me marked 'R.A.F. 1.' 7. Gunter was about to "develop this argument when the chief officer interrupted him "and said that he had no doubt that the order was lawful."

The applicant moving ex parte applied for leave to move for certiorari to quash the order made by the chief fire officer.

H. V. Lloyd-Jones Q.C. and *Peter Pain* for the applicant.

The following case was cited in argument in addition to those referred to in the judgment: *Rex* v. *Milk Marketing Board, ex parte North.*[2]

April 2, 1954. LORD GODDARD C.J. Mr. Lloyd-Jones applies for leave to move for certiorari to bring up an order of the chief fire officer of the Glamorgan Fire Brigade before whom the applicant was charged with a disciplinary offence and was cautioned.

In my opinion, the chief officer, although he is the chief officer of a body set up by statute in the sense that he sits by virtue of the regulations made under the Fire Services Act, 1947, cannot in any sense be said to be a court. The Secretary of State, under the power given him by the Act of 1947, has made disciplinary

[1] See note on p. 731. [2] (1934) 50 T.L.R. 559.

regulations laying down terms under which fire officers are to administer discipline in the body of which they are chief officers, and providing for certain penalties which may be inflicted, and the conditions under which they may be inflicted. Those regulations give a right of appeal, to the fire authority in certain cases, and to the Secretary of State in other cases, but where the only punishment awarded, if it can be dignified by the name of punishment, is a caution, there is no appeal.

It is said that this court can review the order of the chief officer who administered the caution.

In *Regina* v. *Metropolitan Police Commissioner, ex parte Parker,*[1] a case under a different statute and which is not entirely on all fours with the present case, I said[2]: "Where a "person, whether he is a military officer, a police officer or any "other person whose duty it is to act in matters of discipline, is "exercising disciplinary powers, it is most undesirable, in my "opinion, that he should be fettered by threats of orders of "certiorari and so forth, because that would interfere with the "free and proper disciplinary exercise of the powers that it may "be expected he would otherwise use."

It seems to me impossible to say that a chief officer of a force which is governed by discipline, such as a fire brigade is, in exercising disciplinary authority over a member of the force, acting either judicially or quasi-judicially, any more than a schoolmaster is when he is exercising disciplinary powers over his pupils. It is true that there is an Act of Parliament, the Fire Services Act, 1947, but so there is an Army Act, and there are the Queen's Regulations under the Army Act. Under the Army Act a court-martial can be set up to deal with certain offences, and a commanding officer has power to deal with certain disciplinary offences in the orderly room; there he is not sitting as a court but as an officer administering discipline. I have never heard it suggested that this court can issue certiorari to bring up his order, nor do I know of any case with regard to police officers, who are also dealt with under regulations in matters of discipline, in which this court has ever yet purported to exercise control over those bodies by the issue of the writ of certiorari. Certiorari goes to courts, or to something which can fairly be said to be a court. Recently, beginning with *Rex* v. *Electricity Commissioners, ex parte London Electricity Joint Committee Co. (1920) Ld.,*[3] very considerable expansion has been given to the word "court" because nowadays government departments are given powers which may be called semi-judicial or quasi-judicial powers, and, accordingly, this court has exercised control over them by certiorari. That is an entirely different thing from saying that this court can interfere with the discipline of police forces, fire

[1] [1953] 1 W.L.R. 1150; [1953] 2 All E.R. 717.

[2] [1953] 1 W.L.R. 1150, 1155.

[3] [1924] 1 K.B. 171; 39 T.L.R. 715.

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brigades or similar bodies which, in their nature, must be generally known as disciplined services, and where the chief officer is simply acting as an officer in the matter of discipline. In such cases this court ought not to exercise control by means of the writ of certiorari. In my opinion, there is no ground for giving leave to move in this case, and the application is refused.

Hallett J. I agree. I am reinforced in my opinion by the allegations contained in the affidavit filed on behalf of the applicant. Mr. Lloyd-Jones has sought to convince us that this court is being asked to exercise its jurisdiction of supervising the proceedings of inferior courts, but the first complaint in the affidavit is that the applicant was given an order to do something which he says he ought not to have been ordered to do. There is there no question of any proceeding of any court, but this court so far is being asked to review whether an order given to one member of an organized body by a senior member of the body was a proper order or not. Then he says: "In fact the penalty "I sustained was a loss of pay of £8 14s. 6d. because I was sus-"pended on half-pay for two weeks prior to the hearing." Neither the order nor the suspension had anything to do with the conduct of the hearing and cannot be affected by the hearing; but we are asked by a side wind to review the propriety of the order and the subsequent suspension by going into whether the hearing was conducted in what is alleged to have been a non-judicial manner. I only add those two facts because they seem to me to illustrate the distinction which Lord Goddard C.J. has drawn between a purely disciplinary proceeding which is not the proper subject of review by this court, and a judicial proceeding which is. I agree that this application ought to be refused.

Application refused.

J. F. L.

The applicant appealed.

H. V. Lloyd-Jones Q.C. and *Peter Pain* for the applicant.

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Singleton, Hodson and Morris L.JJ.

April 6, 1954. Singleton L.J. By the Fire Services Act, 1947, s. 4: ". . . the council of every county and county borough "shall, subject to the provisions of this Act, be the fire authority "for the area of the council," and power was given by the Act under which the county council can delegate certain of its powers. The Fire Services (Discipline) Regulations, 1948, deal, as the name shows, with questions of discipline. [His Lordship read the relevant regulations and the portions of the affidavit of the applicant set out above and continued:] There is nothing to show that there was any written report, complaint, or other written allegation. The submission which was made by the friend of the accused that the proceedings were out of order, because he had not

been supplied with copies of the report failed because of want of any proof that there was any written report. The accused did not ask, nor did his friend ask, if there was any such written report. The submission was not based upon fact, and perhaps it is not surprising in those circumstances that the chief officer swept it aside, though I should not think it is right to say that he did so without considering it.

The chief officer was well acquainted with the Statutory Instrument; he knew the nature of the order which had been given, and he formed the view that the order was a lawful order, and he so held.

It is sufficient for the purposes of this case to say that the applicant was given an order which he disobeyed. He was found guilty of disobedience to orders, and the punishment inflicted upon him was the least of those set out under regulation 13 of the regulations of 1948—a caution. It meant that, as he had been suspended for some days, he lost half his pay during the time of his suspension. The order which was given was a simple one according to the applicant, namely that he should clean the uniform of Assistant Divisional Officer Evans. The applicant disobeyed that order. He might have dealt with it otherwise; he might have obeyed the order and then have put forward to the fire authority, or, if necessary, to the Secretary of State, the question whether, in view of the instruction which had been issued, this order was lawful and one with which a fireman was bound to comply. He did not do that; he disobeyed the order, and so the case was made the subject-matter of a charge. I cannot help feeling that it was extraordinarily foolish conduct. In these days it behoves everyone to act reasonably. If every fireman or every policeman is to take it upon himself to disobey an order of this kind and to say: "I do "not think it is lawful," it will become almost impossible to carry on any public service. The Secretary of State has made other regulations—the Fire Services (Ranks and Conditions of Service) Regulations, 1948 (S.I. 1948, No. 546)—which deal with the good government of the fire services, and with questions of discipline. It is always possible for a man to raise a question whether or not an order, such as this, is a proper order to give, and the sensible way is to carry out the order and raise the matter afterwards, if he wishes to do so, instead of disobeying it and asking for trouble. The applicant says in his affidavit that the chief officer did not deal with his case in the way in which he ought to have done. He complains that as to one matter (and I have mentioned it already) the chief officer swept this aside without considering it, and, as to the lawfulness or otherwise of the order, that the chief officer interrupted Gunter's argument and said he had no doubt that the order was lawful. I have said nothing as to the latter part of the affidavit, as it has not been possible that this court should hear any answer to it,

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but if that which is stated in the affidavit is true (and I say nothing as to that) it does not bear a very pleasant look.

The relief which the applicant seeks arises under section 7 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938. By subsection (1) of the section it is provided: "The "prerogative writs of mandamus, prohibition and certiorari shall "no longer be issued by the High Court." Subsection (2) provides: "In any case where the High Court would, but for the "provisions of the last foregoing subsection, have had jurisdic-"tion to order the issue of a writ of . . . certiorari removing any "proceedings . . . into the High Court . . . the court may make "an order . . . removing the proceedings or matter, as the case "may be." Thus the remedy is discretionary in the court. If it is seen that there is a danger of serious injustice being done by the decision of an inferior court through its assuming a jurisdiction it had not, or through something in the trial which is unlawful or contrary to the interests of justice, then the Divisional Court may grant the remedy which is sought in this case.

In the Divisional Court Lord Goddard C.J. said: "In my "opinion, the chief officer, although he is the chief officer of a "body set up by statute in the sense that he sits by virtue of "the regulations made under the Fire Services Act, 1947, cannot "in any sense be said to be a court"; and later in his judgment the Lord Chief Justice said: "It seems to me impossible to say "that a chief officer of a force which is governed by discipline, "such as a fire brigade, is, in exercising disciplinary authority "over a member of the force, acting either judicially or quasi-"judicially." The Lord Chief Justice was following the decision of the Divisional Court, in which he gave the first judgment in *Regina* v. *Metropolitan Police Commissioner, ex parte Parker.*[1] The Lord Chief Justice in that case having held that the Commissioner of Police, in the circumstances of that case, was not exercising any judicial or quasi-judicial function, but was merely acting as a disciplinary authority, added[2]: "Where a person, "whether he is a military officer, a police officer or any other "person whose duty it is to act in matters of discipline, is exer-"cising disciplinary powers, it is most undesirable, in my opinion, "that he should be fettered by threats of orders of certiorari and "so forth, because that would interfere with the free and proper "disciplinary exercise of the powers that it may be expected he "would otherwise use."

In that case the judgment of the Lord Chief Justice was based on both points: first, that the commissioner of police was not sitting in a judicial or quasi-judicial capacity; and, secondly, that the remedy which was sought was discretionary in the court. In this case I prefer to base my decision upon the second ground. This applicant is a member of a service which is of great public importance. For the good of that service and of those who are

[1] [1953] 1 W.L.R. 1150. [2] Ibid. 1155.

employed in the service, the Secretary of State has made regulations so that their position may be ascertained, and so that there may be as few difficulties as possible. There is, as was said in another case, a complete code. If a man feels that he is ordered to do something which he ought not to be ordered to do, he can raise the matter in the way that I have said, but, if instead of doing that, he deliberately sets out to disobey the order given to him by a superior officer, he is only making difficulties for himself and for the whole of the service, and that is something which he ought to realize. Again, in the ordinary case which is dealt with by the chief officer, a case of discipline, there is an appeal to the fire authority. In the circumstances of the present case, there was not, because the punishment inflicted was only a caution, but there are ways and means of bringing to the notice of the fire authority in a proper case the conduct of one who has to preside over a disciplinary tribunal of this kind, if it is thought right and proper that that should be done.

In the circumstances I do not think that the Divisional Court ought to have granted the relief which the applicant sought, nor do I think that this court should do so. The application must be dismissed.

HODSON L.J. I agree, and have nothing to add.

MORRIS L.J. I also agree.

Application dismissed.

Solicitor: *W. H. Thompson.*

B. A. B.

[COURT OF APPEAL.]

* MORTON *v.* MORTON (No. 2).

[M. 1952 (D.) 250.]

Husband and Wife — Maintenance — Agreement — Change of circumstances—Whether wilful neglect to maintain—Jurisdiction of court to review agreed terms—Whether reasonable at time of application —Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23.

Legal Aid—Costs—Husband and wife—Order for security for wife's costs —Wife legally aided—Hardship.

On an application under section 23 (1) of the Matrimonial Causes Act, 1950, the court has jurisdiction to review the terms of a separation agreement relating to the maintenance of the wife, and to decide whether, in all the circumstances at the time when the application is made, the husband is providing reasonable maintenance for his wife. In considering such an application it is however essential to bear in mind that the parties have agreed terms and the court will be reluctant to vary those terms.

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Tulip v. *Tulip* [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 followed.

Morton v. *Morton* (*No.* 1) (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273 considered.

Decision of Judge Gerwyn Thomas (sitting as a Special Commissioner in divorce) affirmed.

Appeal from Judge Gerwyn Thomas.

The applicant, Maria Alice Morton, was married to the respondent, Willie Colston Morton, in 1913 and they had two children, a girl who was born in 1914 and a boy born in 1919. Both these children were alive at the time of the application. In 1930, the husband and wife made a separation agreement in writing, the terms of which are set out in the judgment of Singleton L.J. The husband thereafter continued to make the payments to the wife which he had agreed to make for her maintenance. In 1933 he stopped making payment for the maintenance of his son as the son had started working. The wife took proceedings in the magistrates' court against the husband for wilful neglect to maintain her, but on appeal to the Divisional Court [1] the order made in her favour by the stipendiary magistrate was discharged. In 1951 the wife again applied to the court of summary jurisdiction on the ground that her husband had wilfully neglected to maintain her and had deserted her. That summons also was dimissed. In May, 1952, the wife applied to the District Registry of the High Court under section 23 of the Matrimonial Causes Act, 1950,[2] again alleging that her husband had wilfully neglected to provide reasonable maintenance for her. Her application was heard by Judge Gerwyn Thomas sitting as a special commissioner in divorce and, after considering a report by the District Registrar of Cardiff District Registry about the circumstances and means of the parties at various dates, he dismissed the application. The wife appealed.

The facts are more fully stated in the judgment of Singleton L.J.

E. P. Wallis-Jones for the applicant wife.

D. P. Rowland for the respondent husband.

No cases other than those referred to in the judgment of Singleton L.J. were cited in argument.

Singleton L.J. This is an appeal from an order of Judge Gerwyn Thomas, sitting as special commissioner in divorce on

[1] (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273.

[2] Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to pro- "vide reasonable maintenance for his "wife or the infant children of the "marriage, the court, if it would have "jurisdiction to entertain proceedings "by the wife for judicial separation, "may, on the application of the wife, "order the husband to make to her "such periodical payments as may be "just; and the order may be enforced "in the same manner as an order for "alimony in proceedings for judicial "separation."

November 25, 1953. He had before him an application under section 23 of the Matrimonial Causes Act, 1950, which replaces section 5 of the Law Reform (Miscellaneous Provisions) Act of 1949. [His Lordship read section 23 (1), and continued:] The power given by that subsection is in addition to any rights which the wife may have to apply to the magistrates for an order.

The facts of this case are, I hope, unusual. The history, as given to us by Mr. Wallis-Jones, is as follows: The wife is now 60 years of age; the husband is 62. He was until comparatively recently a collier earning considerable wages, and wages which were higher in 1953 than they had been before. The parties were married in 1913. There were two children, a girl born in 1914, and a son who was born in 1919. Both of those children are still alive; both are married, and the wife, who is the appellant in this court, lives with her married daughter. In 1930 there were matrimonial differences between husband and wife, and the wife took proceedings, which were compromised; an arrangement being made and reduced to writing, bearing a sixpenny stamp. The arrangement is in these terms: "Morton against Morton. Heads "of Agreement. In consideration of Maria Alice Morton . . . "withdrawing summons for maintenance against Willie Colston "Morton . . . the said Maria Alice Morton and Willie Colston "Morton hereby mutually agree to enter into separation deed con-"taining the following clauses: 1. Husband to pay wife one "pound a week and boy ten shillings a week the first payment "to be made on Saturday next. 2. While unemployed husband "to pay wife for herself and boy amount of dependants benefit "only. 3. Husband to deliver to wife her goods and furniture. "4. Wife to have custody of boy with right of access by husband. "5. Usual clause that no proceedings be taken while terms of "agreement kept. 6. Mutual dum casta clause." That was perhaps a little unusual. "7. Husband to contribute £3 3s. 0d. to "wife's costs." That document is dated August 19, 1930. No further agreement followed, but under the terms of that document the husband paid £1 a week to his wife regularly, and it is not said that he ever fell into arrears.

In 1933 the son of the marriage started working, and the father ceased paying the 10s. a week in respect of the boy. The wife took proceedings against the husband in the magistrates' court, and an order was made by the stipendiary magistrate that the husband should pay the sum of 30s. a week to the wife. The husband's appeal to the Divisional Court was heard by the President and Hodson J. on January 14, 1942.[1] It was held that the heads of agreement were a binding contract, and were not a contract to make a contract; that the existence of the contract was not necessarily a bar to the making of a subsequent order; and, according to the headnote, it was further held that as the

[1] (1942) 58 T.L.R. 158; [1942] 1 All E.R. 273.

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terms of the agreement had been faithfully carried out, the husband could not be said to be guilty of an offence of wilfully neglecting to maintain, and there were no grounds on which the magistrate could make an order. It may be that the latter part of that headnote goes a little too far in view of the decision of the Court of Appeal in *Tulip* v. *Tulip*,[2] to which I shall refer. The result was that the Divisional Court discharged the order made by the stipendiary magistrate.

On November 13, 1951, the wife again applied to the stipendiary magistrate on the ground of wilful neglect to maintain her, and on the ground of desertion. How there could be desertion, in view of the terms of the agreement, which the husband and wife had made, I fail to see. The stipendiary magistrate dismissed the summons; and there was no appeal from that decision.

On April 19, 1952, the wife's solicitors wrote to the husband: "We have been instructed by your wife to write to you regarding "the amount of £1 a week which she receives from you under "the terms of an agreement entered into as long ago as August "19, 1930, when proceedings under the Summary Jurisdiction "Acts, instigated by her, were compromised and as a result "she then withdrew the summons for maintenance. In view "of present day conditions you will surely appreciate that this "sum is quite inadequate to maintain your wife and we hope "to learn from you that you are prepared to increase the weekly "sum by a substantial amount. Please let us hear from you "at an early date." To which the husband's solicitors replied on April 26, 1952: "Mr. W. C. Morton of Tonypandy has called "to see us today upon your letter addressed to him on the 19th "instant. We would refer you to our letter of November 29 last. "Before the fresh proceedings between the parties came to a "hearing in the Merthyr magistrates' court in November last "negotiations were conducted between your client's then solicitor "and ourselves with a view to a new agreement being entered "into out of court. Those negotiations were carried on strictly "without prejudice to our client's position under the existing "agreement, and although it was stated on his behalf that he was "prepared to consider making an increase in the weekly main-"tenance provided by the existing agreement your client's terms "were so unreasonable having regard to her husband's circum-"stances that he had no alternative than to allow the case to "come on for hearing with the result mentioned in our letter "to you of November 29 last." That was a reference to the dismissal of the wife's complaint. The letter continues: "Since "he failed to reach an agreement with his wife then he feels "that it is useless making another attempt to reach a reasonable "agreement with her and he has therefore instructed us to say "that he will defend any proceedings which she may be advised "to take against him in the matter."

[2] [1951] P. 378; [1951] 1 T.L.R. 1056; [1951] 2 All E.R. 91 (C.A.).

On May 9, 1952, Mrs. Morton issued an application under section 23 of the Matrimonial Causes Act, 1950, claiming that her husband " . . . has wilfully neglected to provide reasonable main- " tenance for her and prays that he be ordered to make to her " such payments for her maintenance as may be just." The application was referred to the registrar so that he could ascertain the facts, about means and the like. Counsel appeared before him on both sides and in due course he reported: " Counsel " requested reports of means on various dates as follows " as to the applicant, and as to the respondent, so that at the request of counsel the financial position of the applicant and of the respondent was ascertained at each time for which counsel had asked. " As to applicant. On April 26, 1952, she had no income " but was in receipt of 20s. per week from the respondent and " national assistance at 22s. per week up to June 16, 1952, when " it was raised to 27s. per week but subsequently reduced (some " weeks before March 26, 1953) to 23s. 6d. per week until March " 26, 1953, on which date she became entitled to retirement " pension of 24s. per week. Therefore:—At April 26, 1952, and " May 9, 1952, no income, but receipts were 42s. per week. At " June 26, 1952, and August 20, 1952, no income, but receipts " were 47s. per week. From October 25, 1952, to March 26, 1953, " no income, but receipts were 47s. reduced to 43s. 6d. per week. " From March 26, 1953, to April 18, 1953, her income was 24s. " plus receipt of 20s., a total of 44s. per week. The rent of her " house is £1 2s. 3d. per week, electricity charges are 4s. or 5s. " per week and gas 6s. per week, one-half of which is paid by " her daughter. Applicant's outgoings therefore were at all " material dates constant at 18s. 7½d. per week. Applicant has " her daughter (working) with her husband (working) and two " daughters (one working) living with her occupying four-fifths of " the house, but paying only half the outgoings. A rental of 40s. " per week would not be unreasonable for the accommodation " used. Applicant looks after the house for herself and " daughter's family and services rendered could be valued at 20s. " per week." From the latter part of the report on the applicant's position, it will be seen that she could have been in a better financial position than she was, if her daughter and her daughter's husband had paid a reasonable amount for the accommodation they had at her house. They were paying very little. At the date of the report the daughter had been left by her husband; but prior to the time of his leaving the daughter, he had been working as a collier and had been contributing £7 a week to the house, from which it may be said that the income of the household was very considerable, although that may not be an element for consideration. At the same time I think that it is something which is worth noticing in the unusual circumstances of this case.

As to the respondent husband, the report says: " At all " material dates he had a varying wage plus a constant income

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"as follows." He had some house property from which there was a balance of rent in his favour, after paying rates, of 4s. 0d. a week. On April 26, 1952, his gross wages were £14 11s. 11d., but by May 3, 1952, he was sick and not working, and he did not work again until June 26, 1952. During that time he was drawing sickness benefit. He returned to work as a collier for a short time, and I should imagine he was not fit for it, because on March 25, 1953, he took other work, and his gross wages from October 25, 1952, to April 18, 1953, were £9 15s. 11d. a week. That was the report of the registrar on the position of the two parties to this dispute.

It appeared to me at an early stage in the argument that the question before the commissioner was really one of fact, and it appeared, too, when the judgment of the commissioner was read, that he so treated it. His judgment set out the facts, and he said: "The wife, under the appropriate section of the Act, applies "to the court for maintenance from her husband on the ground "of his wilful neglect to provide reasonable maintenance. The "figures (which are, in fact, agreed) before me, or the funda-"mental figures, are that the husband earns £8 7s. 6d. a week as a "workman, plus 17s. 9d. a week income, which he derives from "one or two cottages, making a total of £9 5s. 3d. a week." That is the figure taken from the report as at October, 1952. The commissioner continued: "I think it is clear from the cases "quoted to me, namely, *Morton* v. *Morton*,[3] *Tulip* v. *Tulip*,[4] and "*Dowell* v. *Dowell*,[5] that that agreement"—that is the agreement of 1930—"does not preclude the court from going into this "question as to whether there is wilful neglect to provide reason-"able maintenance; and, accordingly, I permitted the application "to be heard, the registrar's report to be put in before me, and "evidence to be called by either party. I think I am entitled to, "and should, look at the agreement and the terms of the agree-"ment as representing what was fair and reasonable in 1930, at "any rate, and I treat it as of evidential value as to what was "fair at that time as constituted by the free will of both parties: "£1 per week. If I understand the law, what I have to consider "at the present moment, in view of the change of circumstances, "and having regard to all the circumstances, is whether the "husband has wilfully neglected to provide reasonable mainten-"ance, having regard to the fact of what his earnings were, and "as to what her receipts are."

Mr. Wallis-Jones in his submission to this court argued there that the commissioner took too narrow a view of the position, and that his duty was to consider not only what the earnings were at a particular date, but to consider what they had been before that time as well. I think, when one looks at the whole of the judgment, the commissioner did that, in fact.

The judgment continues: "I have already spoken as to his

[3] 58 T.L.R. 158.
[4] [1951] P. 378.
[5] [1952] W.N. 296; [1952] 2 All E.R. 141.

"earnings and income, and it remains for me to say what the "agreed receipts of the wife are at the present time: £1 a week "from the husband and 24s. as permanent pension, so that her "total receipts are £2 4s. 0d. That is not a high figure in all "conscience, but more than double what she thought was fair in "1930 when his wages in 1930 were about half, roughly, what "he is earning today. His wages have gone up by a little over "half, and her receipts are up by more than half. I do not know "by how much the cost of living has gone up but I take judicial "notice of the fact that the cost of living undoubtedly has gone "up since 1930. With £2 4s. 0d. a week coming in to her from "two sources, she is living in a house with a daughter and a "grand-daughter, and they are paying the expenses of the house "between them. She says that her daughter pays half the rent, "the rent being £1 5s. 3d.; she says her daughter also pays half "the gas, and I think she said half the light. She is only "charging half in spite of the fact that there are three bedrooms "in the house, she only occupies one, and the other two are "let. It is what I call a difficult case. I do not think, having "regard to all the circumstances: the earnings and income of "the husband, and the receipts of the wife, that he is in breach "of his statutory duty. I am not satisfied, accordingly, that he "has wilfully neglected to provide reasonable maintenance for "his wife."

As the President pointed out in the case between these parties before the Divisional Court a dozen years or so ago, wilful neglect to provide reasonable maintenance imports some element of matrimonial misconduct. The commissioner did not find proof of that on the facts of this case. He applied his mind to the decision of this court in *Tulip* v. *Tulip*.[6] In that case: "In June, 1942, a "husband and wife entered into a deed of separation, the husband "covenanting (if certain stipulations were observed) to pay such "sum as after the deduction of income tax would amount to and "leave the net yearly sum of £156. Those payments were "regularly made. The wife covenanted to support and main-"tain herself out of that provision and out of her separate estate, "or otherwise. In December, 1949, the wife asked the husband "to increase the amount payable under the deed of separation. "This request was refused, and thereupon she took out a "summons in the High Court for increased maintenance, alleging "that her husband had wilfully neglected to provide reasonable "maintenance for her. She further asked the court to order the "husband to secure such payments as might be ordered. In his "affidavit the husband referred to the deed, and to the discharge "of his liabilities under it, and said that he relied upon the deed "and upon his wife's covenants in it 'whether by way of estoppel "'or otherwise.' It was conceded that since the date of the deed "the husband's financial position had materially improved, while "that of the wife, who was suffering from spinal arthritis, had

[6] [1951] P. 378.

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"deteriorated. Barnard J. held, refusing the wife's application, "that, despite the change in the respective positions of the "parties, the husband, who had faithfully carried out the terms "of the deed, could not be held guilty of wilful neglect to main-"tain, which imported some element of matrimonial mis-"conduct."

The wife appealed to this court, and it was held by a majority of the court (Lord Asquith of Bishopstone and Birkett L.J.), "that the existence of the deed did not preclude the wife from "applying to the court under section 5 of the Law Reform (Mis-"cellaneous Provisions) Act, 1949, and that the court had juris-"diction to determine whether at the time of that application "the husband was providing maintenance for the wife which was "reasonable in the circumstances."

Harman J., who was the other member of the court, took a different view. He said [7]: "A husband who merely declines to "pay a greater sum than that stipulated in a deed is not guilty "of 'wilful neglect' to maintain within the meaning of section 5 "of the Act; the existence of a binding deed, providing present "maintenance, the terms of which have been faithfully observed, "is conclusive evidence that the husband has discharged his "obligations."

Of course, this court is bound by the decision in *Tulip* v. *Tulip*.[8] I have said already that the commissioner followed the decision in that case. I think it is right to refer to passages from the judgment of the majority, which was given by Birkett L.J. Having referred to several of the authorities, including *Morton* v. *Morton* (*No.* 1),[9] Birkett L.J. said [10]: "It is quite clear from a "consideration of that case, and indeed all the cases cited to us, "that the existence of a deed is no bar to the wife's application "under section 5 of the Act of 1949. Indeed, all the discussion "in the cases on the evidential value of the deed would be quite "irrelevant if this were not so. The real question therefore in "the present appeal is whether Barnard J. was right in saying, "as I think it is quite plain that he did say from the passage "which Mr. Latey cited, that because there was a deed of "separation in existence providing for maintenance, and that "this provision had been faithfully observed by the husband, it "was impossible to say that he had been guilty of wilful neglect "to provide reasonable maintenance, and that as no matrimonial "offence had therefore been committed the wife's application "must be dismissed. I am of opinion that in so deciding "Barnard J. was wrong. With great respect to him, he seems "to have ignored several essential matters. He seems to have "decided that a sum for maintenance, agreed to in 1932, was "unalterable so long as the husband continued to pay it, and "was willing to go on paying it. But the real question for his "determination was not that, but whether at the time the

[7] Ibid. 379.
[8] [1951] P. 378.
[9] 58 T.L.R. 158.
[10] [1951] P. 378, 388.

"application was made to him the husband had wilfully neglected "to provide reasonable maintenance. That must mean reason- "able at the time of the application, in the light of all the "circumstances then existing. . . . I think that the judge never "considered, or, if he did consider, never decided, the two "essential elements in the wife's application: (a) whether the "husband was neglecting to provide reasonable maintenance for "his wife, and (b) whether his neglect was wilful; and I think "it is plain why he never considered or decided these points. "His judgment was based on the view that where a deed was "in existence providing for maintenance, and the provision for "maintenance had been faithfully observed, there could be no "matrimonial offence of 'wilfully neglecting to provide reason- "'able maintenance' however much the circumstances had "changed. In a word, he said that once a sum for maintenance "had been fixed by mutual agreement, and embodied in a separa- "tion agreement, it must be considered to be reasonable main- "tenance for all time. In my view, this way of deciding the "application was wrong. . . ."

Thus the decision of the Court of Appeal was that although when the husband and wife separated they entered into an agreement as to what payment should be made by the husband to the wife, and the provision for maintenance had been faithfully observed, section 23 of the Act of 1950 (or section 5 of the Act of 1949) gave the wife a right to come to court and complain that her husband had been guilty of wilful neglect to provide reasonable maintenance for her, although she recognized that she had entered into an agreement with him which she thought would bind her at the time it was made, and that he had kept his side of the bargain. The decision is far-reaching and it may be that the effect of the section may well cause a husband to say: "Why "should I enter into an agreement? If I do, and I fall out of "work, or if my means become less, I am bound by the terms "of the agreement; but why should I, or any other husband, "enter into an agreement if the other party is not going to be "bound by it?" Thus it may be thought that the effect of section 23 of the Act of 1950, or of section 5 of the Act of 1949, takes something away from the sanctity of an agreement between husband and wife.

It is right that I should say that Birkett L.J., towards the end of his judgment in *Tulip* v. *Tulip* added [11]: "I refrain from "expressing any view of the merits of the application. It may be, "in such a case as this, that the court might find it difficult to "exercise its jurisdiction in favour of the wife, having regard to all "the circumstances of the case; but with that we are not con- "cerned." That is something which should be remembered before an application under section 23 (1) of the Act of 1950 is made. If there is an agreement between husband and wife, even though

[11] Ibid. 390.

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it be some years old, it is the duty of the one who has to consider an application under section 23 to remember that there is such an agreement, and to consider its terms, and to bear in mind that that agreement is binding on the husband, even if it does not prevent the wife from making an application under section 23. It is further to be remembered that the wife, who obtains a measure of certainty under the terms of the agreement, may be, by the terms of that agreement, in a very much better position than she would have been if she had not had the agreement. The time might come when the husband had little means of earning or of paying the amount which he had undertaken to pay. He has no answer under the agreement.

It follows from what I have said that I regard it of the utmost importance that the existence of an agreement and its terms should not be overlooked in considering whether an application should be made under this subsection. The courts ought not lightly to be asked to upset, or to go behind, the terms of an agreement freely entered into between the parties, even though, under a decision of this court, the court is clothed with power by section 23 (1) to make an order in a proper case in which it is shown that the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife.

Let me go one stage further. The application was made notwithstanding the correspondence to which I have referred—the letters of April 19 and 26, 1952—from the terms of which it would appear that the husband had been ready to make an increased offer, and from which, again, it would appear difficult to establish "wilful neglect to provide reasonable maintenance." After the issue of the application, there was further correspondence which came to light during the argument before this court. A letter from the wife's solicitors, dated September 16, 1952, reads: "Dear Sirs, Morton *v.* Morton. Our client does not accept "your client's offer of £2 10s. 0d. a week and prefers to take the "judge's award." That offer is two-and-a-half times the amount which the wife had agreed to accept under the terms of the agreement of 1930. The earlier letter of April 26 had referred to discussions and to an offer.

It is difficult to see how it can be said that a husband is guilty of wilful neglect to provide reasonable maintenance for his wife in view of the fact that she was satisfied with an agreement in those circumstances.

Mr. Wallis-Jones, on behalf of the wife, said that for some part of the time in the years gone by the wife was receiving public assistance. During most of that time her son-in-law was living in the same house and earning, I suppose, much the same money as a collier as her husband was doing. The son-in-law contributed £7 a week to the house, and the daughter herself was working, while one of her daughters was working at the time of this application.

New solicitors had come upon the scene, and I suppose legal aid had been granted. After Judge Gerwyn Thomas had given his judgment, it was pointed out to him that there was a sum of £30 in court as security for the applicant's costs. The wife had obtained legal aid, and, according to a practice that prevails, the wife asked for an order for security of the costs of her application under section 23 (1). An order was made that the husband should lodge £30 in court and this was done.

I wonder how much the hearings in the various courts have cost this man? The application to the magistrate; the hearing in the Divisional Court in 1942; the hearing before the registrar, when counsel were present; the hearing before the commissioner; the £30 as security for costs provided by the husband. It is perhaps not surprising that his solicitors had written on his behalf making an offer of £2 10s. 0d. a week. It would have paid him to pay something more than he ought to pay rather than to face the costs of all these proceedings, for his wife has legal aid. There was no prospect of his getting anything back. The matter was fully investigated by a registrar, and by the county court judge sitting as special commissioner; still, an appeal was made to this court, and on February 9, 1954, a full certificate for legal aid upon the appeal was granted to the wife. There is no chance whatever of the husband getting any costs. He is a working man who is earning £8 or £9 a week, but he has had to find considerable sums of money for costs. The judgment of the commissioner gave the interpretation to the section for which the wife asked, and that which he had to decide was a pure question of fact, subject to some small criticisms which Mr. Wallis-Jones made upon his manner of approach to the subject.

I feel that this is very hard upon a working man. The wife entered into an agreement but times changed. She has had the benefit of that agreement for more than 20 years. Her husband was ready and willing in September, 1952, to increase the amount to £2 10s. 0d. a week, to avoid continued litigation, but the litigation has gone on and on. The Legal Aid and Advice Act, 1949, was intended to help litigants who could not bear the expense of litigation. This case at least shows what a hardship it may work on the other side. It has been said in recent years that there may be great hardship to a successful defendant to any action which is supported by the legal aid fund; for when he wins, he has little chance of getting any costs from anyone. That is a loss which, in some cases, falls upon an insurance company. In this class of case the costs of the litigation, so far as the successful husband is concerned, fall upon him, and it is a considerable burden.

I have taken a little time in this case; I hope that I have set out the facts clearly. I am satisfied that the commissioner had to decide a question of fact. He decided that there was no proof of wilful neglect to provide reasonable maintenance within

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the terms of section 23 (1). That ought to have been enough. In my opinion, this appeal must be dismissed.

JENKINS L.J. I agree.

HODSON L.J. I agree.

Appeal dismissed. Order for the taxation of the appellant's costs under the Third Schedule to the Legal Aid Act.

Solicitors: *Rhys Roberts & Co., for C. James Hardwicke & Co., Cardiff; Cunliffe & Airy, for Taliesin Griffiths & Son, Merthyr Tydfil.*

E. D.

[COURT OF APPEAL.]

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* *In re* VON DEMBINSKA.

[No. 208 of 1953.]

Bankruptcy—Public examination of debtor—Adjournment—Adjournment generally with liberty to restore—Whether adjournment ultra vires—Power to adjourn "from time to time"—Meaning—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 15 (3), 18 (1), 109 (2)—*Bankruptcy Rules,* 1952 (*S.I.* 1952, *No.* 2113), *r.* 192.

The power conferred by section 15 (3) of the Bankruptcy Act, 1914, on the court to adjourn the public examination of a debtor "from time to time" gives power to the court to make an order not only adjourning the examination from one fixed date to another but also adjourning it generally with liberty to restore.

APPEAL from Mr. Registrar Bowyer.

On May 7, 1953, a receving order was made against the debtor Olga Natalie Franciszka Lubranska von Dembinska. Her public examination was fixed for July 7. It appearing that the debtor was ill, the public examination was adjourned until July 21. Medical certificates were then produced which stated that the debtor was ill and that she might not be able to attend for "four "or five weeks at least." Thereupon an order was made adjourning the public examination generally with liberty to the debtor to apply to have it restored. The debtor did nothing further and on October 12 the Official Receiver wrote to her asking whether she wished to have the public examination restored. She did not reply to that letter, and on November 4 the late Mr. Registrar Parton made an order adjudicating the debtor a bankrupt on the ground that she had not set down an application to reinstate her public examination.

The debtor applied to Mr. Registrar Bowyer to annul the adjudication order on the ground that the order of July 21, adjourning generally her public examination, was ultra vires the court, since it was not within the powers conferred by section 15 (3) of the Bankruptcy Act, 1914,[1] and that, accordingly, the basis of the order of adjudication was wrong. The registrar dismissed the debtor's application.

The debtor appealed.

F. H. Collier for the debtor.
Muir Hunter for the Official Receiver.

EVERSHED M.R. On November 4, 1953, the late Mr. Registrar Parton made an order adjudicating one Olga Natalie Franciszka Lubranska von Dembinska a bankrupt. The order was in the following terms: "This being the day appointed for "the hearing of the Official Receiver's adjourned application for "an order of adjudication against the above-named debtor pur-"suant to section 18 of the Bankruptcy Act, 1914. And upon "hearing the Official Receiver and the debtor not being present "or represented. And it appearing that the debtor has not set "down an application to reinstate her public examination which "was adjourned generally on the 21st day of July 1953 and is "not therefore in a position to make application to the court to "approve her proposal for a composition which has been accepted "by the creditors. It is ordered that the debtor . . . be and the "said debtor is hereby adjudged bankrupt."

The circumstances which gave rise to the recital which I have read were briefly these: A suggested scheme or composition had been put forward by or on behalf of the debtor, and it is the fact that upon some date in September at a meeting of creditors summoned for the purpose those creditors had resolved to accept the proposal; but, in the meantime, the public examination of the debtor which was required to be held under the terms of section 15 of the Bankruptcy Act, 1914, had been from time to time adjourned. Various reasons accounted for the adjournments; but eventually on July 21, the court, having in its possession certain evidence about the state of the debtor's health, instead of again adjourning the public examination to some future fixed date, proceeded to make an order adjourning the public examination generally with liberty for the debtor—and also no doubt for the Official Receiver—to apply to have it restored; and the note of the proceedings indicates, as is the fact, that a further medical certificate had been produced stating that the debtor would be unfit to attend the court for "four to five weeks at "least." It is obvious, therefore, that the order made, if it were

[1] Bankruptcy Act, 1914, s. 15: "(1) Where the court makes a receiving order, it shall . . . hold a "public sitting, . . . for the examination of the debtor. . . .
"(3) The court may adjourn the "examination from time to time."

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validly made, was the most sensible order which could have been made.

Thereafter nothing further happened and the Official Receiver, according to the debtor's own somewhat long affidavit, wrote on October 12 reminding her that the public examination had been standing over for a very long time indeed and asking her whether she desired to have the public examination restored. It must have been quite plain by this time to the debtor that until it had been restored and concluded, or alternatively dispensed with altogether, it was impossible to have the proposal for composition effectively approved.

However, this letter remained unacknowledged and unanswered on the debtor's part; and after about three weeks, the Official Receiver proceeded to bring on again his application for an order of adjudication, which application had itself already been once or twice adjourned.

Mr. Collier, for the debtor, has expressed the sense of grievance which his client feels, because, as events have turned out, she has been unable, so she says, to get the composition which was proposed formally approved, and she thinks that that is a hardship which she ought not to suffer. I am bound to say that I think she suffered no hardship and has no real cause for grievance whatever. I should have thought she had been treated with great consideration, numerous adjournments having been granted; but, of course, whether she has really suffered any kind of hardship is not the question which we have to decide; the question is whether on the face of it this order is liable to be impugned.

The basis upon which the debtor attacks the order is this: she says that the order made on July 21, 1953, adjourning generally the public examination with liberty for the debtor to restore, is ultra vires the court, and accordingly the whole basis upon which this adjudication rested goes. Section 15 (3) of the Bankruptcy Act, 1914, provides: "The court may adjourn the "examination from time to time." I add that, as Birkett L.J. observed early in the course of the argument, there is also a general power under section 109 (2) of this Act that the court "may at any time adjourn any proceedings before it upon such "terms, if any, as it may think fit to impose."

In my judgment section 15 (3), on the face of it, quite manifestly gives power to the court to make an order, not only adjourning the examination from one fixed date to another but also adjourning it generally with liberty to restore; and that prima facie view of the subsection is, I think, strongly reinforced by the terms of section 109 (2). It seems to me also to be in accordance with the plain and ordinary sense of the English words used, and particularly the last four of the, "from time to "time," which I interpret as meaning: "as and when it is "appropriate so to do."

But Mr. Collier has argued most strongly that "from time

"to time" means "from one fixed time to another fixed time," and that the court cannot do more than that, save to the extent to which express power so to do is conferred; and he says that the only express power to adjourn otherwise than from one fixed date to another fixed date is contained in rule 192 of the Bankruptcy Rules, 1952. I think that Mr. Collier is involved in considerable difficulty about this, because if the words of sub-section (3) are to be construed in the way he means, so as to limit the court's power of adjournment to an adjournment from one fixed date to another, then the rule would itself appear to be ultra vires, since, on the face of it, it would give a power in excess of the power given by the statute.

Rule 192 and certain other rules which follow concern, however, what are called adjournments sine die, and the rules provide that in certain events which are there specified—for example, the debtor not making a full and true disclosure—events which have not happened and which are not applicable here, then the court may adjourn the examination sine die; and in that event certain other consequences follow. Mr. Collier has said that an adjournment sine die and an adjournment such as was made here are necessarily the same thing, and that whatever the language used, the order which was made on July 21 was in fact an adjournment sine die and was bad, because it was not made in accordance with the rules.

I entirely reject that argument. This order was an order of the character which the notes I have read stated it to be—a common enough form of order which is, I think, well within the discretion of the court conferred by the statute and commonly experienced in other branches of the administration of justice. It was an order adjourning this examination generally with liberty for the debtor to restore it, and I need not repeat the obvious convenience and, as I think, consideration shown to the debtor in making the order in that form.

The rules to which I have alluded confer, within the general discretion, an express power to make orders in a particular form, called orders for adjournment sine die in certain events; and when such an order is made, and properly made, because such events have happened, certain other consequences follow which are set out in the rules; but that is to my mind in no way a limitation of the more general power under the section, which I am quite satisfied was expressly and designedly exercised in this case.

The decision of that point adversely to the debtor really disposes of this appeal, because, as Mr. Collier pointed out at the beginning of his address, his attack upon the order here, which he called a speaking order, was an attack upon what was said on its face; the ground for the adjudication made under section 18 (1) is, in effect, stated to be that the composition or scheme had not been approved in pursuance of the Act. But I add that, even if Mr. Collier were right, or if it were necessary

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or appropriate to look outside the recital in the order, I am far from satisfied that this court could or should interfere with the adjudication made; that is, annul it under section 29. It appears that the creditors at the first meeting, or at some adjournment of it, were invited to pass a resolution adjudging the debtor bankrupt. The resolution failed; the creditors did not pass any other resolution to the opposite effect, and therefore it might well, as it seems to me, be said that no resolution having been passed by the creditors at the first meeting or any adjournment thereof, the debtor was liable to be made bankrupt on that account. Mr. Collier says that the jurisdiction to adjudicate on that ground was excluded by the fact that at another meeting, not being the first meeting or an adjournment thereof, the creditors did pass a resolution approving what the debtor had proposed by way of composition.

I have indicated during the argument reasons for thinking that a resolution passed in such circumstances does not enable the debtor to escape from the effects of the first four lines of section 18, but I need not pursue the matter further; I only mention it to indicate that, as I think, this debtor has no grievance.

It is also said that the Official Receiver should have given the debtor express notice of the circumstance that his application for an order for adjudication, which had already been adjourned on two or so occasions, was coming up again for hearing on November 5. Upon that, all I need say is that in all the circumstances of the case I am quite satisfied that failure to give express notice to that effect is no ground whatever for annulling the adjudication.

For those reasons I think that the registrar was clearly right in refusing to make the order for annulment, and I would dismiss the appeal.

BIRKETT L.J. I am entirely of the same opinion, and I think it is scarcely necessary to add anything to what my Lord has already said.

Perhaps, however, I could say a word or two about the principal point raised in this appeal by Mr. Collier. It would appear that on May 7, 1953, the receiving order was made against the debtor and the public examination was fixed for July 7. On July 7 it appeared that the debtor was ill and medical certificates were produced in support. Thereupon the examination was adjourned until July 21, but again on July 21 medical certificates were produced which stated that the debtor was ill, and might not be able to attend for four or five weeks. Thereupon, the order was made which has been the substance of the controversy in this case, namely, that the public examination should be adjourned generally with liberty to restore.

I am bound to say that from a very early stage in this case I myself took the view that that was what I would call a

sensible and humane order. There was the history of illness; there was the factor of uncertainty as to when the debtor would be well enough to attend, and in all the circumstances it would seem right and proper to say: "Very well; it is impossible to fix any "date with precision, so we will adjourn this matter generally "with full liberty to restore it to the list." There could be no hardship or grievance there; but Mr. Collier said, in effect, that there has been a great grievance, and he has given utterance to it, because the order in this case which was made on November 4 was an order adjudicating the debtor bankrupt in these terms: ". . . it appearing that the debtor has not set down an applica- "tion to reinstate her public examination which was adjourned "generally on the 21st day of July, 1953, and is not therefore in "a position to make application to the court to approve her "proposal for a composition which has been accepted by the "creditors. It is hereby ordered that the debtor . . . be and the "said debtor is hereby adjudged bankrupt."

Whilst I myself am quite satisfied that there was no real ground for any grievance on the part of the debtor, the point that is taken—and quite rightly and properly taken—is that the order that was made on July 21 postponing this matter generally with liberty to restore was made under a power which it was not proper for the registrar to use—that there was no statutory authority for that to be done—and it was contended that section 15 (3) of the Act of 1914, which provides that the court may adjourn the examination "from time to time," on its true construction meant that it only gave a power to adjourn from a fixed day to a fixed day. I am quite clearly of opinion that on the construction of the words—and indeed I would add as a matter common English usage—the words "from time to time" cannot have that interpretation.

I think they mean that when the circumstances warrant it there may be an adjournment as and when the occasion requires. I do not think they can possibly be meant to bear the rigid interpretation for which Mr. Collier contends, namely, that it should be from one fixed day to another.

He reinforced his submission by saying that the order of July 21 first of all did something which the registrar had no power to do, and secondly, it was in effect an order under rule 192 of the Bankruptcy Rules, 1952. That rule reads: "The court may "adjourn the public examination sine die and may make such "further order as it thinks fit, where—(*a*) it is of opinion that "the debtor is not making a full and true disclosure of his "affairs; or (*b*) the debtor, without showing any sufficient reason "has failed to attend the public examination or any adjournment "thereof, or to comply with any order of the court in relation to "his accounts, conduct, dealings, or property."

First of all it is quite clear that these matters which are set out in (*a*) and (*b*) do not apply to this case. I have heard nothing which leads me to suppose that any adjournment of this matter

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was made because a true and full disclosure of the debtor's affairs had not been made. Secondly, with regard to (*b*), "without "showing any sufficient reason has failed to attend the public "examination," it is quite plain that the registrar accepted the medical certificates and acted upon them, believing the debtor's state of health to be an adequate reason.

The only importance of this matter is that Mr. Registrar Bowyer expressly disclaims and disclaimed at the time any such intention. He says: "I did not bring into play the provisions of "this rule"—which, of course, Mr. Collier says is in a sense a penal rule—"I did not do that at all; I did it under the powers "given to me in section 15 (3) of the Act."

For my own part, I think that the registrar was wholly right, and therefore on the main point upon which this appeal has been argued, I am of opinion that it fails, and there is, therefore, no necessity for me to add anything on any of the other matters with which my Lord has dealt.

Romer L.J. I quite agree with my Lords, and I only want to add one word about section 15 (3) of the Act of 1914, which provides that the court can "adjourn the examination from time to "time."

I agree with what my brethren have said about that. It is not confined to adjourning from one specific date to another specific date; it means adjourning for such periods of time, or generally, as the court may think most convenient.

I would like to draw attention to the similarity of the language which is used in Ord. 52, r. 7, of the Rules of the Supreme Court, which states: "The hearing of any motion or application may "from time to time be adjourned upon such terms, if any, as the "court or judge shall think fit"; it is a matter of common practice and common knowledge that applications, summonses and motions are constantly stood over or adjourned generally with liberty to restore, in the same way that the public examination was adjourned generally in the present case. I think it would be most unfortunate, both from the point of view of the creditors and from the point of view of the debtor and of everybody concerned, if there were not that power, which gives a flexibility to the proceedings and without which, as I think, there would be considerable difficulty in carrying them through to a successful conclusion; and I am quite satisfied that there is such a power. I am satisfied that the registrar acted upon that power and not under the special power conferred by rule 192, and that it becomes plain through the opinion which has been expressed by the present registrar—who indeed may be regarded as the mouthpiece of the court. The court says that that is the power which was exercised; I am well assured that it was the power that was exercised, and that great care was taken, and deliberately taken, to avoid action under rule 192, which is a penal provision, and which in a sense puts a debtor rather in the position of somebody

who is in contempt and who can only be heard after satisfying the court that the misdemeanours which have resulted in his ostracism have been removed and that he has made out a proper case that the application should proceed.

There are various formalities attendant upon rule 192, and I am quite certain, apart altogether from what Mr. Registrar Bowyer has now said, that there was never any intention on the part of the registrar to act under that rule.

I agree that the appeal fails.

Appeal dismissed.

Solicitors: *Simmonds, Church Rackham & Co.; Solicitor, Board of Trade.*

B. A. B.

[CHANCERY DIVISION.]

* *In re* LEWIS & SMART LD.

1954
April 6.
Wynn-Parry J.

[No. 00115 of 1952.]

Company—Winding up—Void dissolution—Effect of declaration—Misfeasance summons pending at date of dissolution—Subsequent order declaring dissolution void—Whether summons revived—Companies Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 352.

A misfeasance summons was taken out against certain alleged promoters of a company, which was wound up in a creditors' voluntary liquidation before process was served on the respondents.

At a later date an order was made under section 352 of the Companies Act, 1948,[1] declaring the dissolution void. The summons then came before the registrar, who made no order. On appeal by the applicant:—

Held, that the order under section 352 did not have the effect of reviving the summons, which had abated on the dissolution of the company.

Observations of Lord Blanesburgh in *Morris* v. *Harris* [1927] A.C. 252, at p. 268, applied.

MOTION.

The company went into voluntary liquidation on June 11, 1951, the liquidation being a creditors' voluntary liquidation. On February 5, 1952, the applicant issued an originating summons joining as respondents the liquidator of the company and three

[1] Companies Act, 1948, s. 352: "(1) Where a company has been dissolved, the court may at any time within two years of the date of the dissolution . . . make an order, upon such terms as the court thinks fit, declaring the dissolution to have been void, and thereupon such proceedings may be taken as might have been taken if the company had not been dissolved."

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Lewis & Smart Ld., *In re.*

persons who were alleged to have been concerned in the promotion of the company and, in connexion with that promotion, to have made a secret profit.

On April 7, 1952, the liquidator called the final meeting. On April 10, 1952, he filed the usual return, and three months later, on July 10, 1952, the company became dissolved under the provisions of section 300 of the Companies Act, 1948. On October 5, 1953, an order was made by the court under section 352 declaring the dissolution void. Between the date of the dissolution and that order the summons was served on the various respondents. On November 18, 1953, the originating summons was before the registrar for the purpose of obtaining directions. It was stood over for three weeks in order that the evidence, directed to be by way of affidavits, might be completed.

During that period it was intimated to those representing the applicant by those representing one of the respondents that the point would be taken on her behalf that the effect of the dissolution had been to cause the originating summons to abate, and that the effect of the order declaring the dissolution void was not to revive the summons.

On the further hearing the registrar made no order on the summons. The applicant then brought this motion by way of appeal.

J. G. Monroe for the applicant.
T. M. Shelford for a respondent.

The other respondents did not appear.
The cases referred to in argument are cited in the judgment.

Wynn-Parry J., after stating the facts: On February 4 of this year the summons came before the registrar, who accepted the submission that the summons had abated and had not been revived on the authority of *Morris* v. *Harris*.[1] In his order the registrar expressed the opinion that the originating summons abated on the dissolution of the company and was not revived by the order of October 5, 1953, declaring the dissolution to have been void; and therefore he made no other order than for the taxation of the costs of the applicant and of one of the respondents, Terence Patrick Smart, to be taxed as between solicitor and client under the provisions of the Legal Aid and Advice Act, 1949. It is by way of appeal from that order that this motion comes before me.

In *Morris* v. *Harris*[2] the distinctions between sections 223 and 242 of the Companies (Consolidation) Act, 1908, now respectively sections 352 and 353 of the Companies Act, 1948, were exhaustively considered. I quote from the speech of Lord Blanesburgh, which, in my respectful view, most clearly emphasizes the

[1] [1927] A.C. 252. [2] Ibid.

distinction between the two sections. Referring to section 223 of the Companies (Consolidation) Act, 1908, now section 352 of the Companies Act, 1948, Lord Blanesburgh said [3]: "It is true that "a declaratory order under the section unqualified in terms does, "and it was in my judgment essential, if many difficulties which "readily occur to the mind were to be avoided, [provided] that "such an order should have the effect of restoring to the revived "company its corporate existence as from the very moment of the "dissolution thereby declared 'to have been void.' But the "expository words which follow carefully and, as I think, "advisedly refrain from adding that such an order is to have the "effect of restoring to the company from the same moment, not "its corporate existence only, but its corporate activity also. On "the contrary, these expository words import, as I think, that it "is only after the order has been made—it is 'thereupon' but not "before—that any active consequences are to ensue.

"I think, my Lords, that the terms in which these conse-"quences are described are exhaustive and emphatic. They are "intended to show that an order under the section made, it may "be, as long as two years after a dissolution which up to that "moment was completely effective, is not at once and as of course "to ratify acts done during the interval, which, if done at all, "must necessarily have been acts of mere usurpation, by a "liquidator or other pretended agent with no office knowingly "done on behalf of a company which had no existence. On con-"sideration, it appears, I think, clear that automatically to "validate such acts as being the acts of a duly constituted officer "on behalf of a duly incorporated company might involve con-"sequences too disastrous to be even envisaged. These are "avoided by the terms of the section. The company is restored "to life as from the moment of dissolution but, continuing a con-"venient metaphor, it remains buried, unconscious, asleep and "powerless until the order is made which declares the dissolution "to have been void. Then, and only then, is the company "restored to activity.

"And now is made apparent the reason for the difference in "phraseology and effect between section 223 and subsection (6) of "section 242. A dissolution under section 242, as I have said, is "preceded by no winding up, and the section had to envisage a "dissolution which might have taken place without the knowledge "any one concerned in the company. Hence the wide powers "given to the court by subsection (6). Section 223, on the other "hand, is confined to cases where the dissolution succeeds the "complete winding up of the company's affairs and cannot take "effect at all except at the instance or with the knowledge of the "liquidator, the company's only executive officer. The legisla-"ture has not seen fit to make provision for validating any "intermediate acts done on behalf of such a company so "dissolved."

[3] Ibid. 268.

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Lord Blanesburgh then stated his conclusion: "In my judgment, accordingly, the arbitration proceedings which abated on the dissolution of the old company thereby became abortive and have in no sense been reconstituted as a result of Astbury J.'s order."

It is clear from the passages which I have read that the question to which I must direct my mind is whether or not the proceedings started by the originating summons abated on the dissolution of the company in July, 1952. For this purpose I think it is necessary to consider what is the real nature of misfeasance proceedings.

In *Cavendish-Bentinck* v. *Fenn*,[4] Lord Macnaghten said: "The 165th section of the Act of 1862"—that is the misfeasance section—"has often come under discussion, and it has been settled, and I think rightly settled, that that section creates no new offence, and that it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity. It has also been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company. Apparently it has not been judicially determined that the applicant is bound to show that he is interested in the result of the application, but I think it must be so. I cannot think that Parliament intended that a person who happens to come under the description of a creditor or a contributory may take upon himself the functions of a public prosecutor in a matter with which he has really no concern. It was, therefore, in my opinion, necessary for the appellant to prove that Mr. Fenn has committed a breach of trust, or a misfeasance in the nature of a breach of trust, as a director of the Cape Breton Company, and that by reason of that misfeasance the company has sustained loss; and it was also necessary for him to show that he has an interest in the result of the application."

The object of any misfeasance proceedings, by whomsoever they are brought, is to swell the assets of the company by the recovery of damages. The successful fruits of misfeasance proceedings must be paid to the company or its liquidator in a liquidation for the purpose of distribution among those who are interested in the assets; but, if the company for the benefit of whom or for whose creditors and contributories misfeasance proceedings are started becomes dissolved under section 300 of the Companies Act, 1948, it follows, in my view, that those proceedings are necessarily at an end, because so long as the company remained dissolved it would be impossible to carry the proceedings to judgment, for no effective order, having regard to the nature of the proceedings, could be made.

[4] (1887) 12 App.Cas. 652, 669.

It therefore appears to me that the true conclusion is that, upon the dissolution of this company in July of 1952, the proceedings started by the originating summons abated. Taking that view, it appears to me that this case is directly covered by the reasoning and the conclusion of Lord Blanesburgh in *Morris* v. *Harris*.[5]

I was referred to a recent decision of Vaisey J. in *In re C. W. Dixon Ld.*[6] where he had to consider the effect of an order declaring the dissolution of a company to have been void in regard to property which on the dissolution was supposed to have been vested in the Crown as bona vacantia; but, in my view, that case does not touch the present case. Vaisey J. held in regard to that subject-matter that the dissolution was avoided ab initio, and I respectfully agree. That was necessary in that case to produce an effective order, having regard to the fact that on the dissolution the property was taken to have vested in the Crown; and, as I read the judgment, that is really the basis of it.

Vaisey J. said[7]: "Anyone can declare a dissolution to be void; "it is a mere matter of utterance; but when the court is given "power to declare that something has happened, I apprehend the "legislature must inevitably intend to give the court power of "making a declaration which is effective."

It seems to me that that can have no relation to a case, such as the present, concerning proceedings which, on the view which I take of the matter, abated upon the dissolution. Those proceedings, having abated, cannot, in face of the clear reasoning of Lord Blanesburgh in *Morris* v. *Harris*,[8] be treated as having been revived by the order declaring the dissolution void.

Therefore, for those reasons, I must hold that the motion fails and must be dismissed.

Order accordingly.

Solicitors: *Langhams & Letts for Philip Baker & Co., Birmingham; Whitelock & Storr.*

F. R. D.

[5] [1927] A.C. 252.

[6] [1947] Ch. 251; 63 T.L.R. 155; [1947] 1 All E.R. 279.

[7] [1947] Ch. 251, 255.

[8] [1927] A.C. 252.

[CHANCERY DIVISION.]

1954
Mar. 23;
Apr. 9, 14.

Roxburgh J.

* *In re* GREAVES, DECD.
GREAVES *v.* GREAVES.

[1953 G. No. 3052.]

Family Provision — Limitation — Extension of time — Circumstance affecting administration or distribution of estate—Mistake as to time by applicant's solicitors — Evidence —Practice — Procedure summons inappropriate—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45), *as amended by Intestates' Estates Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 64), *s.* 2 (1) (1A).

By section 2 of the Inheritance (Family Provision) Act, 1938, as amended by Sch. III to the Intestates' Estates Act, 1952: "(1) "Except as provided by the following provisions of this section or "section four of this Act, an order under this Act shall not be "made save on an application made within six months from the "date on which representation in regard to the deceased's estate . . . "is first taken out. (1A) If it is shown to the satisfaction of the "court that the limitation to the said period of six months would "operate unfairly,—. . . (*c*) in consequence of some other circum-"stances affecting the administration or distribution of the estate, "the court may extend that period."

The widow of a deceased testator made application under the Inheritance (Family Provision) Act, 1938, for further provision to be made for her. When the summons came before the master, it was discovered that it was out of time, having been taken out more than six months after the grant of probate; the reason for the delay being that the plaintiff's solicitors were ignorant of the time limit prescribed by the Act. On an application to the court to extend the time pursuant to section 2 (1A) (*c*):—

Held, that the solicitors' mistake was not a "circumstance "affecting the administration or distribution of the estate," so that there was no jurisdiction to extend the time.

Held also, that in view of the novelty and importance of sub-section (1A), it would be right to hear any evidence which counsel in their discretion might put forward as relevant.

Observations on the correct procedure in taking out a summons asking for an extension of time under section 2 (1A).

ADJOURNED SUMMONS.

The widow of a testator, being dissatisfied with the provision made for her under her husband's will, through her country solicitors entered into negotiations with the solicitors of the deceased's personal representatives regarding an increased provision. After the negotiations had been suspended for some time, a summons was taken out under the Inheritance (Family Provision) Act, 1938, asking for further provision. At the hearing, the master pointed out that the summons was out of time, having been taken out more than six months after the grant of probate. The plaintiff then applied under section 2 of the Act (as amended by Sch. III to the Intestates' Estates Act, 1952) for an extension

of time, the summons in its original form being adjourned into court as a procedure summons.

R. J. S. Thompson (*F. B. Alcock* with him) for the plaintiff.
W. P. A. Graetz for the defendants.

At the hearing Roxburgh J. expressed the view that the summons was not in proper form, and consulted the chief master.

ROXBURGH J. I have spoken to the chief master, and, as a result of my conversation with him, the proper practice, in my view, is this: If the plaintiff wants relief under section 2 (1A), the proper course is to ask for that relief as a separate item by originating summons, proceeding also as a separate item to ask for the main relief. If the plaintiff becomes aware that his summons is out of time after he has issued it, then his duty is to ask for leave to amend the summons by asking for relief under section 2 (1A) as a separate item. Then it would be quite proper and, indeed, desirable, for the question of relief under section 2 (1A) to be adjourned into court as a separate matter and before the hearing of the main part of the summons. But it is not a procedure summons and should not be so listed. It is the ordinary case of an originating summons adjourned into court on one point and not on the other point. There will be leave to amend.

During the reading of the affidavits, counsel for the plaintiff proposed to read certain evidence relating to the plaintiff's circumstances; counsel for the defendants submitted that this was irrelevant.

ROXBURGH J. I will give a formal ruling on this. In view of the novelty of this subsection and of its importance, I am not prepared at this stage to rule out any evidence which you may think material to your client's case. I am not at all sure what my real duty is under this section. The Court of Appeal may take a different view from mine, and, therefore, my ruling is that counsel may read any evidence which they have filed which they regard as material in any way.

Cur. adv. vult.

April 14. ROXBURGH J. read the following judgment. Edwin Horace Greaves died on March 2, 1953. His will was proved on April 14, 1953, and this application under the aforesaid Act was made on December 21, 1953. When it came before the master he pointed out that it was out of time. Hence this preliminary application for an extension of time.

Well within the prescribed time the plaintiff (who is the testator's widow) instructed solicitors and they negotiated with the solicitors for the defendants, who were both executors and beneficiaries. On August 7, 1953, the solicitors for the widow

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GREAVES, DECD., *In re.* GREAVES *v.* GREAVES.

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wrote (in a letter headed "without prejudice"): "It has "occurred to us that if the suggested arrangement can be carried "into effect it would save any further controversy and possible "litigation, and would, we think, satisfy all parties concerned." On September 9, 1953, the solicitors for the defendants replied (in a letter, also headed "without prejudice"): "Our clients are "considering your letter, but we have today before us certain "communications from the Revenue affecting values for estate "duty purposes. To use our clients' own words, they cannot say "whether there will be anything to be generous with, and until "we can conclude matters with the Revenue we do not think "our clients can give us any definite instructions." At this point the negotiations were suspended. On October 14, 1953, the prescribed period expired.

There is, in my judgment, no doubt that the reason why no proceedings began in due time was that the plaintiff's solicitors were ignorant of the time limit. But it has been submitted by counsel that the limitation to the period of six months would operate unfairly because (1) the plaintiff was without information as to the true value of the estate; (2) the negotiations for a compromise had been suspended but not ended; (3) the estate had not been distributed, and that these were circumstances affecting the administration or distribution of the estate. I think that they were. But, in my judgment, no unfairness flows from any of them. As to the first point, the plaintiff's solicitors never asked for any information regarding the true value of the estate; and indeed, the true value of any estate is seldom known within six months from the date of a grant. As regards the second, the plaintiff had ample time within the prescribed period and after the negotiations had been suspended to issue a summons, and this step would undoubtedly have been taken by anybody aware of the time limit. As to point three, I certainly cannot lay down a rule that it would be unfair not to extend the time in every case in which no distribution has yet been made. This is so in the great majority of cases, and is not, in my view, a circumstance which makes it unfair to require a plaintiff to proceed within the prescribed period. In my judgment if, in the present case it is unfair to hold the plaintiff to the prescribed time, it is so in consequence of the mistake of her solicitors and for no other reason, and that is not a circumstance affecting the administration or distribution of the estate.

The consequence is that the summons is dismissed.

Order accordingly.

Solicitors: *Doyle, Devonshire & Co. for Abberley & Walker, Burslem; Holt, Beever & Kinsey for Brown & Corbishley, Newcastle-under-Lyme.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* STIRLING, DECD.
UNION BANK OF SCOTLAND LD. *v.* STIRLING.

1954
Apr. 13.

Wynn-Parry J.

[1954 S. 125.]

Will—Construction—Testamentary character—Gifts to executor and trustee—To be disposed of in accordance with memorandum signed by testator—Such memorandum not to have testamentary effect—Gifts expressed not to create a trust—Whether executor entitled beneficially.

A testator, after appointing a bank to be his executor and trustee, bequeathed to the bank a pecuniary legacy of £1,000 with the request that it will "dispose of it in accordance with any "memorandum signed by me and I direct that any such memoran-"dum is not to form part of this my will or to have any testamen-"tary character . . . and I declare that the foregoing expression "of my wish in connexion with the said sum of £1,000 shall not "create any trust or legal obligation even if the same shall be com-"municated to the bank in my lifetime." He further requested that any part of the legacy not disposed of in accordance with a memorandum should fall into residue. He further bequeathed one-third of his residuary estate to the bank "with the request that it will "dispose of it in accordance with any memorandum signed by me "and I direct that any such memorandum is not to form part of "this my will or to have any testamentary character and I declare "that the foregoing expression of my wish in connexion with the "said one-third share shall not create any trust or legal obligation "even if the same shall be communicated to the bank in my life-"time." The testator made no communication in his lifetime, but a memorandum was found at his death.

On the hearing of a summons taken out to ascertain the effect of these provisions:—

Held, that the bank took both the legacy and the share of residue beneficially.

In re Falkiner [1924] 1 Ch. 88 followed; *In re Rees' Will Trusts* [1950] Ch. 204; 66 T.L.R. (Pt. 1) 23; [1949] 2 All E.R. 1003; *In re Hawksley's Settlements* [1934] Ch. 384; 50 T.L.R. 231, and *In re Boyes* (1884) 26 Ch.D. 531 distinguished.

ADJOURNED SUMMONS.

The facts are set out in the judgment.

F. E. Skone James for the plaintiff bank.
G. C. Raffety for certain beneficiaries.
D. H. Mervyn Davies for other beneficiaries.

Case cited in argument but not referred to in the judgment: *In re Spencer's Will.*[1]

WYNN-PARRY J. This summons raises a short point of construction on the respective wills of Robert Stirling and his wife,

[1] (1887) 57 L.T. 519; 3 T.L.R. 822.

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Stirling, decd., *In re.* Union Bank of Scotland Ld. *v.* Stirling.

Wynn-Parry J.

Josefina Stirling. The two wills are for all material purposes in the same form, and I can deal with the whole summons conveniently by reference to the will of the testator, Robert Stirling.

He appointed the plaintiffs to be his executor and trustee, and, having inserted the usual clauses necessitated by the appointment of a bank as executor and trustee, he then proceeded by clause 2 to provide that, if his wife should survive him for the space of a month then, but not otherwise, he gave and devised all his real and personal estate to her absolutely and beneficially without any sort of trust or obligation. In the events which happened, he died first and his wife did not survive him for a month, so in the case of neither will did clause 2 operate.

The will of Robert Stirling continues: "If my said wife "shall not survive me for the period aforesaid then I direct and "declare that the subsequent clauses of this my will shall take "effect." Then follows clause 4 (a), which is one of the material clauses for consideration: "I bequeath the following pecuniary "legacies: (a) To the bank the sum of £1,000 free of duty to be "paid in priority to all other legacies bequeathed by this my will "with the request that it will dispose of it in accordance with "any memorandum signed by me and I direct that any such "memorandum is not to form part of this my will or to have any "testamentary character and I request the bank that if the said "legacy of £1,000 is not wholly disposed of in complying with "such memorandum the balance not so disposed of shall fall "into and form part of my residuary estate and I declare that the "foregoing expression of my wish in connexion with the said sum "of £1,000 shall not create any trust or legal obligation even "if the same shall be communicated to the bank in my lifetime." Then follow a number of further pecuniary legacies to various relations.

By clause 5 the testator constituted his residuary estate and bequeathed it "as to one-third share thereof to my brother the "said James Fairlie Stirling absolutely as to another one-third "share thereof to my brother the said David Edward Stirling "absolutely and as to the remaining one-third share thereof to "the bank with the request that it will dispose of it in accordance "with any memorandum signed by me and I direct that any "such memorandum is not to form part of this my will or to have "any testamentary character and I declare that the foregoing "expression of my wish in connexion with the said one-third "share shall not create any trust or legal obligation even if the "same shall be communicated to the bank in my lifetime."

The testator, Robert Stirling, died on November 24, 1952, and his wife, the testatrix, Josefina Stirling, died on December 2, 1952. Neither of them made any communication to the plaintiff bank during their respective lifetimes of their wishes in respect of either the legacies or the one-third of their respective residues, but certain memoranda were found among their papers at their deaths. It is not contended, in the circumstances, that any of

those memoranda can have any legal effect, and the sole question in the circumstances which I have to consider is whether, on the true construction of the will, both as regards the legacy and the one-third residue in each case bequeathed to the plaintiffs, the legacy and the share of residue may be retained by the plaintiffs and disposed of by them as they think fit without any trust or obligation, or are subject to a trust for the benefit of the persons entitled to the residue of each estate and for his or her next-of-kin respectively.

I propose first to construe the will unaided or unembarrassed by any authority. It is pointed out by Mr. Mervyn Davies that in the very first clause the bank is stamped with a fiduciary character, being described as and appointed as "executor and "trustee." It is further poined out by Mr. Mervyn Davies that in the second clause in the conditional gift to his wife the testator uses the words "absolutely and beneficially," but it is, on the other hand, to be observed that he adds the words "without any "sort of trust or obligation," which words, of course, may be considered strictly to be otiose, following as they do the words "absolutely and beneficially." Those, of course, are points to be taken into consideration.

I then proceed to the first of the two vital clauses, clause 4 (a). It opens, as I have said, with the words: "To the bank the sum "of £1,000 free of duty to be paid in priority to all other legacies "bequeathed by this my will," and if the clause stopped there there would be nothing whatsoever in the language used to indicate that the bank were to take that £1,000 otherwise than absolutely and beneficially; for I should find that there was insufficient in the points to which I have already referred, in view of that language, to cut down what would be a perfectly plain and unqualified gift.

The clause goes on with the request that the bank will dispose of the £1,000 in accordance with any memorandum signed by the testator, and there is the direction that the memorandum is not to form part of the will. That is a direction, and is, therefore, intended to be operative. That is followed by a request as regards any balance, and in contrast to the verb "direct" there is the verb "request." That is followed by a declaration, which again is the introduction to a phrase intended clearly to be operative, namely, "that the foregoing expression of my wish in "connexion with the said sum of £1,000 shall not create any "trust or legal obligation even if the same shall be communicated "to the bank in my lifetime." Turning to clause 5, where the last third of the residuary estate is given to the bank, there is exactly the same direction and the same declaration, the only difference in the construction of the residuary clause being the necessary omission of the request relating to any part of the £1,000 not wholly disposed of, which the testator desired to fall into residue.

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Regarding the matter as purely one of construction, it appears to me to be a necessary conclusion from the scheme of the will that the testator intended that the bank, at any rate as regards the other residuary legatees so far as the bequest of the £1,000 is concerned, and as regards the next-of-kin so far as the residuary clause is concerned, should take the £1,000 legacy and the share of residue absolutely and beneficially. The question then arises: Is there any authority, or line of authority, which will operate to prevent me giving effect to the construction which I have placed on these two wills?

The nearest case is *In re Falkiner.*[1] The headnote of that case reads as follows: "By her will, dated April 22, 1922, a "testatrix devised and bequeathed her real and personal estate "to two persons upon trust for sale and conversion and invest-"ment of the net proceeds as therein mentioned. She then "bequeathed to the two persons by name 'absolutely as joint "'tenants one half of the residuary trust moneys, with the "'request that they will dispose of the same in accordance with "'any memorandum or paper signed by me and deposited with "'this my will or left amongst my papers at my death.' There "was a similar gift of the other half of the residuary trust "moneys, subject to a life interest. She then declared that any "such memorandum or paper should not have any testamentary "character, 'and the above expression of my wishes as to the "'disposal of the said sums shall not create any trust or legal "'obligation, even if the same shall be communicated to my "'trustees in my lifetime.'" Pausing there, it will be seen that the relevant provisions in that will are very similar to the relevant provisions in these two wills.

"The two persons were the partners in the firm of solicitors "which prepared her will, and an earlier will dated August 9, "1921, which contained the same bequests and declaration. "Before the date of the first will the testatrix sent to one of the "partners a list containing the names of those she wished to "benefit, and in preparing her first will he did his utmost to "induce her to allow the names of beneficiaries to be inserted in "the ordinary way, but she refused. On October 18, 1921, the "testatrix sent him revised lists of the persons and institutions "she wished to benefit, and requested him to destroy the earlier "list, and he replied next day, 'I have your letter of the 18th "'instant, with the enclosures, and quite understand your "'instructions.' Subsequently she wrote letters making slight "alterations in the lists, which he similarly acknowledged." It was held: "that the true inference was, seeing that the partners "had full knowledge of the contents of the testatrix's will, that "they only agreed to give effect to the testatrix's wishes in "accordance with the scheme of the will, including the provision

[1] [1924] 1 Ch. 88.

"that there was to be no trust or legal obligation, and accordingly that they took the property bequeathed to them absolutely for their own benefit."

In the course of his judgment Tomlin J. said [2]: "The first question is whether they are absolute owners of what is expressed to be given them by the will. If not, then the further question will arise whether they are trustees for the persons and institutions set out in the lists of October 12, 1921, or whether they are trustees of a fund of which the beneficial interest is undisposed of, so that the persons beneficially entitled are the testatrix's next of kin. I think the question whether, if there is not a trust created outside the will in favour of the persons named in the lists, the Messrs. Mead are trustees for the next of kin must depend on the construction of the will itself; because if there was no bargain outside the will imposing a fiduciary relationship"—and that is the case here—"then that relationship can only exist by virtue of the terms of the will itself. Looking at the will, I do not think that any fiduciary relationship is created. By the fifth clause of the will the testatrix bequeathed to them absolutely as joint tenants a moiety of the residuary trust moneys, with the request that they would dispose of the same in accordance with any memorandum or paper signed by her and deposited with her will or among her papers; and the position is similar with regard to the remaining moiety subject to a life interest given to Dr. O'Sullivan. Then by clause 8 the testatrix provides: 'Any such memorandum or paper referred to in clauses 5 and 7 hereof shall not be deemed to form part of my will or to have any testamentary character and the above expression of my wishes as to the disposal of the said sums shall not create any trust or legal obligation even if the same shall be communicated to my trustees in my lifetime.' I think on the true construction of the will the Messrs. Mead take these interests absolutely, and that, assuming there are no trusts created outside the will, they cannot be said to be trustees for the next of kin."

It will be observed that Tomlin J. placed great weight upon the language of clause 8 of the will, which, in effect, corresponds to the declaration found at the end of clause 4 (a) and at the end of the provision in clause 5 dealing with the one-third share of the residuary estate bequeathed to the bank, and in so far as, upon a question of construction, one case can be said to govern another, it appears to me that this case is covered by the reasoning of Tomlin J. in that case.

In the later case of *In re Schär*,[3] it appears that in the matter of the estate of that deceased at an earlier stage Cohen J. had to consider the true construction of the will and codicil of the deceased in regard to this point. The testator had made a will in 1931 directing that his residuary estate should be divided among

[2] [1924] 1 Ch. 88, 94.

[3] [1951] Ch. 280; [1950] 2 All E.R. 1069.

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Stirling, decd., *In re.* Union Bank of Scotland Ld. *v.* Stirling.

Wynn-Parry J.

beneficiaries, all or some of whom lived in Germany. In 1940 he made a codicil providing that if, at his death, or before his trustees had wound up his estate, there should be legislation in force in this country depriving the beneficiaries of the right to receive those benefits, they should go to his trustees absolutely.

When the matter came before Cohen J. in March, 1945, he declared, on the true construction of the will and codicil, and particularly clause 6 of the codicil—the effect of which I have read, with the exception of these words: "then I give such "benefits to my trustees absolutely with the request but without "creating any trust that they will carry out the wishes contained "in my said will or any codicil thereto when legislation permits "them to do so"—that "legacies and shares of residue thereby "given to persons who survived the testator and were at his death "enemies within the meaning of the Trading with the Enemy "Act, 1939, and any orders made thereunder were payable to the "bank and to the first two defendants beneficially." Unfortunately, there is no report of his judgment, but it is clear from that reference to his order that he had approached the case, as Tomlin J. did in *In re Falkiner*,[4] as one purely of construction. Those two cases, and particularly *In re Falkiner*,[4] appear to me to support the contention that I ought to declare that the legacy and the share of residue passed to the bank absolutely. Indeed, as I have already indicated, I think that upon this point *In re Falkiner*[4] is decisive.

I was referred to one or two other cases. The first was *In re Rees' Will Trusts*,[5] a decision of the Court of Appeal. In that case, Evershed M.R. pointed out[6] that "These courts have also "been very insistent on the importance of the principle that those "who assume the office of trustees should not, so far as they fairly "can prevent it, allow themselves to be in a position in which their "interests and their duties conflict," but I find nothing in that case which could cut down the effect of *In re Falkiner*,[7] and it would appear to me that *In re Rees' Will Trusts*[8] is distinguishable from the present case because the devise and bequest there was to the trustees "they well knowing my wishes concerning the "same"; that is, the whole of his property.

In *In re Hawksley's Settlements*[9] the relevant provision was that the testatrix appointed three persons to be her executors and residuary legatees "to carry out instructions that I may leave in "writing or verbally which I have not yet fully completed," but there was not in that case anything which corresponded to clause 8 of the will in *In re Falkiner*,[10] or to the declaration at the end of clause 4 (a) and clause 5 in the wills in this case; and it appears to me that the older case of *In re Boyes*[11] is distinguishable on the same basis.

[4] [1924] 1 Ch. 88.
[5] [1950] Ch. 204; 66 T.L.R. (Pt. 1) 23; [1949] 2 All E.R. 1003.
[6] [1950] Ch. 211.
[7] [1924] 1 Ch. 88.
[8] [1950] Ch. 204.
[9] [1934] Ch. 384; 50 T.L.R. 231.
[10] [1924] 1 Ch. 88.
[11] (1884) 26 Ch.D. 531.

In those circumstances and for those reasons, treating the matter purely as one of construction, I propose to make a declaration that the pecuniary legacy and the one-third share of residue pass to the plaintiff bank absolutely.

Declaration accordingly.

Solicitors: *S. F. Miller, Mathews & Co.*

F. R. D.

[COURT OF APPEAL.]

C. A.

1954 *Oct.* 9.

Somervell, Denning and Romer L.JJ.

* BUNGALOWS (MAIDENHEAD) LD. *v.* MASON.

[Plaint H. 727.]

Landlord and Tenant—Rent restriction—Death of tenant—Widow occupying as statutory tenant—Acceptance of new rent book containing new conditions of tenancy—Statutory tenancy converted into contractual tenancy—Death of widow—Daughter's right to remain in possession—Increase of Rent & Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (1) (*g*).

On the death of the defendant's father, who was the contractual tenant of a dwelling-house to which the Rent Restriction Acts applied, his widow continued in occupation as a statutory tenant under section 12 (1) (*g*) of the Act of 1920. Some three years later the agent and rent collector of the landlord presented a new rent book, containing "regulations and conditions of the tenancy" different from those under which the original contractual tenancy had been granted. The widow's daughter, as her mother's agent, accepted the new rent book, the widow's name was entered in it, and rent was paid on the basis of the new agreement. On the death of the widow the landlords claimed possession from the daughter, who claimed to be entitled to remain in occupation as a statutory tenant:—

Held, that the landlords, through their agent, had offered the widow a tenancy on new conditions, rent had been paid and accepted on that basis, and the widow's statutory tenancy had been converted into a contractual one. Therefore on the widow's death the daughter was entitled to the protection of section 12 (1) (*g*).

APPEAL from Judge Elder-Jones, sitting at Windsor County Court.

The defendant's father was, at the date of his death in 1949, the contractual tenant of a dwelling-house of which the plaintiffs' predecessors were landlords. His widow, Mrs. Mason, remained in possession, paying rent, as a statutory tenant, subject to the conditions of the previous tenancy, until February, 1952. By that time the plaintiffs had purchased the dwelling-house with other buildings. Mrs. Mason was by then bed-ridden, and the defendant, her daughter, paid the rent and dealt with other business matters in her behalf. One Harvey, who was employed by the

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plaintiffs as their agent and rent collector, called at the house with a new rent book, although there was space in the old rent book for further entries. He asked certain questions, and, according to his evidence, it was agreed between himself and the defendant, as representing her mother, that Mrs. Mason should be the tenant. Her name was put in the new rent book, which contained "regulations and conditions of the tenancy" differing from those in the previous rent book, and which presumably were those applicable under the original tenancy granted to the defendant's father. The defendant admitted that Harvey drew her attention to the new conditions, and rent was duly paid and accepted on that basis. On the death of Mrs. Mason the plaintiffs claimed possession, but the defendant claimed to be entitled to remain in occupation as statutory tenant under section 12 (1) (*g*) of the Rent and Mortgage Interest (Restrictions) Act, 1920.

The county court judge dismissed the claim of the plaintiffs, and they now appealed.

N. C. Tapp for the landlords.

Sir Shirley Worthington-Evans, for the defendant, was not called on.

Somervell L.J., stated the facts and continued: Mr. Tapp for the landlords contended that we should regard the "Regulations and conditions of the tenancy" not as terms of the "tenancy" but simply as regulations, but in view of the heading and of their wording it seems to me plain that they must be treated as conditions of the tenancy. They were brought to the defendant's attention as agent for her mother. In those circumstances there was ample evidence on which the judge could find, as he did, that the landlords, by Harvey, offered Mrs. Mason, through the agency of the defendant, a tenancy on new conditions. That was accepted, and rent was paid and accepted on that basis. From that time, in my view, Mrs. Mason became a contractual tenant, and so the defendant is entitled to the benefit of section 12 (1) (*g*) of the Act of 1920 on her mother's death.

There are two other matters which I think I should mention. One is that a week after the rent had been accepted, and, in my opinion, the contract concluded, Harvey called again and pasted on the rent book a note indicating that Mrs. Mason held as successor of her husband, but, of course, it was too late to alter the contractual position which had already been set up. Mr. Tapp also sought to argue a point which he admitted he had not taken below, namely, that where a person is in possession as a statutory tenant, as a matter of law his position cannot by agreement be turned into that of a contractual tenant. Having looked at some observations by McNair J. in *Murray Bull & Co. Ld.* v. *Murray*,[1] on which counsel said that he was going to rely, it seems

[1] [1953] 1 Q.B. 211; [1952] 2 T.L.R. 1003; [1952] 2 All E.R. 1079.

to me plain that the point is a bad one. All I would say about that case is that McNair J. was not dealing with this point. He was dealing with a case where it was suggested that the position of a statutory tenant had been worsened by being turned into that of a licensee. For these reasons I think this appeal fails and must be dismissed.

DENNING L.J. I agree.

ROMER L.J. I agree.

Appeal dismissed.

Solicitors: *William Foux & Co.; T. W. Stuchbery & Son, Windsor.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

* WATERMAN *v.* WALLASEY CORPORATION. HESKETH *v.* SAME.

1954
Apr. 27.

Lord Goddard C.J., Hilbery and Donovan JJ.

Shop—Sunday closing—Garage—Premises used for second-hand car business lawfully open on Sunday for sale of accessories—Display of cars for sale—Examination of cars by possible customers and discussion with assistant—Car driven by assistant on demonstration ride—No sale of car—"Serving of customers"—Whether premises open for the serving of customers in connexion with second-hand car business—Shops Act, 1950 (14 *Geo.* 6, *c.* 28), *ss.* 47, 59, *Sch.* 5.
Sunday.

By the Shops Act, 1950, s. 47: "Every shop shall . . . be closed "for the serving of customers on Sunday: Provided that a shop "may be open for the serving of customers on Sunday for the "purposes of . . ." the sale of motor supplies or accessories.

Where the business of a dealer in second-hand cars is carried on and cars for sale are displayed in a shop which is lawfully open on Sunday for the sale of motor accessories and persons who may wish to buy a car come into the shop on Sunday and examine the cars displayed for sale and discuss them with an assistant, but no sale takes place, the shop, being lawfully open for the sale of accessories, cannot be said to be open for the serving of customers in connexion with the business of a dealer in second-hand cars and no offence is committed under section 47.

Where, however, in similar circumstances, the persons who examine the cars are taken by an assistant for a demonstration ride in one of the cars, that fact affords evidence from which justices may conclude that the shop was not closed as required by section 47.

WATERMAN *v.* WALLASEY CORPORATION.

CASE STATED by Wallasey justices sitting at Wallasey.

An information was preferred against the defendant, Harry Waterman, for that he, on August 2, 1953, being the occupier of a shop in which he carried on business as a dealer in used and

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second-hand motor-vehicles did not close the shop for the serving of customers on that day, being a Sunday, contrary to sections 47 and 59 of the Shops Act, 1950.[1]

The following facts were found by the justices: The defendant was the occupier of premises known as The Empress Motors Garage, Wallasey, where he carried on business as a dealer in used and second-hand motor-vehicles. The premises were normally open seven days a week for the sale of petrol and motor accessories, and on August 2, 1953, were open for the sale of motor accessories but not for petrol. The garage and show-rooms were in the same building and on August 2, 1953, second-hand cars awaiting sale on view in part of the premises were visible from the pavement, and one car awaiting sale was parked on the roadway outside the premises. A man, woman and child entered the premises and in company with the manager of the garage walked over to a car and examined it. A discussion took place and the woman opened the doors of the car and examined its interior. No money was seen to pass. Later on the same day a man and a woman in company with the manager inspected the car parked in the roadway and a discussion took place lasting some minutes. The manager opened the rear door of the car to allow the woman to enter and sit in the rear seat. No money passed and the man and woman walked away.

The defendant contended that his premises were lawfully open on a Sunday for the sale of accessories and that he had not served a customer merely by reason of the manager having gone over to the vehicle and acted as he had done.

The prosecutor contended that by reason of the actions of the manager in discussing the cars with the persons who had come on to the premises and in attending to them, the premises were not "closed for the serving of customers."

The justices considered that the premises being a shop were not closed for the serving of customers in connexion with the appellant's second-hand motor-car business on the material date. They convicted the defendant and imposed a fine of £3. The defendant appealed.

[1] Shops Act, 1950, s. 47: "Every "shop shall, save as otherwise pro- "vided . . . be closed for the serving "of customers on Sunday: Provided "that a shop may be open for the "serving of customers on Sunday "for the purposes of any transaction "mentioned in the Fifth Schedule to "this Act."

S. 50: "Where several trades or "businesses are carried on in the same "shop and any of those trades or busi- "nesses consist only of transactions of "such a nature that, if they were the "only transactions carried on in the "shop, the provisions . . . requiring "the shop to be closed for the serving "of customers . . . [on] . . . Sunday "would not apply to the shop, the "shop may be kept open . . . [on] ". . . Sunday . . . for the purposes "of those transactions alone, subject, ". . . to such conditions as may be "prescribed."

S. 59 (1): "In the case of any "contravention of any of the . . . "provisions of this Part of this Act, "the occupier of the shop shall be "liable to a fine . . ."

Sch. 5: "Transactions for the pur- "poses of which a shop may be open ". . . for the serving of customers on "Sunday: 1. . . . (*h*) aircraft, motor, "or cycle supplies or accessories."

George Bean for the defendant.
R. S. Nicklin for the prosecutor.

The following cases were mentioned in argument: *Willesden Urban District Council* v. *Morgan* [2] and *London County Council* v. *Freeman, Hardy and Willis.*[3]

DONOVAN J. referred to section 47 and Schedule 5 to the Shops Act, 1950, and continued: The defendant kept a shop which was lawfully open on Sunday for the sale of motor a cessories. The justices found that in the window motor-cars were displayed for sale with the prices on them. There were two instances of persons, who may have been prospective customers, coming along and being allowed by the manager to examine the cars. There were discussions but no sale took place and no money passed. What in fact happened was that somebody interested in a car asked questions about it and was answered.

On those facts it was contended that the defendant had infringed section 47 by not closing his shop for the service of customers on Sunday. The precise question is whether this shop was closed although there were customers, persons there, who might want to buy a motor-car. The question is a nice one, but we think that the shop was so closed. No sale was effected.

The purpose of the Act is to protect shop assistants; but if a shop may lawfully be open, as this one might, and someone comes along and inspects a motor-car which can be lawfully sold the next day, in our view it is stretching the Act too far to say that the shop is open for the serving of customers who wish to buy a car. In the course of the argument the case was put of a chemist's shop which may open on Sunday for the sale of medicine and other things; if somebody goes in for a bottle of aspirin and is shown a camera and how it works, it seems to us that it is extravagant to say that that shop is open for the sale of cameras or for the service of customers who may wish to buy a camera. There is no evidence, in our view, which justified the justices in saying that this shop was open merely because someone came along and asked about the motor-cars. We think on the facts of this case that the justices adopted too narrow and rigorous a construction of the section and that this conviction must be quashed.

LORD GODDARD C.J. I agree.

HILBERY J. I agree.

Appeal allowed.

[2] [1915] 1 K.B. 349; 31 T.L.R. 93. [3] (1913) 77 J.P.Jo. 245.

1954

Waterman v. Wallasey Corporation. Hesketh v. Same.

Hesketh v. Wallasey Corporation.

Case stated by Wallasey justices sitting at Wallasey.

An information was preferred against the defendant, William Cecil Hesketh, for that he, on August 2, 1953, being the occupier of a shop known as Dodd's Garage, Hoylake Road, Wallasey, in which he carried on the business of a dealer in used and second-hand motor-vehicles, that not being one of the transactions mentioned in the Fifth Schedule to the Shops Act, 1950, did not close the shop for the serving of customers in connexion with such business, contrary to sections 47 and 59 of the Shops Act, 1950.

The following facts were found by the justices: The defendant carried on at his premises the business of a dealer in used and second-hand motor-vehicles and in petrol and oil and and motor and cycle supplies and accessories. The premises comprised a garage and forecourt, freely accessible from the road, in which were petrol pumps and other appliances used in connexion with the business. The garage was too small to contain all the motor-cars which the defendant possessed for the purposes of sale, and some of them normally stood in the forecourt. Notices indicating that they were for sale were exhibited on two of the vehicles standing in the forecourt. On Sunday, August 2, 1953, the garage part of the premises was open, and three of the defendant's employees, two of whom were seen to serve petrol, were present. A man entered the forecourt, examined the vehicles, and discussed several of them with one of the defendant's employees. Later a motor-cyclist rode up, dismounted and examined the vehicles, and was taken for a drive in one of the vehicles exposed for sale by one of the defendant's employees. Another employee also demonstrated cars to a man and a woman and drove them away from the premises in one of the cars. No sale of any vehicle was seen to be effected on that day.

The defendant contended that by reason of paragraph 1 (*h*) of the Fifth Schedule to the Shops Act, 1950, the premises could lawfully be open and he and his employees could lawfully be present for the serving of customers; that there had been no serving of customers within the meaning of section 47 in connexion with his business as a dealer in used and second-hand vehicles, and that the mere display, inspection and demonstration of vehicles to persons coming on to the forecourt did not amount in law to the serving of customers; and that the Act was designed to prevent and render unlawful sales to customers in a shop on Sundays, but did not render unlawful the transactions, not being sales, disclosed by the facts of the case.

The prosecutor contended that if the defendant or any of his employees were on the premises available and ready to serve in connexion with the defendant's business as a dealer in used or second-hand motor-vehicles the offence charged was committed and that, in view of the actions of his employees, the premises

were not "closed for the serving of customers" within the meaning of the Act.

The justices considered that the prosecutor's contentions were correct and that the premises, being a shop, were open on a Sunday for the serving of customers in connexion with the defendant's business as a dealer in used and second-hand cars. They convicted the defendant and imposed a fine of £3.

The defendant appealed.

George Bean for the defendant.
R. S. Nicklin for the prosecutor.

DONOVAN J. The difference in the facts between this case and that of *Waterman* v. *Wallasey Corporation* is that in this case people were taken for demonstration runs in a car. We think that that fact makes a material difference in this sense, that it was some evidence from which the justices could reasonably draw the conclusion that the shop was not closed on Sunday as section 47 requires. That being so, the appeal is dismissed.

Appeal dismissed.

Solicitors: *S. Eversley & Co. for G. Gerald Strong, Liverpool; Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; Chamberlain & Co. for Town Clerk, Wallasey.*

J. F. L.

[LEEDS ASSIZES.]

* ARCHER v. CATTON & CO. LD.

1954
Mar. 9.
Streatfeild J.

Limitation of Action — Negligence — Injury caused by acts outside statutory period—Injury first discovered within statutory period—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 2 (1).

In an action of negligence, the cause of action accrues at the time of the negligence, because it is then that the damage is caused even though its consequences may not be apparent until later.

Between 1923 and 1940 the plaintiff was employed by the defendants on work which resulted in the casting-off of a great deal of fine dust. In October, 1943, for the first time the plaintiff found himself to be suffering from a condition of the chest which, he alleged, had been caused by his subjection to the dust up to 1940. On September 27, 1949, he issued a writ against the defendants claiming damages for negligence and breach of statutory duty. In a preliminary issue on a plea by the defendants that the action was barred by section 2 of the Limitation Act, 1939:—

Held, that the plaintiff's cause of action accrued up to 1940 and, the writ not having been issued until more than six years thereafter, his claim must fail.

Howell v. *Young* (1826) 5 B. & C. 259 applied.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

1954

Archer
v.
Catton
& Co. Ld.

Preliminary issue.

The plaintiff claimed damages for negligence and breach of statutory duty under section 47 of the Factories Act, 1937. The defendants denied negligence and breach of statutory duty and also pleaded that the action was barred as not being brought within six years from the date when the cause of action accrued. The facts are fully set out in the judgment.

J. Harvey Robson for the plaintiff.
R. Withers Payne for the defendants.

Streatfeild J. The plaintiff pleads that he has suffered injury, namely a condition of his lungs, due to the inhalation of dust while in the employment of the defendants, Catton & Co. Ld. He alleges in his statement of claim that the injury was brought about by the negligence and breach of duty of the defendants, and so far as the breach of duty is concerned reliance is placed on section 47 of the Factories Act, 1937, dealing with measures to be taken to protect employees against the inhalation of dust. One of the pleas of the defence is that the action was not brought within six years from the date when the cause of action accrued. The defendants contend, therefore, that the cause of action is barred by section 2 of the Limitation Act, 1939. I am now required to deal with that as a preliminary issue, not having heard any evidence on the merit of the actual cause of action; but I have been invited by counsel on both sides to consider that issue on a statement very fully made by Mr. Harvey Robson, which is agreed by Mr. Payne on behalf of the defendants as an accurate statement of the facts for the purposes of the issue.

The facts upon which I am asked to pronounce upon this point of law are these. Between 1923 and 1940 the plaintiff was employed by the defendants. Until 1937 of that period his work had consisted of servicing Bessemer furnaces, which necessitated the breaking up of the fire brick linings to Bessemer converters in order that they might be renewed with new fire brick. That was work done in a confined space and resulted in the casting off of a great deal of fine dust. In 1937 a change was made, but only to the extent that, instead of being fire brick for the next three years it was fire clay, the plaintiff's work being otherwise the same and a great deal of dust being given off in its removal. In 1940 the plaintiff was directed to different work altogether, work which either did not involve him being subjected to dust or, if it did, only very slightly; so Mr. Harvey Robson concedes that nothing that took place after 1940 can in any way be said to have contributed to the condition from which this man afterwards was found to be suffering. In October, 1943, having been employed on that other work, he then for the first time found himself to be suffering from a condition of his chest which is said to have been caused by his subjection for a long

period of time to dust collections and had to give up his work by reason of his chest trouble. He returned in the summer of 1944. In 1945 he was off work again, and he then returned after a little time until January 1946 when he was laid off work for the same reason; and he has been off work ever since.

The writ in this action was not issued until September 27, 1949. Mr. Harvey Robson contends that, if his cause of action can be said to have arisen in October 1943, when the plaintiff for the first time gave up work by reason of his chest trouble, then this action was brought just within the statutory limit of six years. On the other hand, he concedes that, if in fact his cause of action arose in 1940, then the writ issued in 1949 was out of time. On that question of law, reference has been made to Dr. Charlesworth's Law of Negligence, 2nd ed., p. 597, in which, after quoting section 2 (1) of the Limitation Act, 1939, and pointing out that the section applies to actions founded on simple contract or on tort, the learned author continues: "In an action "of negligence, the cause of action accrues at the time of the "negligence, because it is then that the damage is caused, even "though its consequences may not be apparent until later." He then quotes *Howell* v. *Young*,[1] where a solicitor was sued for negligence in representing that certain mortgages were sufficient security for a loan. More than six years after that alleged negligence damage was suffered and an action was begun to which the solicitor pleaded that it was statute barred. Holroyd J. held that it made no difference that the damage was suffered more than six years afterwards and that the cause of action accrued when the solicitor negligently gave the advice that the mortgages were sufficient security for a loan. If the proposition laid down in that case and enunciated by Dr. Charlesworth is correct, it seems to be quite clear that it is fatal to the plaintiff's claim in this case.

Mr. Harvey Robson, however, has argued strenuously that a cause of action in negligence cannot be complete until there is, first of all, negligence and until the plaintiff either knows or should know that he has suffered injury in consequence of it. In other words, he is contending that, although the act of continued negligence over a long period, if negligence it was, was complete by 1940, in fact it led to no ill consequences until October, 1943, when for the first time the plaintiff became aware of the damage which he had suffered and his cause of action became complete.

I have come to the conclusion, although with regret because it may well be that hardship has been suffered, that that is not a sound proposition, and that *Howell* v. *Young*[2] is in principle indistinguishable and that I am bound by that case and a line of cases which have stood the test of time for many years. In my judgment, the proposition is correctly stated in Dr. Charlesworth's learned work to which reference has been made, and the

[1] (1826) 5 B. & C. 259. [2] Ibid.

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ARCHER v. CATTON & CO. LD.

Streatfeild J.

true view in the present case is that all the time up to 1940 when the plaintiff was exposed to this dust, assuming for the moment that that amounted to negligence or breach of statutory duty, there was the accrual of the cause of action, and it makes no difference, as Holroyd J. found in *Howell* v. *Young*,[2] that the plaintiff himself was not aware of the fact that it would have led to ill consequences. For these reasons, in my judgment this action is statute barred, the writ not having been issued until more than six years after the accrual of the cause of action. Under those circumstances, therefore, the plaintiff's claim must fail.

Judgment for the defendants.

Solicitors: *Rowley, Ashworth & Co., Manchester; Willey, Hargrave & Co., Leeds.*

[CHANCERY DIVISION.]

1954

May 3.

* PRACTICE NOTE (FAMILY PROVISION).

Family Provision — Practice — Applicants with adverse interests — Representation by counsel—Inheritance (Family Provision) Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 45).

The following has been issued by Vaisey J.—Where two or more persons are joined as plaintiffs in an application under the Inheritance (Family Provision) Act, 1938, it will generally be the case that their respective interests are, or may be, in conflict, and difficulties will then arise as to the presentation of their claims, since two or more plaintiffs cannot be separately represented by counsel at the hearing.

The Act requires that the application shall be "by or on "behalf of" the dependant and it is therefore not possible for one claimant to initiate the proceedings, making the other claimant a defendant.

In a recent case, in which a widow and her infant daughter were joint plaintiffs and this difficulty arose, an order was made (upon summons by the plaintiffs in the proceedings) in the following form:—

"AND IT APPEARING that the interests of the Infant Plaintiff "are or may be adverse to those of the Plaintiff . . . and "that it is desirable that the Infant Plaintiff should be "enabled to be separately represented for the purpose "of prosecuting her claim in this action under the above "mentioned Act

"IT IS ORDERED that the Infant Plaintiff . . . be struck out "as a Plaintiff and added as a Defendant

The recital was inserted to make it plain that the infant, having complied with section 1 (1) of the Act by originally joining in the application as a plaintiff, remains a claimant although transferred to the other side of the record.

1954

PRACTICE NOTE (FAMILY PROVISION).

May 3, 1954.

[QUEEN'S BENCH DIVISION.]

* ADDISON *v.* BROWN.
SAME *v.* SAME.

1954
Apr. 12, 13.

Streatfeild J.

[1950 A. No. 2440.]
[1952 A. No. 234.]

Husband and Wife—Maintenance—Agreement—Foreign divorce—Agreement purporting to oust jurisdiction of foreign court—Enforceability in England—Public policy.

Contract — Implied term — Consent not to be unreasonably withheld — Husband's agreement to pay child's medical expenses if "reasonable "and approved by the husband" — National Health Service not used. National Health Service.

In 1939 the plaintiff married an American subject domiciled in California and there were three children of the marriage. Differences having arisen between the parties, the husband informed the wife that he wished to divorce her in America. Before any proceedings had taken place an agreement was executed whereby the husband undertook to pay a weekly sum for the maintenance of the wife and children. By a clause in the agreement it was provided that in the event that either the husband or wife should institute proceedings or obtain a divorce in the state of California the provisions of the agreement should continue in full force and effect and should be conclusive with respect to the husband's obligations under the agreement. The clause continued: "Neither the "husband nor the wife will make application to any court in such "proceeding, if any, for any different relief, but this agreement "may be embodied in and made part of such judgment or decree. If "any judgment of any court shall otherwise provide with respect "to any of the matters in this agreement embraced, the provisions "hereof shall control notwithstanding the terms of any such "judgment."

In 1948 a court in California pronounced an interlocutory judgment of divorce in favour of the husband and incorporated the agreement making it part of the order. In 1949 the judgment was made absolute. In an action by the wife to enforce the terms of the agreement, the husband contended that the action was not maintainable in the English courts, the agreement being contrary to public policy and therefore void:—

Held, that although an agreement purporting to oust the jurisdiction of the English courts was contrary to public policy, one which purported to do so in respect of a foreign court was not, and therefore the agreement was actionable.

Bennett v. *Bennett* [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413 distinguished.

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Action.

The action was brought by the defendant's former wife, Mrs. Olivia Josephine Addison, against Stewart D. Brown, on an agreement to pay maintenance. The defendant was an American subject, domiciled in California. In April, 1939, he married the plaintiff in England, there being three children of that marriage, now aged 14, 13 and 10 years. Differences arose between the parties and the defendant told the plaintiff that he wished to divorce her in the United States of America.

Prior to divorce proceedings an agreement in regard to property and the custody of the children was executed and provided: "The husband agrees to pay to the wife the sum of "twenty dollars a week for the support and maintenance of the "wife and for the support, maintenance and education of the "children of the marriage until the youngest of the said children "shall attain the age of 18 years. Nevertheless, the said sum "of twenty dollars a week shall be reduced from time to time "by five dollars a week in respect of any child who shall be at "boarding school during such period as such child is, in fact, "boarding at the school. The husband further agrees to pay all "proper school bills incurred by the wife for the children, dental "and medical expenses and clothing bills, provided in each case "that the items are reasonable and approved by the husband . . . "In the event that either the husband or wife shall at any "time institute or continue a proceeding for divorce or obtain a "divorce in the state of California, whether upon matters here-"tofore or hereafter arising, the provisions of this agreement shall "continue in full force and effect and shall be conclusive with "respect to the husband's obligations to pay to the wife for "her own use and purpose the sums hereinbefore provided by "him to be paid. Neither the husband nor the wife will make "application to any court in such proceeding, if any, for any "different relief, but this agreement may be embodied in and "made part of such judgment or decree. If any judgment of any "court shall otherwise provide with respect to any of the matters "in this agreement embraced, the provisions hereof shall control "notwithstanding the terms of any such judgment."

On February 26, 1948, the court in California pronounced an interlocutory judgment of divorce in favour of the husband, and the order of the court stated that the agreement was approved and directed the parties to comply with the provisions of the agreement, which was incorporated and made a part of the order. The order continued: "Provided, however, that the court hereby "orders the money payments provided to be made by the terms "of the said agreement to be so made as alimony, subject, and "without prejudice to the court's continuing jurisdiction thereof; "and the court expressly reserves the right to modify, amend or "add to the said agreement in so far as it provides for the care, "custody and maintenance of the three minor children of the "plaintiff and defendant."

In March, 1948, the defendant paid to the plaintiff a lump sum of £50 and in May a further sum of £50. It was agreed that by the acceptance of the total sum of £100 the plaintiff compromised her personal claim, leaving the agreement in full force and effect only with regard to the three children of the marriage. In April, 1948, the defendant began making payments under the agreement. On March 25, 1949, the court in California made absolute the judgment of divorce, and again recited that the provision for alimony was binding on the parties. In May, 1949, the plaintiff married a warrant-officer in the British army, and by him she has had two children.

On July 18, 1949, the defendant's solicitors wrote to the plaintiff sending a cheque for £16 5s.—the first time that a cheque for that exact amount had been sent—and informing the plaintiff that the defendant was about to remarry. The letter continued: "We are directed to say further that Mr. Brown "considers that the past monetary demands made upon himself "have been unnecessarily high and that in future he is only "prepared to send to you the 25s. per week per child as set out "in the original agreement between you. He points out also "that in view of a settlement of £100 cash paid over to you last "year there is clearly no further weekly payment due to you."

To that letter the plaintiff replied acknowledging the cheque and stated: "I should also like to point out that the agreement "clearly states that Mr. Brown has to pay for the children's "clothing, for which I enclose two bills to date. Will you be "good enough to send any letters to the above address."

The defendant continued until July, 1950, to remit through his solicitors a monthly sum of £16 5s. He omitted to do so in October, 1949, because he said that he was too pressed financially owing to the expense of the children's school bills.

On September 20, 1949, the pound was devalued from four dollars to two dollars 80 cents. to the pound.

On August 9, 1950, the plaintiff issued a writ, and in January, 1952, she issued a second writ, in which she claimed maintenance for the children from the date of the last writ up to date, relying on the agreement under seal of December, 1949, so far as the children were concerned, both with regard to their five dollars a week each and with regard to their school bills, medical and clothing expenses.

On March 25, 1952, the actions were consolidated, and the plaintiff, giving credit for amounts which the defendant had paid, claimed a balance of £442 15s. 6d.

P. R. Hollins and *M. H. Jackson-Lipkin* for the plaintiff.
Conrad Dehn for the defendant.

In addition to the cases cited in the judgment the following case was referred to in argument: *Berry* v. *Berry*.[1]

[1] [1929] 2 K.B. 316; 45 T.L.R. 524.

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Streatfeild J. stated the facts and continued: It is contended on behalf of the defendant that this action is not maintainable in the English courts because the agreement sued on is contrary to public policy and, therefore, void by reason of the decision in *Bennett* v. *Bennett*.[1] It is not for a moment suggested that this action is not maintainable in the English courts on the ground that the agreement has been incorporated and has become merged in a foreign judgment. Apart from the point that the agreement is unenforceable because it is contrary to public policy, no one has suggested that the English courts have no jurisdiction to entertain this agreement.

The question whether the agreement is contrary to public policy is a matter of law of which I should be obliged to take note quite apart from the pleadings. *Bennett* v. *Bennett*[1] was decided by Devlin J., and went to the Court of Appeal where his judgment was unanimously upheld. The circumstances of that case were, however, entirely different. In August, 1948, the plaintiff wife presented a petition for the dissolution of her marriage. In the petition she asked for the custody of the two children of the marriage, alimony pendente lite, maintenance for the younger son and maintenance and security for herself. By an agreement before the pronouncement of any decree, her husband entered into a deed under seal whereby he agreed to make financial provision for the plaintiff and the younger son in consideration for which the wife covenanted not to proceed with the prayers for maintenance, and to consent to those prayers being dismissed, and not to present any further petition for maintenance. The registrar made a consent order in which the prayers for maintenance were struck out. When the husband fell into arrear with the payments under the deed his wife sued him for the arrears. Devlin J. held—rightly in my view—that the agreement sued on was unenforceable because it was contrary to public policy. In the Court of Appeal the material judgment is that of Denning L.J.,[2] and it is not without significance that he commences his judgment with these words: "In this case the only question to my "mind is whether the wife can sue upon the deed by action at "law or whether her proper remedy is by application to the "Divorce Court. I would not subscribe to a decision which "deprived her of all remedy." The case proceeded on the ground that, under the Supreme Court of Judicature (Consolidation) Act, 1925, section 190 (1) provides: "The court may, if it thinks fit, "on any decree for divorce or nullity of marriage, order that the "husband shall, to the satisfaction of the court, secure to the "wife such gross sum of money or annual sum of money for any "term . . . the court may deem to be reasonable," and under section 176 it is clear that "the court" for that purpose means the Probate, Divorce and Admiralty Division of the High Courts

[1] [1952] 1 K.B. 249; [1952] 1 T.L.R. 400; [1952] 1 All E.R. 413.

[2] [1952] 1 K.B. 249, 260.

of Justice in England. Denning L.J., when he came to the question of permanent maintenance, said[3]: "An award of "permanent maintenance on a divorce is peculiarly a matter for "the Divorce Court, and the jurisdiction of that court in regard "to it cannot be ousted by the private agreement of the parties. "The reason lies in public policy." I would particularly draw the attention of the defendant to what the Lord Justice said about the public policy of the law of England on which he (the defendant) now places reliance in stating that this agreement is unenforceable. Denning L.J. said: "First, it is in the public "interest that the wife and children of a divorced husband should "not be left dependent on public assistance, or on charity, when "he has the means to support them. They should therefore be "able to come to the Divorce Court for maintenance, notwith-"standing any agreement to the contrary: *Hyman* v. *Hyman*.[4] "Secondly, when maintenance is awarded by the Divorce Court, "it is not fixed irrevocably at a named figure. It can be varied "thereafter, upwards or downwards, according to the circum-"stances prevailing at the time. And if the husband is unable "to pay, and arrears accumulate, it is in the discretion of the "Divorce Court whether to enforce payment of the arrears or "not. These beneficent controls would be lost if the parties "could, by agreement, without the intervention of the court, fix "maintenance permanently at an unalterable figure. Any "private agreement of the parties which purports to make main-"tenance a debt enforceable at law must of necessity impliedly "oust the jurisdiction of the Divorce Court to fix it, vary it or "discharge it, and it is, by reason of that implication, invalid, "for the ouster goes to the whole consideration. There is no "consideration moving from the wife except an implied promise "to accept the named figure and not to ask for more, and that is "invalid, because it impliedly takes away the jurisdiction of the "court to give her more. If her promise does not bind her, then "his should not bind him: *Gaisberg* v. *Storr*,[5] *Combe* v. *Combe*.[6] "Sometimes there may be an implied promise by her to prosecute "the divorce proceedings, but that would be worse, for it would "be collusion. In the present case, however, the ouster is not "merely by implication. It is expressed in clause 10 of the "deed. That clause is invalid. It forms the whole, or substan-"tially the whole, consideration for the husband's promise to "pay the annuities. His promise is therefore invalid." It is clear from that passage of the judgment that had these proceedings been brought in the Divorce Division of the High Court this agreement would have been unenforceable. But I cannot think that the public policy of the law of England works in that way.

[3] Ibid. 262.
[4] [1929] A.C. 601; 45 T.L.R. 444.
[5] [1950] 1 K.B. 107; 65 T.L.R. 485; [1949] 2 All E.R. 411.
[6] [1951] 2 K.B. 215; [1951] 1 T.L.R. 811; [1951] 1 All E.R. 767.

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Although it may be contrary to public policy to oust the jurisdiction of the English courts, I cannot think that it is the public policy of England to oust a plaintiff in the English courts from suing on an agreement, assuming that it is otherwise actionable, on the ground that that agreement purports to oust the jurisdiction of a foreign court. It is submitted that it makes no difference that the court whose jurisdiction the agreement purports to oust is an American court rather than an English one. In my judgment, there is nothing in *Bennett* v. *Bennett*[7] which compels me to hold that the purported ouster of the jurisdiction of a foreign court is contrary to the policy of the law of England. I do not think that it is. And even if it were, as was pointed out by Mr. Hollins, the American court has adopted this agreement and has preserved the right to alter or vary it as the case may be. So I do not think, therefore, that there is anything in the point that this agreement is contrary to public policy and is therefore void. It is not suggested that the courts in England on any other ground have not jurisdiction to entertain this action. This agreement, although it was executed before the American Consulate, and although it has been incorporated in a foreign judgment, nevertheless was one which at all material times was intended to be executed in this country where the wife was resident. Under those circumstances, in my judgment the first point taken on behalf of the defendant that this agreement is unenforceable fails.

The other point which is taken is whether I can hold on the facts that there was any implied variation of this agreement under seal as the result of correspondence which took place in July, 1949, and the plaintiff's conduct in accepting a figure of £16 5s. monthly until July, 1950, just before she issued her writ. Reliance is placed for that proposition on *Berry* v. *Berry*,[8] a decision of the Divisional Court, where it was held that a deed of separation under seal could be varied, applying the rules of equity under the provisions of the Supreme Court of Judicature Act, 1873, and it was there held that there was a variation as a result of an agreement in writing which was an answer to the wife's claim on a maintenance agreement. Applying the rules of equity, the court came to the conclusion that the agreement was varied. But on the facts of the present case how can I come to the conclusion that there was a variation of this agreement? The agreement provided for five dollars per child per week. The letter of July 18, 1949, in effect, said precisely the same thing. The plaintiff told me that she regarded it as being an agreement for approximately 25s. per week per child, which in fact was five dollars per week at four dollars to the pound. There is nothing in that letter to suggest that there was an agreement between them that, come what may thereafter, it was to remain at 25s. for evermore. There is nothing to my mind in her letter

[7] [1952] 1 K.B. 249.

[8] [1929] 2 K.B. 316; 45 T.L.R. 524.

of reply to show that she was consciously or willingly accepting the variation of the term of the agreement. It is true that two months later, when devaluation came in, she continued to receive without complaint £16 5s. a month; whereas, if she is right in this action, she was entitled to receive in sterling a larger sum per month. But I am not surprised, having looked at the correspondence, that she took the attitude of accepting what she was given from her husband and being reasonably thankful for something less than she was legally entitled to. In those circumstances I am not able to find that there was anything in the correspondence or in her conduct for some months afterwards in accepting £16 5s. which can amount to a variation of that deed so as to invoke the principles of equity, and I find that there was no implied variation of the agreement.

On those two findings it follows that the plaintiff is entitled to enforce this agreement in the English courts at the rate of four dollars to the pound from April 1, 1948, which is the start of her claim, to September 15, 1949. After that date, there being a devaluation and the agreement being expressed in dollars, she is entitled to payment at the rate of five dollars a week, whatever that may entail. There then being two dollars, eighty cents. to the pound, she, of course, is entitled to a larger sum. But, of course, she must give credit, as she does, to the payments on account which the defendant has made.

There remain only the two other items for clothing and for medical expenses. It is true that in the agreement itself both of those items are subject to the approval of the defendant: "The husband further agrees to pay all proper school bills "incurred by the wife for the children; dental and medical "expenses and clothing bills, provided in each case that the "items are reasonable and approved by the husband." It was contended that by analogy to the law of landlord and tenant, where, under the Landlord and Tenant Act, 1927, it was found necessary to provide that in any agreement containing a covenant against subletting without the consent of the landlord there must be implied a term that such consent must not be unreasonably withheld, which would also have so provided, if it had been necessary, in the case of ordinary agreements. From that it is argued that the court is not entitled to imply that the consent of the husband must not be unreasonably withheld. The position with regard to medical expenses was that one child was suffering from adenoids and tonsils. The plaintiff took the child to her own doctor, who sent her to a specialist, who advised that the tonsils and adenoids should be removed and that it should be done reasonably quickly. He also told her that if she had it done under the National Health Service it might lead to a delay of two years. That does not speak very well for the National Health Service if it is correct. But that it would have led to some delay there can be no doubt. It was for that reason that the plaintiff had this operation done at the expense

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of her new husband, and ultimately at the expense of the defendant. She sent in the account, which was twelve guineas for the surgeon's fee, two guineas for the consultation fee, and a nursing home charge of £4 13s., making a total of £19 7s. The defendant, a man earning £2,000 a year, told me that he considered that that was far too much; that it ought to have been done under the National Health scheme, and that he was not prepared to pay any of it. In my view that figure was a very reasonable charge. In my judgment, in matters of medical and dental attendance, there is no difficulty, to give business efficacy to this agreement, in implying that the plaintiff was entitled to use her own good judgment, and that her husband's approval ought not to be unreasonably withheld. It was a wholly unreasonable attitude for the defendant to take, that he should have left it to the public funds of the National Health Service to look after his child.

[His Lordship considered the claim of £35 12s. 6d. for clothing, and continued:] In the same way, it seems to me ridiculous that the plaintiff was not entitled to give the children these modest requirements in the way of clothing without first referring to her former husband. I cannot think that it was necessary for her, within the four walls of this agreement, to have to write to her former husband, wherever he was, to obtain his authority for buying things like vests or pants or gym-slips or cardigans for these little children. So that, in those circumstances, again I would say that there is nothing unreasonable in these bills for clothing.

In those circumstances, therefore, in my judgment, the plaintiff is entitled to succeed and the total amount that she is entitled to, taking her claim down to December 15, 1951, is the sum of £442 15s. 6d. Accordingly, there will be judgment for the plaintiff for that sum.

Judgment for the plaintiff.

Solicitors: *Rowe & Maw; Randolph & Dean.*

J. D. P.

[CHANCERY DIVISION.]

1954
Feb. 18, 22, 23.

Harman J.

* *In re* RAYLEIGH WEIR STADIUM.

[1953 S. No. 5177.]

Land Charge—Share in land—Registration—Property held on trust for sale—Purchase of share of property—No written contract—Receipt for purchase-money—Receipt registered as estate contract and general equitable charge—Interest only in proceeds of sale—Not registrable as land charge—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *ss.* 1 (6), 42 (6)—*Land Charges Act,* 1925 (15 *Geo.* 5, *c.* 22), *ss.* 10, *Class C* (iii), (iv), 20 (6), (8).

The respondent purchased or agreed to purchase on October 11, 1948, for £10,000 an eighth share of property, which the owner of the legal estate held on behalf of himself and his partner equally as part of the assets of the partnership. On February 16, 1949, the respondent registered his interest as an estate contract under Class C (iv) of section 10 of the Land Charges Act, 1925. In December, 1949, the partners were adjudicated bankrupt, and the property vested in their trustee in bankruptcy. On October 17, 1953, the respondent registered a further charge in respect of the property under Class C (iii), as a general equitable charge. The trustee, who wished to sell the property, by this summons asked for an order that the charges should be vacated:—

Held, (1) that as the definition of "land" in section 20 (6) of the Land Charges Act, 1925, excluded an undivided share in land, a charge on an undivided share in land was not capable of registration as a land charge under the Act; (2) that since by section 1 (6) of the Law of Property Act, 1925, a legal estate could not subsist in an undivided share in land, the respondent could have no legal interest in the property, but having regard to section 42 (6) of that Act his interest under the transaction of 1948 constituted a share in the proceeds of sale of the property; (3) that, as a charge arising under a trust for sale was expressly excluded from registration under Class C (iii), the respondent's interest was accordingly wrongly registered in that class; (4) that the transaction (if it was a contract at all) was not a contract to convey the legal estate, and the legal owner of the property had been under no obligation to create a legal estate either in his partner or the respondent, so that the respondent's interest was not a contract registrable as an estate contract under Class C (iv); and both charges must therefore be vacated.

Rose v. *Watson* (1864) 10 H.L.Cas. 672 considered.

ADJOURNED SUMMONS.

By this application the court was asked for an order to vacate two land charges registered respectively under Class C (iii) and Class C (iv) of section 10 of the Land Charges Act, 1925,[1] by the respondent, Ernest Charles Randall, a solicitor, in respect of freehold property known as Rayleigh Weir Stadium at Thundersley, Essex.

[1] Land Charges Act, 1925, s. 10: "(1) The following classes of charges "on, or obligations affecting land "may be registered as land charges "in the register of land charges, "namely:— . . . Class C (iii) Any "other equitable charge, which is not "secured by a deposit of documents "relating to the legal estate affected "and does not arise or affect an "interest arising under a trust for "sale or a settlement and is not "included in any other class of land "charge (in this Act called 'a "'general equitable charge'); and (iv) "Any contract by an estate owner or "by a person entitled at the date of "the contract to have a legal estate "conveyed to him to convey or create "a legal estate. . . ."

Subs. (8): "The registration of a "land charge may be vacated pur-"suant to an order of the court or a "judge thereof."

S. 20 (6): "'Land' includes land "of any tenure . . . but not an un-"divided share in land. . . ."

Law of Property Act, 1925, s. 1: "(6) A legal estate is not capable of "subsisting or of being created in an "undivided share in land. . . ."

S. 42 (6): "Any contract to con-"vey an undivided share in land . . . "shall be deemed to be sufficiently "complied with by the conveyance of "a corresponding share in the pro-"ceeds of sale of the land in like "manner as if the contract had been "to convey that corresponding "share."

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Rayleigh Weir Stadium, *In re.*

In 1948 the stadium was the property of Francis Bernard McGreavey who carried on business there as proprietor of the stadium, and owned, in addition to the freehold of the stadium, a number of loose chattels and equipment.

McGreavey entered into partnership with one Frederick Leslie Rundle, and they carried on the business of speedway and greyhound racing at the stadium. The partners were equally interested in the assets of the business which included the stadium, the legal estate in which remained vested in McGreavey.

According to the respondent, the land charges arose out of a transaction between him and McGreavey and Rundle, dated October 11, 1948, by which they sold him or agreed to sell one-eighth share of the freehold of the stadium in consideration of his payment of £10,000 to them.

On February 16, 1949, the respondent entered the first charge on the register under Class C (iv) of section 10 of the Land Charges Act, 1925, the charge being described as "an estate contract "imposed or created by an instrument dated October 11, 1948, "made between Francis Bernard McGreavey . . . and Frederick "Leslie Rundle . . . of the one part and Ernest Charles Randall ". . . of the other part."

On December 14, 1949, the partners were adjudicated bankrupt. On December 16, 1949, the present applicant was appointed trustee in their bankruptcy, and the property in the stadium vested in him as trustee.

Some years later the trustee wished to sell the property, and the respondent having learned of this intention, wrote, on June 5, 1953, in the following terms to the trustee: "Re McGreavey "and Rundle (In bankruptcy). Rayleigh Weir Stadium. I have "heard that there have been negotiations for the sale of the free-"hold of the stadium and the chattels thereat and I have also "heard that a contract has been entered into for their sale. You "are aware that the debtors, in consideration of a payment of "£10,000 by me to them, sold to me a one-eighth part of the "freehold of the stadium and a one-eighth part of the chattels "thereat on October 11, 1948, and that they undertook to dis-"charge the mortgages existing on the freehold on October 11, "1948."

On October 17, 1953, the respondent further registered his interest as a charge under Class C (iii) of section 10 of the Act "being a general equitable charge imposed or created by an "instrument." The instrument was stated as having been made between McGreavey and Rundle and Randall, and was described in the following terms: "Whereby the said Ernest Charles "Randall [the respondent] paid the sum of £10,000 in respect of "the purchase of a one-eighth part of the under-mentioned "property, and in respect of which no conveyance has been "executed." No mention was made of any contract, but only of a payment in respect of a purchase. That charge was registered against McGreavey, Rundle and the trustee.

The respondent refused to comply with the trustee's demand that he should remove the charges from the register; and on November 19, 1953, the trustee took out the present summons asking for an order vacating the charges registered by the respondent.

The respondent by his affidavit dated December 30, 1953, stated: "On October 11, 1948, Francis Bernard McGreavey and "Frederick Leslie Rundle agreed to sell and I agreed to purchase "for £10,000 a one-eighth share of the freehold property called "the Rayleigh Weir Stadium and other property and on the same "day I paid to each of them the said Francis Bernard McGreavey "and Frederick Leslie Rundle the purchase price of £5,000 in "respect thereof."

Harold Christie Q.C. and *G. B. H. Dillon* for the applicant.
S. Pascoe Hayward Q.C. and *J. W. Mills* for the respondent.

Case cited in argument other than those referred to in the judgment: *In re Engall's Agreement.*[2]

HARMAN J., having stated the facts: The respondent in his affidavit refrained from making any statement about the instrument which he registered under the Land Charges Act, 1925, but a little more is to be found about it from the answers which he gave when he was examined under section 25 of the Bankruptcy Act, 1914, from which it would appear that the document described in the register either as an estate contract or as a general equitable charge was a receipt. He modestly declines to say what was the form of the receipt, and he avers, moreover, that he put it in a drawer immediately after receiving it, and that he was unable to find it when he searched for it. The instrument said to constitute the document of charge is not, in consequence, forthcoming.

On a summons such as this to vacate the register, the question whether or not such a document ever existed is not one which I can determine. I must proceed with this application on the footing that the respondent paid, as he alleges, £5,000 each to McGreavey and Rundle. He did, in fact, in the course of his examination in their bankruptcy produce two cheques, one of which went to McGreavey and one to Rundle drawn in his own favour and endorsed to them severally. What was in the receipt, however, remains a mystery. It was not, so far as I can see, a contract; it may have been a memorandum of a contract and it may have contained the terms of a contract, but its operative effect, according to the respondent, went beyond that of a receipt. It is an extraordinary story that a solicitor of experience should pay the whole of his purchase-money and have no scrap of paper to show for it, or indeed that he should pay the whole of the purchase-money and receive nothing but a receipt.

[2] [1953] 1 W.L.R. 977; [1953] 2 All E.R. 503.

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The trustee in bankruptcy has claimed that the respondent had gone into partnership with McGreavey and Rundle to the extent of £10,000 for an eighth share. But the respondent denies that, and says that although he bought one-eighth of the assets he did not buy one-eighth of the liabilities. That is not a matter which I can determine.

I have, therefore, to decide whether this receipt, or the contract evidenced by this receipt, is capable of registration under the Act. Examination of section 10 shows that "The following classes "of charges on, or obligations affecting, land may be registered as "land charges in the register of land charges. . . ." So that the charge has to be a charge on land. Under the definition in section 20 (6) "land" includes various things, but it does not include an undivided share in land. If therefore this is only a charge on an undivided share in land, it cannot be registered as a land charge under the Act. Class C (iv), under which the respondent made his first registration, states: "Any contract by an estate owner . . . "[McGreavey was undoubtedly 'an estate owner'] to convey "or create a legal estate" is to be called "an estate contract." The question is, therefore, whether there was a contract by McGreavey—there was not by Rundle because he was not an estate owner—to create a legal estate. Class C (iii), which is the second class on which the respondent relies, provides: "Any other equit-"able charge, [that is other than a charge under C (ii)] which is "not secured by a deposit of documents relating to the legal "estate affected and does not arise or affect an interest arising "under a trust for sale or a settlement and is not included in any "other class of land charge. . . ." In order therefore to come under that class, the contract or instrument has first of all, to constitute an equitable charge and, secondly, it has to be an equitable charge not arising nor affecting an interest arising under a trust for sale.

What was the position on October 11, 1948? McGreavey who had been the absolute owner of this land, had taken Rundle into partnership. He was, in consequence, obliged to hold the freehold property which constituted the partnership on trust for himself and Rundle in equal shares. He retained the legal estate, but though he could have been obliged by Rundle to sell it and divide the proceeds equally between them Rundle could not have obliged him to convey to him a half share in the land itself. That emerges, first, from section 1 (6) of the Law of Property Act, 1925: "A legal estate is not capable of subsisting or of being "created in an undivided share in land . . ." and section 34 to the same effect provides "(1) An undivided share in land shall not "be capable of being created except as provided by the Settled "Land Act, 1925, or as hereinafter mentioned."

In section 42 (6) of the former Act, is this rather oracular statement: "Any contract to convey an undivided share in land . . . "shall be deemed to be sufficiently complied with by the convey-"ance of a corresponding share in the proceeds of sale of the land

"in like manner as if the contract had been to convey that "corresponding share." McGreavey's obligation to Rundle could therefore have been carried out by the conveyance to him of a share in the proceeds of sale. McGreavey, in my view, held the land on trust for sale, although the trust for sale does not appear in the title. He could no doubt have made a good title at that time without showing it, if Rundle did not choose to object or to register his interest.

What in the circumstances did the respondent acquire from Rundle? Clearly no more than Rundle could give him, namely a one-eighth share in the partnership assets. That was clearly (disregarding chattels) an interest in the proceeds of sale and nothing else. Indeed, even if Rundle had expressly contracted to give him something else, namely, an undivided share in land, section 42 (6) would have made that contract satisfied by a conveyance of a corresponding share in the proceeds of sale.

On the other hand, what, if anything, did McGreavey sell or agree to sell to the respondent? He agreed to sell him a one-eighth share of his interest in the land and the chattels. McGreavey's interest in the land was, having regard to his obligations towards Rundle, clearly an interest only in the proceeds of sale. What the respondent got by this payment was, at the highest, a contract to convey to him, or assign to him, a share in the proceeds of sale of the land.

Mr. Pascoe Hayward said that McGreavey was bound to create a legal estate not in the respondent, but in himself and his partner in order to implement the trust for sale, and he referred to *Turley* v. *Mackay* [1] in support of the proposition that a legal estate to be conveyed or created under Class C (iv) need not be created in favour of the obligee. I accept that, of course, but I do not see that McGreavey was under any necessity of creating a legal estate. It seems to me that the trust for sale existed while the property was in his hands. It is true, if somebody had wanted him to execute the trust, that it would have been necessary for him to appoint a trust corporation or another person to be trustee, in order to give a good receipt to a purchaser. But that is merely a matter of machinery, and it does not seem to me there was any contract to convey or create a legal estate as envisaged by section 10. This was not therefore a contract (assuming that it be a contract) which could be registered under Class C (iv).

With regard to Class C (iii), Mr. Pascoe Hayward says, first, that his client, having paid his purchase-money and not having got a conveyance, is entitled to a general equitable charge on the land, and for that proposition he cites *Rose* v. *Watson*.[2] In that case Lord Cranworth, concurring in the judgment of Lord Westbury, said [3]: "There can be no doubt, I apprehend, that when

[1] [1944] Ch. 37; 59 T.L.R. 273; [1943] 2 All E.R. 1.

[2] (1864) 10 H.L.Cas. 672.

[3] Ibid. 683.

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"a purchaser has paid his purchase-money, though he has got no "conveyance, the vendor becomes a trustee for him of the legal "estate, and he is, in equity, considered as the owner of the "estate. When, instead of paying the whole of his purchase-"money, he pays a part of it, it would seem to follow, as a "necessary corollary, that, to the extent to which he has paid his "purchase-money, to that extent the vendor is a trustee for him; "in other words, that he acquires a lien, exactly in the same way "as if upon the payment of part of the purchase-money the vendor "had executed a mortgage to him of the estate to that extent." Mr. Pascoe Hayward contends that if payment of part of the purchase-money for the whole will give a lien, payment of the whole of the purchase-money for a part will also give a lien. It is a neat way of turning the thing upside-down, but it does not, in my judgment, help him because, in order to get within the sub-section, there must be a charge which does not affect an interest arising under a trust for sale, and that is precisely the effect of this charge. The interest arising under a trust for sale was, until they went bankrupt, the interest of McGreavey and Rundle in this property and that was an interest expressly excluded from Class C (iii) of section 10. What the respondent acquired, if he acquired anything at all, was a general equitable charge on the proceeds of sale of this partnership property. Whether or not he became a partner does not matter for that purpose. I take the view, therefore, that, assuming the respondent to have all that he says he has, and notwithstanding the fog in which the facts remain carefully concealed, he could not on the facts as stated have an interest in this land which would entitle him to register a charge against it, and I propose accordingly to make an order vacating both registrations.

Application granted.

Solicitors: *Zeffertt, Heard & Morley Lawson for Heard & Coleman, Hadleigh, Essex; E. C. Randall.*

I. G. R. M.

H. L. (Sc.)*

1954 *Mar.* 29, 30; *May* 4.

* INLAND REVENUE COMMISSIONERS . Appellants;

AND

BARR (trading as HENRY & GALT) . . Respondent.

Revenue—Income tax—Balancing charge — Sale of assets — Permanent discontinuance of business—Income Tax Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 32), *s.* 17.

In July, 1946, B sold as a going concern the ironfounding business which he had theretofore carried on; from that date his interest in and connection with the trade ceased and he permanently discontinued trading, though after the sale the business continued

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* *Present*: Lord Morton of Henryton, Lord Reid, Lord Tucker, Lord Asquith of Bishopstone and Lord Cohen.

and was carried on as if there had been no change of ownership. The portion of the purchase price allocated to the plant and fittings, in respect of which an initial allowance had been made, exceeded their written down value at the date of the sale, and under section 17 of the Income Tax Act, 1945, a balancing charge was made on B:—

Held, that the sale took place before the trade was "permanently "discontinued" within the meaning of section 17 (1), since after the sale the trade was carried on by the purchaser, and that, accordingly, a liability to a balancing charge arose.

Inland Revenue Commissioners v. *West*, 1950 S.C. 516; 31 T.C. 402 distinguished and dicta disapproved.

Decision of the First Division of the Court of Session [1953] T.R. 7; T.C. Leaflets No. 1634 reversed.

APPEAL from the First Division of the Court of Session.

This was an appeal against an interlocutor dated January 13, 1953, pronounced by the First Division of the Court of Session as the Court of Exchequer in Scotland on a case stated under section 64 of the Income Tax Act, 1952. The case was stated on the requisition of the appellants, the Commissioners of Inland Revenue in the matter of a determination by the Commissioners for the General Purposes of the Income Tax for the Division of the Upper Ward of Renfrew on an appeal taken to them by the respondent John Barr against an assessment to income tax for the year of assessment 1946–7 in respect of a balancing charge made on him under sections 17 and 55 (3) of the Income Tax Act, 1945, in the sum of £1,405.

The facts are set out by Lord Morton of Henryton and Lord Reid.

Sir Lionel Heald A.-G., *J. O. M. Hunter Q.C.* (of the English Bar, Q.C. of the Scottish Bar), *Sir Reginald Hills* (of the English Bar) and *W. P. Grieve* (of the Scottish Bar) for the appellants.

R. P. Morison Q.C. (of the English Bar, Q.C. of the Scottish Bar), *Manuel Kissen* (of the Scottish Bar) and *H. Major Allen* (of the English Bar) for the respondent.

Their Lordships took time for consideration.

May 4. LORD MORTON OF HENRYTON. My Lords, the only question arising on this appeal is whether, on the facts set out in the case stated, a liability to a "balancing charge" under section 17 of the Income Tax Act, 1945, arose on the sale by the respondent of the plant and machinery used in the business formerly carried on by him under the style of "Henry & Galt." The facts are fully set out in the case stated and I can summarise them, for the purposes of my opinion, as follows.

For many years the firm of Henry & Galt carried on business as ironfounders at Paisley. The respondent (who was previously the manager of the concern) became a partner with Mr. James Galt on April 1, 1928, and from the latter's death in 1945 carried on the business as sole proprietor until July, 1946. On July 15,

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1946, the transfer of the business as a going concern to one Thomas Reid was completed. The purchase price was £14,000, which included the sum of £4,000 allocated to the plant and fittings. I now quote paragraphs 5 and 6 of the case stated: "5. The "respondent's interest in and connection with the trade of Henry "& Galt ceased when the sale thereof to Mr. Reid took place, "and the respondent then retired from business and permanently "discontinued trading. 6. After the sale the business was carried "on and continued as if there had been no change." I pause to say, that I attach no significance to the change in wording from "trade" in paragraph 5 to "business" in paragraph 6, nor was any argument based on this at the hearing.

Section 17 of the Income Tax Act, 1945, so far as relevant for the present case, is in the following terms: "(1) Subject to the "provisions of this section, where, on or after the appointed day, "any of the following events occurs in the case of any machinery "or plant in respect of which an initial allowance or a deduction "under rule 6 of the Rules applicable to cases I and II of "Schedule D has been made or allowed for any year of assess-"ment to a person carrying on a trade, that is to say, either— "(*a*) the machinery or plant is sold, whether while still in use or "not; or (*b*) the machinery or plant, whether still in use or not, "ceases to belong to the person carrying on the trade by reason "of the coming to an end of a foreign concession; or (*c*) the "machinery or plant is destroyed; or (*d*) the machinery or plant "is put out of use as being worn out or obsolete or otherwise "useless or no longer required, and the event in question occurs "before the trade is permanently discontinued, an allowance or "charge (in this part of this Act referred to as 'a balancing "'allowance' or 'a balancing charge') shall, in the circum-"stances mentioned in this section, be made to, or, as the case "may be, on, that person for the year of assessment in his basis "period for which that event occurs. . . . Any reference in this "subsection to the permanent discontinuance of a trade does "not include a reference to the happening of any event which, by "virtue of any of the provisions of rule 11 of the rules applicable "to cases I and II of Schedule D, is to be treated as equivalent "to the discontinuance of the trade."

It will be observed that a balancing charge is made in the case of machinery or plant only if three conditions are fulfilled, namely, (1) that an initial allowance or a deduction under rule 6 of the Rules applicable to cases I and II of Schedule D has been made or allowed for any year of assessment to a person carrying on a trade; (2) that one of the four events set out in the section has occurred; and (3) that the event in question occurs before the trade is "permanently discontinued." My Lords, it is common ground that the first two of these conditions are fulfilled in the present case, but your Lordships have to determine whether the sale to Mr. Reid occurred before the trade was permanently discontinued, within the meaning of the section.

Before I go on to consider this question I ought to quote sections 68 (4) and 70 of the Act of 1945.

"68.—(4). Any reference in this Act to the setting up or "permanent discontinuance of a trade includes, except where the "contrary is expressly provided, a reference to the occurring of "any event which, under any of the provisions of the Income Tax "Acts, is to be treated as equivalent to the setting up or perma-"nent discontinuance of a trade."

It is common ground that the concluding sentence of section 17 (1) of the Act supplies an instance where "the contrary is "expressly provided."

"70. This Act may be cited as the Income Tax Act, 1945, and "shall be construed as one with the Income Tax Acts."

I shall refer later to rule 11 of the rules applicable to cases I and II of Schedule D, as this rule is referred to in section 17 (1) of the Act of 1945 and is, in my view, of considerable importance in the case.

The respondent appealed against the assessment to income tax upon him for the year of assessment 1946–7 so far as it included a balancing charge of £1,405. The Commissioners expressed their decision in the case stated as follows:—"We, the "Commissioners who heard the appeal, held that we were bound "by the decision of the Court of Session in the case of *Inland* "*Revenue Commissioners* v. *West and Others* ("*Girl Eileen*"),[1] "and that no 'balancing charge' was exigible in this case, and "the assessment in respect thereof was accordingly discharged." They stated a question of law for the opinion of the court in the terms which I quoted in my opening words. In the First Division of the Court of Session Lord Carmont referred to the case of *Inland Revenue Commissioners* v. *West*[1] and continued[2]: "It "was held in that case that no balancing charge was exigible, and "although the facts before us are different from those in *West's* "case,[3] the Lord Advocate for the appellants, in opening his "appeal before us, said he could not maintain that the ratio of "*West's* case[3] did not cover the present case. Accordingly, as "the case cannot be argued on the footing that the decision in "*West*[3] is distinguishable, the judgment of the court in that case "applies in such circumstances as we have now before us, and "there is no alternative open to us but to answer the question "put in the negative and I so move your Lordships." Lord Russell and Lord Keith agreed.

In the case of *Inland Revenue Commissioners* v. *West*[3] the Court of Session had to consider whether a balancing charge arose on the sale of certain fishing vessels, the relevant vessel for the present purpose being named the *Girl Eileen*. In my view *West's* case[3] is distinguishable from the present case, for reasons which I shall state hereafter; but the Lord President and Lord Keith,

[1] 1950 S.C. 516; 31 T.C. 402.
[2] (1953) T.C. Leaflets No. 1634.
[3] 1950 S.C. 516.

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in the course of their opinions, expressed views upon the construction of section 17 (1) of the Act of 1945 which, if they are correct, would be fatal to the claim of the appellants in the present case. For instance, Lord Keith said[4]: "It is clear, in my opinion, "that section 17 is looking, not to the continuance of the "machinery or plant in trade, but to the continuance of the "owner of the machinery or plant in trade." These views were not accepted by Upjohn J. in *Boarland* v. *Madras Electric Supply Corporation*[5] or by Danckwerts J. in *Bramford's Road Transport Ld.* v. *Evans*.[6] Each of these two learned judges felt free to differ from the Court of Session, in all the circumstances, for reasons which he expresses in his judgment.

My Lords, the question arising for decision, and the conflicting views upon it, may be stated as follows. A business is sold as a going concern, with its plant. From the moment of its transfer to the purchaser, the seller permanently discontinues trading, but the business is "carried on and continued as if there had been no "change"—to quote again the case stated. In these circumstances, (1) does the sale take place "before the trade is per-"manently discontinued" within the meaning of section 17 (1) of the 1945 Act, because after the sale the trade is carried on by the purchaser, or (2) is the trade "permanently discontinued" at the moment when the sale takes place, because the *person* who had carried on the trade up till that moment permanently discontinues trading as from that moment? Upjohn J. and Danckwerts J. thought that the former was the correct view but I think it is clear that the First Division in *West's* case[7] took the latter view. If the former view is correct, the appeal succeeds, if the latter view is correct, it fails.

It is in these circumstances that I apply myself to the task of construing the language of section 17 of the Act of 1945. I start by observing that the section first refers to a "person carry-"ing on a trade" to whom an initial allowance or deduction has been made in respect of certain machinery or plant, and then goes on to impose a balancing charge on that person if (inter alia) that machinery or plant is sold before the *trade* is permanently discontinued. So far, the language used seems to indicate that the legislature contemplates that a trade is not necessarily discontinued when the person carrying it on sells the business to someone else. It contemplates that plant and machinery, while still in use, may be sold *before* the trade in which it is used has been permanently discontinued. This provision seems to me inconsistent with the view that a trade is at once "permanently "discontinued," within the meaning of the section, if A.B. sells his business to C.D. One illustration of the difficulties arising from the acceptance of this view may be given at once. If it were accepted, the section could never apply in the common case where

[4] Ibid. 516, 536.
[5] [1953] 1 W.L.R. 920; [1953] 2 All E.R. 467.
[6] [1953] 1 W.L.R. 1385; [1953] 2 All E.R. 1308.
[7] 1950 S.C. 516.

machinery and plant is sold together with the goodwill of the business in which it is used; for the "permanent discontinuance" and the sale would necessarily be simultaneous.

I think the true view is that the section regards the question whether the trade itself does or does not "continue" as being completely divorced from the ownership of the trade at any particular time. Moreover, I think this view is in accordance with the ordinary use of the word "discontinuance" as applied to a trade or business. If A.B. sells his business to C.D., and retires to a life of leisure, but C.D. carries on the business just as A.B. previously carried it on, I do not think it would occur to the ordinary person to say that the *business* had been discontinued. He would say: "A.B. has sold his business "and it is being carried on by C.D." Similarly, if the owner of a business dies, having bequeathed his business to his son, and the son carries it on just as the father did, who would say that the *business* had been "permanently discontinued"? Further, it has for many years been a familiar conception in income tax law that a business can "continue" notwithstanding that one owner goes out and a new owner comes in. See, for instance, the Income Tax Act, 1918, rule 9, applicable to Cases I and II of Schedule D. The idea that the same business can be carried on by one person as the "successor" of another is surely inconsistent with the view that a business is "permanently dis- "continued" when A.B. sells it to C.D. and C.D. carries on the business on the same lines. If this view were correct, C.D. would not be carrying on the same business as the successor of A.B.; he would be starting a new business in place of the business which had been permanently discontinued. Yet the idea of "succes- "sion" to a business appears throughout the income tax law, as well as being a familiar idea in everyday life.

For these reasons, even if the earlier part of section 17 (1) stood alone, I should hold that the trade now under consideration was not "permanently discontinued" within the meaning of the section, when the respondent sold it to Mr. Reid, because it was in fact "carried on and continued as if there had been no change," though under new ownership. If, however, there had been any ambiguity in the earlier part of the subsection it would, in my opinion, be completely removed by the concluding sentence thereof, which it is convenient to quote again at this stage: "Any "reference in this subsection to the permanent discontinuance of "a trade does not include a reference to the happening of any "event which, by virtue of any of the provisions of rule 11 of the "rules applicable to Cases I and II of Schedule D is to be treated "as equivalent to the discontinuance of the trade."

In order to apprehend the effect of this sentence, it is necessary to read rule 11 there referred to. That rule is now to be found in section 32 of the Finance Act, 1926, and the material portions of it are as follows:—"(1) If at any time after April 5, 1928, a "change occurs in a partnership of persons engaged in any

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"trade, profession or vocation, by reason of retirement or death, "or the dissolution of the partnership as to one or more of the "partners, or the admission of a new partner, in such circum-"stances that one or more of the persons who until that time "were engaged in the trade, profession or vocation continued to "be engaged therein, or a person who until that time was engaged "in any trade, profession or vocation on his own account continues "to be engaged in it, but as a partner in a partnership, the tax "payable by the person or persons who carry on the trade, profes-"sion or vocation after that time shall, notwithstanding the "change, be computed according to the profits or gains of the "trade, profession or vocation during the period prescribed by the "Income Tax Acts: Provided that, where all the persons who "were engaged in the trade, profession or vocation both imme-"diately before and immediately after the change require, by "notice signed by all of them or, in the case of a deceased person, "by his legal representatives, and sent to the surveyor within "twelve months after the change took place, that the tax payable "for all years of assessment shall be computed as if the trade, "profession or vocation had been discontinued at the date of the "change, and a new trade, profession or vocation had been then "set up or commenced, and that the tax so computed for any "year shall be charged on and paid by such of them as would "have been charged if such discontinuance and setting up or com-"mencement had actually taken place, the tax shall be computed, "charged, collected and paid accordingly. (2) If at any time after "the said April 5 any person succeeds to any trade, profession "or vocation which until that time was carried on by another "person and the case is not one to which paragraph (1) of this "Rule applies, the tax payable for all years of assessment by the "person succeeding as aforesaid shall be computed as if he had set "up or commenced the trade, profession or vocation at that time, "and the tax payable for all years of assessment by the person "who until that time carried on the trade, profession or vocation "shall be computed as if it had then been discontinued."

The vital words for the present purpose are, in the proviso, "*as* "*if* the trade . . . had been discontinued at the date of the change "and a new trade . . . had been then set up or commenced," and in subrule (2) "*as if* it had then been discontinued." These phrases clearly indicate that in the view of the legislature there is no real "discontinuance" of a business, either when a change takes place in the personnel of the partnership by which it is carried on, or (still more important for the present purpose) "if "any person succeeds to any trade, profession or vocation which "until that time was carried on by another person." Bearing in mind that the Act of 1945 is (by section 70 thereof) to be "con-"strued as one with the Income Tax Acts," I turn back to the concluding sentence of section 17 (1) of that Act, already twice quoted. In effect that sentence says: "What we refer to in this "section is a *real* discontinuance of the trade itself, and not such

"an event as a change in the ownership of the business, which "under rule 11 may be treated as being equivalent to a real "discontinuance."

To my mind, my Lords, this concluding sentence makes it abundantly clear that in the earlier part of the section the words "permanently discontinued" have the meaning which I have already ascribed to them.

I add that the cases cited in your Lordships' House show that the courts in both England and Scotland, in considering whether a trade has been "permanently discontinued" have looked, not at a change of ownership, but at the circumstances which arose after the change of ownership— was *the trade* carried on by the successor, or was it not? See for instance *Alexander Ferguson & Co. Ld.* v. *Aikin*,[8] *per* Lord McLaren, *Bartlett* v. *Inland Revenue Commissioners*,[9] where Scrutton J. (as he then was) said: "The trade was not discontinued in the year. The trade "was sold to a company and continued during the whole year."

For all these reasons I find myself unable to agree with the views expressed by the First Division of the Court of Session in *West's* case [10] as to the construction of section 17 of the Act of 1945. I think, however, as I have already said, that that case is distinguishable on its facts from the present case and I see no reason to doubt the correctness of the actual decision. The *Girl Eileen* was owned by the respondents in that case in certain shares, and was engaged in fishing. The respondents continued to employ the vessel in fishing from the port of Fraserburgh until January 24, 1947, when they sold their shares in the vessel for £990. The purchasers continued to employ her in fishing from the port of Lerwick but it does not appear that any goodwill of a business was sold to them; they merely bought a chattel, namely, the ship, and used her for the purpose for which she was built. It was sought to impose a balancing charge on the respondents under section 17. The decision of the Special Commissioners was in the following terms [11]: "We, the Commissioners who heard "the appeal, were of opinion that a sale of plant did take place, "but found that on the facts there was a simultaneous permanent "discontinuance of the trade. We accordingly discharged the "assessment in respect of the balancing charge." This finding, coupled with the special facts of the case, fully justified, in my view, the decision at which the First Division arrived.

In the present case, however, I feel no doubt that, on the true construction of section 17 of the Act of 1945 and in the events which have happened, a balancing charge was properly made upon the respondent, and there is no dispute that the figure of £1,405 is correct, if any balancing charge is payable.

I would allow the appeal and answer the question of law posed in the case stated in the affirmative.

[8] (1898) 4 T.C. 36, 40.
[9] [1914] 3 K.B. 686, 693–4.
[10] 1950 S.C. 516.
[11] Ibid. 525.

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My noble and learned friends, Lord Tucker and Lord Asquith of Bishopstone, who are unable to be present, have asked me to say that they concur in the opinion which I have just delivered.

Lord Reid. My Lords, the relevant facts in this case are few and simple. In 1946 the respondent was carrying on an iron-founding business in Paisley under the firm name Henry & Galt. He sold the business for £14,000. The transfer of the business as a going concern was completed on July 15, 1946. The respondent then retired from business but the business of Henry & Galt was carried on by the purchaser and continued as if there had been no change. £4,000 of the purchase price was allocated to plant and fittings. In respect of that sum a balancing charge under the Income Tax Act, 1945, of £1,405 was assessed on the respondent for the year of assessment 1946–7. There is no dispute that if any balancing charge is due by the respondent the amount assessed is correct. The question is whether any balancing charge can be due by him in view of the fact that he ceased carrying on business when he sold the plant and fittings.

Section 17 (1) of the 1945 Act provides (omitting those parts not material to this case): "... where, ... any of the following "events occurs in the case of any machinery or plant ... (*a*) the "machinery or plant is sold, whether while still in use or not; ... "and the event in question occurs before the trade is permanently "discontinued, an allowance or charge (in this Part of this Act "referred to as 'a balancing allowance' or 'a balancing charge') "shall, in the circumstances mentioned in this section, be made "to, or, as the case may be, on, that person for the year of assess-"ment in his basis period for which that event occurs: ... Any "reference in this subsection to the permanent discontinuance of a "trade does not include a reference to the happening of any event "which, by virtue of any of the provisions of rule 11 of the Rules "applicable to Cases I and II of Schedule D, is to be treated as "equivalent to the discontinuance of the trade."

The sole question in this case is whether on July 15, 1946, "the trade" was permanently discontinued. If "the trade" means the trade of the respondent then it was permanently discontinued, but if it means the business carried on under the firm name of Henry & Galt then it was not because it has been found as a fact that this business was carried on and continued as if there had been no change.

Section 62 of the 1945 Act provides that Part II of the Act (which includes section 17) shall be construed as one with the Income Tax Acts and it is necessary to go to the earlier Acts to see what is meant by discontinuance of a trade. Those Acts contain provisions dealing with cases where one person succeeds to a trade previously carried on by another and there is no doubt that in this case the purchaser "succeeded" to the trade previously carried on by the respondent. On the question of what is meant by succession to a trade I need only refer to the opinion of the

judges of the First Division in *Alexander Ferguson & Co. Ld.* v. *Aikin*[12] and *Watson Brothers* v. *Lothian.*[13] One would expect the Acts to be so drafted that succession and discontinuance of a trade would be mutually exclusive: if someone succeeds to a trade it is not discontinued, whereas if it is discontinued no one succeeds to it. That appears to have been the view of Scrutton J. in *Bartlett* v. *Inland Revenue Commissioners.*[14]

The last part of section 17 (1) which I quoted refers to rule 11 of the Rules applicable to Cases I and II of Schedule D. The original rule 11 was replaced by section 32 of the Finance Act, 1926, and paragraph (2) of the new rule is as follows: "If at any "time after the said April 5 any person succeeds to any trade, "profession or vocation which until that time was carried on by "another person and the case is not one to which paragraph (1) "of this rule applies, the tax payable for all years of assessment "by the person succeeding as aforesaid shall be computed as if he "had set up or commenced the trade, profession or vocation at "that time, and the tax payable for all years of assessment by the "person who until that time carried on the trade, profession or "vocation shall be computed as if it had then been discontinued." That must mean that although the person succeeding does not in fact set up a new trade he is treated for certain purposes as if he had done so; and although the trade to which he succeeded was not in fact discontinued the person who formerly carried it on is to be treated for certain purposes as if it had been discontinued. In other words when a person succeeds to a trade formerly carried on by another there is no actual discontinuance of the trade but there is a notional discontinuance for the purposes of rule 11. The last part of section 17 (1) of the 1945 Act means that this notional discontinuance is not to be treated as a discontinuance for the purposes of section 17. For the purposes of this section there must be an actual discontinuance and no succession to the trade by another person. In the present case the purchaser did succeed to the trade and there was no discontinuance of it. So the sale of the plant occurred before there was any discontinuance of the trade and section 17 applied so that the balancing charge was properly assessed.

The First Division decided this case in favour of the respondent because it was covered by the ratio of their decision in *Inland Revenue Commissioners* v. *West,*[15] so it is necessary to examine that case. Four cases were heard together and the relevant case is that against William Reid which was concerned with the fishing vessel *Girl Eileen.* This vessel had been owned by part owners each holding so many one-sixtyfourth shares. In 1947 all the

[12] 4 T.C. 36.
[13] (1902) 4 F. 795; 4 T.C. 441.
[14] [1914] 3 K.B. 686.
[15] 1950 S.C. 516.

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Lord Reid.

owners sold their shares and balancing charges were assessed on them. The contention of the Inland Revenue before the Special Commissioners was that the trade was not discontinued because after the sale the vessel was still used for fishing by the new owners. It was not contended that the new owners had succeeded to the trade of the old owners and it is not clear on the facts whether that could have been maintained. The Commissioners found that there had been a permanent discontinuance of the trade. Before the First Division the argument for the Crown as reported was that so long as the plant was used in the trade, although not necessarily by the original owners, there was no discontinuance of the trade. The First Division held that the decision of the Commissioners was correct and I think that they were right in rejecting the argument submitted for the Crown. The mere fact that plant after a sale is still used in the same kind of trading as before is not inconsistent with the trade of the seller having been discontinued. The purchaser may simply have bought the plant to use it in his own business and may not have succeeded to the seller's business.

But that was not the ground of judgment. The Lord President said [16] "the scheme of the Act requires that a balancing "charge should be recoverable only from persons still carrying "on the business in question." And Lord Keith said [17] "it is "clear, in my opinion, that section 17 is looking, not to the con-"tinuance of the machinery or plant in trade, but to the continu-"ance of the owner of the machinery or plant in trade." In this I think they went too far: in my opinion what the Act requires is the continuance of the business in question. Under section 22 the charge must be made on the seller in charging the profit or gains of his trade but that can be done after he has ceased trading and it was done in this case.

I am therefore of the opinion that this appeal should be allowed.

Lord Cohen. My Lords, I have had the opportunity of reading the opinion of the noble and learned lord on the Woolsack. I agree with him that this appeal should be allowed for the reasons he gives.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Asher Fishman & Co. for Allan McDougall & Co., Edinburgh, and MacNair, Clyde & Ralston, Paisley.*

[16] Ibid. 532–3. [17] Ibid. 536.

[QUEEN'S BENCH DIVISION.]

* PEACOCK *v.* AMUSEMENT EQUIPMENT CO. LD.

1954
Apr. 6.

Parker J.

[1953 P. No. 1976.]

Fatal Accidents Acts — Damages — Benefit to dependant—Claim by widower as deceased wife's dependant—Receipt of voluntary payment from beneficiaries of deceased's estate—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93).

Damages—Personal injury—Voluntary payment.

The plaintiff's wife died as a result of an accident sustained while she was a passenger on a miniature railway owned by the defendants, and the plaintiff claimed damages as a dependant under the Fatal Accidents Acts, 1846–1908. The wife's estate consisted of a grocery shop with living accommodation attached where the plaintiff had resided, which she left to a son and daughter by a previous marriage, who sold the business. They voluntarily paid to the plaintiff a sum representing one-third of the value of the estate. The defendants contended that the sum so paid should be taken into account in assessing damages:—

Held, that the voluntary payment was not too remote to be brought into account in calculating damages as it was part of the wife's estate which the plaintiff had received as a result of her death.

Baker v. *Dalgleish Steam Shipping Co. Ld.* [1922] 1 K.B. 361; 38 T.L.R. 245 and *Davies* v. *Powell Duffryn Associated Collieries Ld.* (*No.* 2) [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657 applied.

Semble: a grant from a fund brought into existence after death subscribed to by strangers from charitable motives would not fall to be taken into consideration in assessing damages.

Redpath v. *Belfast and County Down Railway* [1947] N.I. 167 considered.

ACTION.

In 1940 the plaintiff, Henry Hector Peacock, a tool supervisor, married a widow with two children. Between 1940 and 1950 the family occupied a house bought by the plaintiff's wife in her own name on mortgage and on which she had paid a deposit. During that time the plaintiff contributed most of his salary, namely £8 a week, towards the upkeep of the home and the living expenses of himself, his wife and her two children. In 1950 the two children left home, the house was sold and a grocery business was bought with the proceeds, some £1,750. Thereafter, the plaintiff and his wife resided in living accommodation attached to the shop premises, and the plaintiff ceased to contribute towards his living expenses which were met by the wife out of the profits of the business.

On August 10, 1953, the plaintiff's wife met with an accident while a passenger on a miniature railway owned by the defendants. As a result of the accident she died. After her death

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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the grocery business was left to her son and daughter who sold it, and the plaintiff found accommodation elsewhere at a cost of £3 a week for board and lodging. After the sale of the business the deceased's son and daughter voluntarily paid over to the plaintiff the sum of £575 representing one-third of her estate. In a claim by the plaintiff against the defendants as a dependant under the Fatal Accidents Acts, 1846–1908, liability was admitted.

At the trial the question arose whether or not the voluntary payment made to the plaintiff by his step-children should be taken into account in assessing damages.

Patrick O'Connor for the plaintiff.
Malcolm McGougan for the defendants.

The cases cited in argument are referred to in the judgment.

Parker J., having stated the facts and referred to the evidence, found that had the business not been purchased the plaintiff would have had to pay £4 a week towards the upkeep of the home for his wife and himself; that, as a result of the purchase of the business he paid nothing; and that, accordingly, by his wife's death he had lost £4 a week which remained to be capitalized. He continued: There are a number of matters to be taken into consideration. There is the consideration that the grocery business is not a gilt-edged investment; that the woman herself was 53 years of age at the time of her death. There is the possibility of the plaintiff's remarriage. There is the consideration that if and when the deceased died the plaintiff would get nothing, because it cannot really be suggested that she would have made a will later on any different from the will which she did make. All those matters have to be taken into consideration in arriving at the appropriate number of years' purchase. But in addition there remains the fact that after the two children had come into the property and it was sold, all the estate was distributed and they paid over voluntarily to the husband a sum of £575, said to represent about a third of the estate, and one of the questions which remain is whether that £575 is to be put into the balance sheet to arrive at the amount of damages to be paid.

Mr. McGougan for the defendants referred me to *Baker* v. *Dalgleish Steam Shipping Co. Ld.*,[1] and also to *Davies* v. *Powell Duffryn Associated Collieries Ld.* (*No.* 2),[2] and pointed out that any benefit received from whatever source, be it even a voluntary payment, falls to be taken into consideration. In *Baker* v. *Dalgleish Steam Shipping Co.*[3] Scrutton L.J. said[4]: "Just as in

[1] [1922] 1 K.B. 361; 38 T.L.R. 245.
[2] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.
[3] [1922] 1 K.B. 361.
[4] Ibid. 372.

"assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce the claim by showing what loss the claimant has in fact sustained by the death." In effect, Mr. McGougan says that the probability of voluntary contribution is here being crystallized and has become a certainty by the payment.

Mr. O'Connor, on the other hand, referred me to *Redpath v. Belfast and County Down Railway*,[5] which was decided in the courts of Northern Ireland, and which, though not binding on me, is a very persuasive authority. The matter came before the Lord Chief Justice of Northern Ireland on a motion to compel the plaintiff in the action to answer certain interrogatories. After the plaintiff had been injured and a number of other passengers killed in a railway accident a fund came into existence, to which people subscribed from charitable motives, for the benefit of the relatives of the persons injured or the dependants of those killed. Interrogatories had been directed to ascertain the amount received by the plaintiff from that fund. Andrews C.J. held that the interrogatories were directed to a matter quite irrelevant to the issues in the action, and in a long, exhaustive judgment (in which he dealt with all the cases) he came to the conclusion that receipts from such a fund, which came into existence long after the death, and which was supported by voluntary subscriptions, was not to be taken into consideration in assessing damages. As he put it[6]: "The possibility of such a fund being formed is a contingency altogether too remote to enter into the calculation and assessment of damages."

It seems to me that each case must depend upon its own facts. It is quite clear that a payment must be taken into consideration even when it is made voluntarily and not as a matter of legal right. Equally, I would not venture to differ from the Lord Chief Justice of Northern Ireland in saying that a fund brought into existence after the death, subscribed to by complete strangers from charitable motives, is a matter to be taken into consideration.

In the present case, even accepting for a moment that the plaintiff was unaware that on his wife's death he would get anything from the family, it is clear that as a result of her death his two step-children have parted with—and have in fact paid to him—part of the widow's estate. They have not collected subscriptions or used what was purely their earnings or savings. In those circumstances I cannot say that that payment is too remote to enter into the calculation of damages. It seems to me it is just one of the things which have to be brought into account.

[5] [1947] N.I. 167. [6] Ibid. 175.

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PEACOCK v. AMUSEMENT EQUIPMENT CO. LD.

Starting with the financial loss as a result of the death, applying what I consider to be the appropriate number of years' purchase, and taking into consideration the payment from the children, I would assess the damages at a sum of £1,250. Accordingly, there will be judgment for the plaintiff for that amount.

Judgment for the plaintiff.

Solicitors: *R. I. Lewis & Co.; William Easton & Sons.*

[QUEEN'S BENCH DIVISION.]

1954
May 5.

Lord Goddard C.J., Hilbery and Donovan JJ.

* MAGEE *v.* MORRIS.

Justices—Warrant—Sunday—Observance—Search warrant—Issue of warrant to search club premises— Execution on Sunday—Whether lawfully executed—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *s.* 6—*Magistrates' Courts Act,* 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 102 (3)—*Licensing Act,* 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 152 (1).

Sunday. Licensing.

Notwithstanding section 6 of the Sunday Observance Act, 1677, a search warrant issued by a magistrate under section 152 of the Licensing Act, 1953, authorizing the police to search premises to see if offences are being committed under the Act may be lawfully executed on a Sunday by virtue of section 102 (3) of the Magistrates' Courts Act, 1952, which provides that "The issue or execution of ". . . a search warrant, shall be as effectual on Sunday as on any "other day."

CASE STATED by Birkenhead justices.

On November 6, 1953, a justice of the peace for the county borough of Birkenhead, after hearing evidence on oath, issued a warrant under section 152 of the Licensing Act, 1953,[1] authorizing the police for the county borough to search the premises of the Hamilton Social Club, Birkenhead, it being alleged that the club was being managed in a manner which would constitute a ground for striking it off the club register under section 144 (1) of the Act.

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

[1] By s. 152 of the Licensing Act, 1953: "(1) If a justice of the peace "is satisfied by information on oath "that there is reasonable ground for "believing that any intoxicating "liquor is sold by retail or exposed "or kept for sale by retail at any "place in the county or borough for "which he is justice, . . . he may "issue a search warrant . . . to a con-"stable authorising him at any time "or times within one month from the "date of the warrant to enter that "place, which shall be named in the "warrant, . . . and search the place "for intoxicating liquor. . . ."

The warrant was duly executed on Sunday, November 8, 1953, and as a result certain informations were laid against the appellant, John Magee, and other persons attending the club for various offences against the Act.

On January 14, 1954, when the justices were about to hear the informations, counsel for the appellant submitted a preliminary point that the proceedings were bad in that the police had no authority to execute the search warrant on a Sunday having regard to section 6 of the Sunday Observance Act, 1677.[2]

It was contended by the respondent that section 152 of the Licensing Act, 1953, authorized the police to execute such a warrant on a Sunday.

The justices were of the opinion that, having regard to section 102 (3) of the Magistrates' Courts Act, 1952,[3] and section 152 of the Licensing Act, 1953, the police had authority to execute the warrant on a Sunday. They adjourned the hearing of the informations and stated a case for the opinion of the court whether the police were acting lawfully and whether they could hear and determine the informations laid as a result of the execution of the search warrant.

C. J. Cunningham for the appellant.
Paul Wrightson for the respondent.

No cases were cited in argument.

LORD GODDARD C.J. This is a case stated by justices for the county borough of Birkenhead and raises the short point whether a search warrant issued under section 152 of the Licensing Act, 1953, authorizing police officers to search premises to see if offences against that Act are being committed, can be executed on a Sunday. Of course, if it could not be, it would be a charter to publicans and other sinners to commit every conceivable sort of offence on a Sunday, and there would be no means of proving it.

It is clear, in my opinion, that a search warrant can be executed on a Sunday because, whatever might have been the true interpretation of section 6 of the Sunday Observance Act, 1677, it is now provided by section 102 (3) of the Magistrates' Courts Act, 1952: "The issue or execution of any warrant "under this Act for the arrest of a person charged with an "offence or of a search warrant, shall be effectual on Sunday

[2] By s. 6 of the Sunday Observance Act, 1677: ". . . no person or "persons upon the Lord's day shall "serve or execute or cause to be "served or executed any writ, process, warrant . . . (except in cases "of treason, felony, or breach of the "peace), but that the service of every "such writ, process, warrant . . . "shall be void to all intents and purposes whatsoever. . . ."

[3] By s. 102 (3) of the Magistrates' Courts Act, 1952: "The issue or execution of any warrant under this "Act for the arrest of a person "charged with an offence, or of a "search warrant, shall be as effectual "on Sunday as on any other day."

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"as on any other day." A search warrant is granted under various statutes. I see nothing in the Magistrates' Courts Act, 1952, to limit the class of search warrant to which the Act applies. Search warrants are issued in respect of the search of premises for stolen goods, in respect of obscene books, illicit stills, with regard to women or girls who are believed to be detained in brothels or immoral places and in a certain number of other cases. In every case a search warrant has to be granted by a magistrate, and there is no difference between one search warrant and another. They are issued under statute because a search warrant is not a thing known at common law. The permission of the particular statute enables the magistrate to issue it. Once he issues his search warrant as a magistrate, it is simply the authority given by him to a police officer to search. As section 152 of the Licensing Act, 1953, provides that the magistrates may issue a search warrant, it seems to me that section 102 (3) of the Magistrates' Courts Act, 1952, applies, and that the warrant can be executed on Sunday as well as on any other day. This appeal, therefore, is dismissed.

Hilbery J. I agree.

Donovan J. I agree that reading the sections together, it is clear that this warrant can be executed on Sunday.

Appeal dismissed.

Solicitors: *Field, Roscoe & Co. for Berkson & Berkson, Birkenhead; Sharpe, Pritchard & Co. for N. B. Jennings, Salford.*

[QUEEN'S BENCH DIVISION.]

1954
May 5.

Lord Goddard C.J., Hilbery and Donovan JJ.

* TURIER *v.* WEBBER.

PRACTICE NOTE

Justices—Case stated—Form—To be prepared on foolscap.

At the opening of an appeal from justices by CASE STATED Lord Goddard C.J. made the following statement:

Special cases for the use of the court ought to be prepared on foolscap and not on brief as this is more convenient for the court. I hope that in future this will be done.

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

[COURT OF APPEAL.]

* CHILDS v. GIBSON.
* CHILDS v. BLACKER.
* SAME v. SAME.

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1954
Apr. 6.

Lord Goddard C.J., Denning and Jenkins L.JJ.

Costs — County court action — Counterclaim — Admission of claim by defendant—Litigation on counterclaim only—Defendant successful on counterclaim—Nominal costs only recoverable by plaintiff—Sum proffered by defendant and refused by plaintiff before action brought —Sum recovered by plaintiff on balance less than that offered before action brought.

A landlord brought separate actions against two tenants to recover the balance on accounts for rent and services. The defendants on the pleadings in each action admitted liability on the claim but counterclaimed for breach of covenant by the plaintiff.

In the first action, the county court judge gave judgment for the plaintiff on the claim with costs of the claim and for the defendant on the counterclaim (though for a smaller sum than that counterclaimed) with costs of the counterclaim; but on a formal review of the registrar's taxation, the judge awarded the plaintiff only the nominal costs of his action. On appeal by the plaintiff:—

Held, that the judge had correctly exercised his discretion as to costs, since the only matter litigated had been the counterclaim on which the defendant had been successful.

Decision on order for costs in *N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ld.* [1940] 1 All E.R. 587 applied.

Before the writ had been issued in the second action, the defendant had twice proffered and the plaintiff had twice refused a sum larger than that which he ultimately recovered on balance in the action brought by him, in which the defendant similarly admitted the plaintiff's claim but counterclaimed successfully. The county court judge, invited to exercise his discretion as to costs in favour of the successful defendant, held that he was bound to follow in all but exceptional cases the procedure laid down in *Chell Engineering Ld.* v. *Unit Tool and Engineering Co. Ld.* [1950] W.N. 146; [1950] 1 All E.R. 378, and to order that the plaintiff should have the costs on his claim and the defendant her costs on the counterclaim. On appeal by the defendant:—

Held, that the judge had wrongly decided that in exercising his discretion as to costs he was bound by *Chell's* case, which was distinguishable; that the court could accordingly exercise its own discretion as to costs; and that, having regard to the circumstance that the plaintiff had recovered a lesser sum than he had been proffered and had refused before action brought, the proper order was that the defendant should recover her whole costs on both claim and counterclaim.

Chell Engineering Ld. v. *Unit Tool and Engineering Co. Ld.* [1950] 1 All E.R. 378 distinguished.

APPEALS and cross-appeal from Judge Gordon Clark, Guildford County Court.

The plaintiff, Ernest Childs, let two flats in 1950, one to one Gibson, the respondent in the first appeal, and the other to a

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Childs v. Gibson.
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Mrs. Blacker. The agreement in each case between the landlord and the respective tenants was for a payment of rent and a charge for services. In October, 1951, the landlord discontinued certain services. The tenants complained; and during 1952 they withheld part of the services charges.

In April, 1953, Mrs. Blacker, having made her own estimate of the value of the services which were not being provided, and having calculated that she owed the landlord £66 14s. 3d. on balance, sent him a cheque for that amount. The cheque was returned. Her solicitors then sent it again "in full settlement," but that, too, was returned on April 20; and on April 22 the landlord issued a writ against her, claiming the balance on account of the full amount of rent and services alleged to be due to him, namely, £100 18s. 6d. On April 23 Mrs. Blacker's solicitors tendered a banker's draft for £66 14s. 3d. to the landlord's solicitors, but that, too, was returned.

On May 29 the landlord applied for summary judgment against Mrs. Blacker under R.S.C. Ord. 14, but in an affidavit she submitted that she had an arguable defence based on her counterclaim; and the landlord's application was dismissed, the action being remitted for trial to the county court.

On October 13, 1953, the action appeared in the list, together with a similar action by the landlord against the tenant Gibson. In each case the landlord claimed the balance on the full amounts alleged to be due to him for rent and services, and the respective tenants, while admitting that the landlord was entitled to credit for the sum claimed, counterclaimed for breaches of covenant to provide services.

The case of *Childs* v. *Gibson* was heard first, and the judge gave judgment for the landlord for £153 6s. 0d. and costs on the claim, and for the tenant for £35 on the counterclaim (which was less than the tenant had counterclaimed) with costs on the counterclaim. The order made no provision for set-off. The taxation of the costs in Childs *v.* Gibson then went before the registrar, when it was submitted for the tenant that as he had always admitted the claim and had succeeded to some extent on his counterclaim, which was the only issue contested, the costs should be taxed in such a way as to give the landlord only nominal costs on the claim. The registrar accepted that submission and taxed the costs on the basis of the decision in *N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ld.*,[1] allowing the landlord only formal costs. On the formal review of taxation before the county court judge, the landlord objected to the registrar's decision and sought the restoration of the original order of the judge awarding him the full costs on his claim. The judge upheld the decision of the registrar. The landlord appealed, asking for the restoration of the original order as to costs.

[1] [1940] 1 All E.R. 587.

The second case—*Childs* v. *Blacker*—came on for hearing on November 24, 1953, the parties having agreed to accept the evidence and findings of the judge in *Childs* v. *Gibson*, so that all that remained for determination was (1) the amount of damages to be awarded to the tenant on her counterclaim, (2) the form of order to be made, and (3) the order as to costs. It was submitted for the tenant, inter alia, that the action was entirely unnecessary in that the tenant had admitted liability on the landlord's claim and had tendered the sum of £66 14s. 3d. before the writ had been issued. Judgment was given that the landlord should recover from the tenant the sum of £94 2s. 0d. and his costs of the action, and that the tenant should recover on her counterclaim against him the sum of £42 and her costs on the counterclaim. The net result of the proceedings would thus be that the landlord would recover £52 2s. 0d., namely, a sum less than that of £66 14s. 3d. which had been twice offered to and twice refused by him before he had taken any proceedings and which had been tendered after the issue of the writ and paid into court; but that on the order as to costs the successful defendant would be required to pay costs of £79. Counsel for the tenant therefore submitted to the judge that in the exercise of his discretion in awarding costs he ought to take that result into consideration. The judge, however, purporting to exercise his discretion, said that in this as in all similar cases where both sides succeeded to some extent, it was always difficult to adjust the costs, but that he saw no essential distinction between the present case and the decision of the Court of Appeal in *Chell Engineering Ld.* v. *Unit Tool and Engineering Co. Ld.*,[2] by which he was bound, and which in his view laid down the procedure to be followed, save in exceptional cases, and that that was the safest course even if it did not produce an ideal result; and he made the order for costs as set out above.

On the taxation of those costs, the registrar heard objections by the tenant, namely, that the substance of the action was the counterclaim on which the tenant had been wholly successful, and that there had been no need for the landlord to incur any costs in pursuing his claim after delivery of the tenant's defence and counterclaim admitting the claim, but that he had elected to take proceedings, and ought not to receive any costs. On the formal review of the order for taxation on January 21, 1954, the judge sustained the tenant's objection and made the order for taxation in accordance with the *Amsterdamsche* case,[3] awarding the landlord nominal costs only. Meanwhile the tenant had entered an appeal against the original order as to costs, and the landlord cross-appealed from the judge's order of January 21, 1954, asking for the restoration of the original order as to costs.

The tenant by her notice of appeal submitted that, on the facts admitted and found by the county court judge, he had failed to exercise his discretion as to costs, or alternatively that if and in

[2] [1950] W.N. 146; [1950] 1 All E.R. 378.

[3] [1940] 1 All E.R. 587.

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so far as he had purported to do so he had exercised it on wrong considerations or had failed to take into account considerations which he ought to have taken into account in exercising his discretion judicially in that: (a) he had held himself bound to follow the decision and the order as to costs in *Chell's* case [4]; (b) he had wrongly held that case indistinguishable from the present case; (c) he had failed to take into consideration (i) that the result of the proceedings was that the landlord had recovered on balance £14 12s. 3d. less than was placed in his hands by the tenant and returned by him before action brought; (ii) that the landlord had chosen to proceed by action in the hope of recovering a larger sum, in which purpose he had been wholly unsuccessful; (iii) that on action brought the tenant had no choice but to pay the landlord a larger sum than was ultimately found due to him or to defend the proceedings and to counterclaim, which she had done wholly successfully; and (iv) that the substance of the case was that the whole of the litigation was on the counterclaim only and the judge had found in favour of the tenant on every issue of fact litigated. The tenant asked that the judge's original order as to costs should be reversed or varied by giving her the costs of the defence, or alternatively that there should be no order as to costs on the claim.

The appeals, being inextricably bound together, were heard together.

Ian Percival for the tenants.
Philip Goodenday for the landlord.

The cases cited in argument were all referred to in the judgment.

LORD GODDARD C.J. stated the facts in *Childs* v. *Gibson* and continued: When the question of costs came before the registrar as the taxing officer of the court, he announced that he should tax the costs in accordance with the decision of this court in *N.V. Amsterdamsche Lucifersfabrieken* v. *H. & H. Trading Agencies Ld.*[1] The decision in that case is conveniently and concisely put in the headnote in these terms [1]: "In an action which was remitted "to the county court, the defendants in their defence admitted "the plaintiffs' claim. There was, however, a counterclaim, "which was the subject of dispute, the defendants ultimately "succeeding on the counterclaim, though for a smaller amount "than that claimed." That is exactly the position here. The headnote continues: "The order drawn up adjudged that the "plaintiffs should recover the amount of the claim and the costs "of the claim, and that the defendants should recover the sum "awarded on their counterclaim and the costs of the counter-"claim:—*Held*, by reason of the admission in the defence of the

[4] [1950] 1 All E.R. 378.
[1] [1940] 1 All E.R. 587.

"plaintiffs' claim, there were attributable to the claim no costs "which had to be divided or apportioned as between the claim "and the counterclaim. The plaintiffs' costs should have been "taxed on the principle that, after the admission of the claim, "the plaintiffs were not entitled to incur any costs relating to "the claim except those of setting down and obtaining leave to "proceed, and the costs of the defendants should be taxed upon "the principle that they were successful on the only matter "litigated, but this would not affect any costs given to either "party in any event."

That was the principle on which the registrar said he would tax. It seems to me that that case was binding on the registrar as it is binding on this court, and really, it is very good sense and very good justice. The matter was then taken before the judge by way of review of taxation, and the judge, who knew what the issues were that had been tried before him and obviously remembered all about the case, said that he had no doubt whatever that the whole of the litigation expenses resulted from the counterclaim; in other words, the only point that was litigated before the judge was the counterclaim, for the other point had been admitted; and therefore, having considered the *Amsterdamsche* case,[1] he came to the conclnsion that the registrar was right to follow it and dismissed the application to review. I think that the judge was right, as I think the registrar was right, to take that view. Moreover, it is perfectly clear that in this case the judge has exercised his discretion on grounds which were in the material before him, and there is no reason to interfere with his decision.

The other case, which is in form an appeal by the defendant, Mrs. Blacker, raises another and different point. [His Lordship stated the facts, and continued:] The only question before the county court judge was how much Mrs. Blacker should get judgment for. She showed damage to the extent of £42, and the result was that the plaintiff recovered from her only £52 2s., which was less than the £66 that she had already offered.

It is said that there was some fault in pleading or some technical question, and that the plaintiff ought to have the whole of the costs of this case. In Mrs. Blacker's case, just as in Gibson's case, the only question that was fought was the question of the counterclaim for breach of contract. Whether one calls it counterclaim or set-off, it was in fact a counterclaim for breach of covenant, the defendant maintaining that she had an action for breach of covenant because the plaintiff had not performed his services.

It is then said that, although the plaintiff has recovered less than the sum that had twice been offered to him, he should have the whole of the costs of these proceedings, or substantially the whole of the costs of the proceedings, because if he gets the costs on the claim and the defendant the costs of the counterclaim, the general costs of the action will go to the plaintiff.

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The judge made that order—that the plaintiff should have the costs of the claim and the defendant should have the costs of the counterclaim—which would result in the plaintiff getting by far the greater amount of the costs, while the defendant, who has in fact been successful in the matter which was litigated, would be left to pay very substantial sums of money both to the plaintiff for his costs, and, of course, her costs.

The judge seems to have thought and has said in terms that he made the order because he considered that the case was governed by *Chell Engineering Ld.* v. *Unit Tool and Engineering Co. Ld.*[2] In my opinion the judge went wrong in that respect. That case was on an entirely different matter. The only question which this court there decided was the application of section 47 of the County Courts Act, 1934, which concerned the question whether, where the amount recovered is under a certain amount, the plaintiff can recover High Court or county court costs. It is rather an involved story and it is not necessary to go through it in detail, but, having perused the case, I am quite clear that that was the real point that was decided in the case, and nothing else. Therefore, if the judge exercised his discretion based on that case, he was obviously exercising it on a wrong ground. He said: "I hold case covered by *Chell Engineering Ld.* v. *Unit Tool and Engineering Co. Ld.*[2]"; and we have a fuller note of the judgment by Mr. Percival, from which it appears that the judge said: "In this as in all similar cases "where both sides succeed to some extent, difficult in the "extreme to adjust the costs. I do not see any essential "distinction between this and the case of *Chell*, etc.[2] *Chell*[2] "did flow from a different situation. Procedure which ought "to be followed except in exceptional circumstances. Safest "course even if it does not produce an ideal result." The judge therefore thought that the *Chell* case[2] laid down the procedure to be followed except in exceptional circumstances. With all respect to him, *Chell*[2] did nothing of the sort. I think it would be a reproach to the law if in these circumstances the plaintiff were entitled to recover all or substantially all the costs of this action, because, in fact, he could have had his money without bringing any action at all. It had been sent to him by cheque, and, after he had returned that, by banker's draft. Instead of accepting that money he issued a writ; and when he had issued the writ and this case had been litigated at very considerable expense—as it turns out, a matter of £50 or £60—he recovered less than he had been offered before the writ was issued. In those circumstances it seems to me only fair that the defendant should have the costs of the action, and I think that that is the order which the judge, in the exercise of his judicial discretion, should have made.

[2] [1950] W.N. 146; [1950] 1 All E.R. 378.

This case may perform one useful purpose; it does draw the attention of county court judges once more to what Denning L.J. said in *Chell's* case,[2] and what I had said in a previous case, following what Lord Blanesburgh said in the House of Lords[3]: "that in most of these cases it is desirable that a judge "should consider whether a special order should be made as to "costs because the issues are often very much interlocked, and "the usual order of 'judgment for plaintiff on claim with costs "'and for defendant on counterclaim with costs' does not always "give a just result."

It is very easy in these cases to say that the plaintiff or the defendant is to have his costs less perhaps some small proportion. In this particular case, as the matter has come before us and as we are satisfied that the judge did not exercise a true discretion because he thought that he was bound by a case which did not in fact bind him, we can make the order which we think ought to be made: namely, that the defendant should have the costs of the action.

DENNING L.J. I agree.

JENKINS L.J. I also agree.

Plaintiff's appeal in Childs v. *Gibson dismissed.*
Defendant's appeal in Childs v. *Blacker allowed. Order of county court varied.*
Plaintiff's cross-appeal dismissed. No order as to costs.

Solicitors: *Strong & Co.; Clyde & Co.; Barton & Hanning.*

M. M. H.

[2] [1950] W.N. 146.

[3] [1950] 1 All E.R. 378, 383.

[COURT OF APPEAL.]

* RONBAR ENTERPRISES LD. *v.* GREEN.

[1954 R. No. 202.]

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Jenkins and Hodson L.JJ., Harman J.

Restraint of Trade — Vendor and purchaser — Partnership — Vendor's covenant not "to carry on or be engaged or interested in any busi-"ness similar to or competing with" business sold—"Engaged"—Meaning—Severance of covenant—Limitation to competing business.

By a partnership agreement of 1951 the plaintiff company and the defendant agreed to become partners in the publication and carrying on of a weekly newspaper dealing with the sporting and entertainment business. The business had previously been carried

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on by the defendant alone. Clause 21 of the agreement provided that on the purchase by one partner of the share of the other partner pursuant to the provisions of the agreement, "the partner whose "share is purchased shall not for five years from such date directly "or indirectly carry on or be engaged or interested in any business "similar to or competing with the business of the partnership." The partnership having been determined, the plaintiff company became the purchaser of the defendant's share of the partnership business and clause 21 came into operation. Subsequently, a company was formed which began to publish a periodical similar in character and make-up to the publication of the partnership which was being published by the plaintiff company as purchasers of the partnership business. The defendant had been writing for the new publication which had featured his articles. The plaintiff company sought an injunction in the terms of clause 21 of the partnership agreement. Roxburgh J. granted an interlocutory injunction restraining the defendant, until judgment in the action, "from "directly or indirectly carrying on or being engaged in or interested "in any business *competing with* the business formerly carried on "by the plaintiff company" and in particular from writing or publishing articles in the new periodical. On appeal:—

Held, (1) that the words "carry on or be engaged or interested "in any business similar to or competing with the business of "the partnership" were apt, particularly in view of the word "engaged," to include a case where the party subject to the restriction took employment in a business of either of the kinds mentioned at a salary or wage, as well as to a case in which he embarked on such a business on his own account or in a partnership; and that, accordingly, assuming that the covenant was valid, that which the defendant had done was prima facie a breach of the provisions of clause 21;

(2) that the fact that the clause extended to prevent the defendant working as a salaried employee or at a wage in a business of either of the kinds mentioned did not of itself make the provisions of clause 21 too wide;

(3) that the argument that clause 21 was unreasonable, in that it was unlimited in point of area, would prevail, since it restrained the defendant from carrying on a similar business in any part of the world, unless it were possible to sever the covenant; that this being a case of vendor and purchaser it was possible to sever the covenant and to segregate the words "similar to or," so as to make the covenant read "shall not . . . carry on or be engaged or "interested in any business competing with the business of the "partnership or any business competing with the business of the "partnership"; and that the interlocutory injunction was justified.

Goldsoll v. *Goldman* [1915] 1 Ch. 292 and *British Reinforced Concrete Engineering Co. Ld.* v. *Schelff* [1921] 2 Ch. 563 followed.

Attwood v. *Lamont* [1920] 3 K.B. 571; 36 T.L.R. 895 distinguished.

Decision of Roxburgh J. affirmed.

Appeal from Roxburgh J.

The following statement of facts is taken from the judgment of Jenkins L.J.: The plaintiff company, Ronbar Enterprises Ld., was incorporated on November 28, 1951. The defendant, Isadore Green, had for some time previously been publishing a weekly newspaper known as "The Weekly Sporting Review and Show "Business" containing feature articles and general news about

the sporting and entertainment business. The company was formed to enter into partnership with the defendant in his business, and to pay him £10,000 for a 40 per cent. interest. There was to be a partnership agreement under the terms of which the paper was to be carried on. An agreement dated December 5, 1951, provided that the partnership was to begin from December 1, 1951. By clause 7 of the agreement, the net profits of the business were to be divided as to 60 per cent. to the defendant, and as to 40 per cent. to the plaintiff company, and there were provisions in clauses 13 and 14 to the effect that the defendant should be managing editor of the partnership business and devote his whole time and attention thereto and, as such managing editor, that he should receive a salary at the rate of £1,000 per annum. The partnership was, apart from particular events, to be determinable by either partner giving to the other three months' previous notice in writing expiring on December 1 in any year after December 1, 1956, so that it was, in effect, to run for six years certain, unless cause for sooner determination arose.

Clause 19 provided that, in the event of either partner committing a breach of the terms of the agreement, the other party should be at liberty to give notice to the offending partner determining the partnership; and the partner giving such notice was to have the option of purchasing the share of the other partner and the capital assets of the business upon the like terms as were set out in clause 20. That clause provided for the purchase by a surviving or continuing partner of the share of a deceased or bankrupt partner at a valuation.

Clause 21 provided: "On the purchase by one partner of the "share of the other partner pursuant to the last preceding clause "hereof the purchase money shall be paid with interest thereon "at the rate of 5 per centum per annum from the date of deter-"mination or dissolution of the partnership within one year from "such date and the partner whose share is purchased shall not "for five years from such date directly or indirectly carry on or "be engaged or interested in any business similar to or competing "with the business of the partnership"—that was the business to be carried on under the partnership agreement under the name of the "Weekly Sporting Review and Show Business Publications."

The plaintiff company determined the partnership by reason of a breach of its provisions by the defendant. In lieu of the valuation as contemplated by the partnership agreement, the price to be paid by the plaintiff company for the defendant's share in the business was agreed at £7,000. On July 31, 1953, the defendant was adjudicated bankrupt.

In these circumstances the restrictive provisions of clause 21 of the partnership deed came into operation. It appeared that, after the defendant's connexion with the plaintiff company had been severed, a company known as Jocal Productions Ld. was incorporated on October 9, 1953, with a nominal capital of £100. The directors of that company were the defendant's wife, Mrs.

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Ada Green, and a Mrs. Calvert, and it started publication of a periodical called "Sport and Show News." That paper was in character and make-up very much the same as the partnership's Show Business periodical, and it had been published at intervals since October, 1953. It was clear that the defendant had been writing for this paper and various issues of it contained notices of the fact of his so writing, and commending to readers of the paper his merits and reputation as a writer on sporting subjects.

The plaintiff company in this action sought an injunction to restrain the defendant from infringing the provisions of clause 21 of the partnership agreement and applied for an interlocutory injunction. Roxburgh J. held that the provisions of clause 21 were severable and that it was possible in the phrase "any business "similar to or competing with the business of the partnership" to segregate the words "similar to or," and he accordingly granted an interlocutory injunction limited to a competing business.

The defendant appealed.

T. M. Eastham for the defendant.
G. T. Hesketh for the plaintiff company.

The following cases were cited in argument in addition to those cited in the judgment: *George Hill & Co.* v. *Hill*[1]; *Smith* v. *Hancock*[2]; *Rolfe* v. *Rolfe*[3]; *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co. Ld.*[4]

Jenkins L.J. This is an appeal by the defendant, Mr. Isadore Green, from an order of Roxburgh J., dated March 12, 1954, whereby the defendant was restrained until after judgment in the action or until further order from directly or indirectly carrying on or being engaged or interested in any business competing with the business formerly carried on by the plaintiffs, Ronbar Enterprises Ld., and the defendant in partnership, and in particular writing or publishing articles or other matter in a paper known as "Sport and Show News."

[His Lordship stated the facts and continued:] The questions that fall to be determined are first whether what the defendant has been doing in relation to "Sport and Show News" is a breach of the restrictive covenant contained in clause 21 of the partnership deed, assuming it to be valid; and accordingly, if so, whether the restrictive covenant is valid. The clause provides: "The "partner whose share is purchased shall not for five years from "such date"—that is, the time of purchase—"directly or "indirectly carry on or be engaged or interested in any business "similar to or competing with the business of the partnership."

Mr. Eastham, on behalf of the defendant, argued that there had been no breach of that restrictive provision because, on its

[1] (1886) 3 T.L.R. 144.
[2] [1894] 2 Ch. 377; 10 T.L.R. 433.
[3] (1846) 15 Sim. 88.
[4] [1894] A.C. 535; 10 T.L.R. 636.

true construction, it did not extend to the rendering of services for a salary or wages as distinct from being engaged in business on one's own account. I do not agree. In my opinion the words "carry on or be engaged or interested in any business similar to "or competing with the business of the partnership" are apt, particularly in view of the word "engaged," to include a case where the party subject to the restriction takes employment in a business of either of the kinds mentioned at a salary or wages, as well as a case in which he embarks on such a business on his own account or in a partnership. In my view, therefore, assuming that the covenant is valid, what has been done does prima facie amount to a breach of it.

As to its validity, that was attacked by Mr. Eastham on these grounds. First, he said that if, contrary to his primary submission, it did extend to prevent the defendant working as a salaried employee, it was on that account too wide. In my view, that is not so. I do not think that it can be said that this covenant is too wide, merely because it would extend to cases of salaried employment, or employment at a wage in a business of either of the kinds mentioned.

Mr. Eastham next contends that the covenant is unreasonable as being unlimited in point of area. He says that a business similar to the business of the partnership might be carried on in any part of the world, and in whatever part of the world it was carried on it would be a breach of this covenant read in accordance with its terms. In my view, that argument must almost certainly prevail, unless it is possible to sever this covenant, so as to segregate the words "similar to or," and make it read "shall "not . . . carry on or be engaged or interested in any business "competing with the business of the partnership or any business "competing with the business of the partnership," the covenant being thus treated as imposing two distinct restrictions with respect to two distinct kinds of business—that is to say, a business competing with the business of the partnership, or a business similar to the business of the partnership.

On the question whether such a severance is allowable, we were referred to *Goldsoll* v. *Goldman*,[1] where there was a covenant in connexion with the sale of a business not to "carry "on or be engaged or concerned or interested in or render services "(gratuitously or otherwise) to the business of a vendor of or "dealer in real or imitation jewellery in the county of London, "England, Scotland, Ireland, Wales, or any part of the United "Kingdom of Great Britain and Ireland and the Isle of Man or "in France, the United States of America, Russia or Spain" or certain other places. In that case, the business concerned was one confined to artificial jewellery, and not including real jewellery, and it was argued that the covenant was wider than was reasonably necessary for the plaintiff's protection as it extended

[1] [1915] 1 Ch. 292, 293.

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to a subject-matter, namely, real jewellery, which was not included in the business sold. It was also attacked as being too wide in point of area, owing to the long string of countries to which the restriction was expressed to extend; but it was held by the Court of Appeal that the covenant was severable both as regards the areas mentioned and also as regards the reference to real or imitation jewellery.

A similar view on a comparable question of severance was expressed in *British Reinforced Concrete Engineering Co. Ld.* v. *Schelff.*[2] In that case in connexion with the sale of a business concerned in the manufacture and sale of road reinforcements a restriction was imposed which restrained the person entering into it from being concerned or interested in the business of the manufacture or sale of road reinforcements in any part of the United Kingdom; and again it was held that the businesses to which the covenant related could be severed, and that, while the covenant would be unreasonable as regards a business in the manufacture of road reinforcements (in which the vendors had never been concerned), there would not be the same ground for holding it unreasonable in respect of the sale of road reinforcements. Accordingly, although in that case the particular restriction was held to be too wide on other grounds, the objection based on the fact that it applied to manufacture as well as sale was surmounted by means of severance.

We were also referred to *Attwood* v. *Lamont*,[3] which at first sight is inconsistent with the other two authorities that I have mentioned, in as much as it was a case in which there was a covenant not to carry on any of a long enumeration of different trades and businesses. It was held by the Court of Appeal that the covenant could not be severed so as to make it equivalent to a string of independent covenants each dealing with a different business.

The explanation of the different conclusion reached in *Attwood* v. *Lamont*[3] as compared with *Goldsoll* v. *Goldman*[4] and the *British Reinforced Concrete* case[5] appears to be that *Attwood* v. *Lamont*[6] was a case as between master and servant, whereas the other two cases were cases as between vendor and purchaser, as is the present case. I think that it can be regarded as settled that the court takes a far stricter and less favourable view of covenants in restraint of trade entered into between master and servant than it does of similar covenants between vendor and purchaser. In the case of a covenant between vendor and purchaser, the court recognizes that it is perfectly proper for the parties, in order to give efficacy to the transaction, to enter into such restrictive provisions as regards competition as are reasonable necessary to enable the purchaser to reap the benefit of that which he has bought; and restrictions of that kind are regarded as necessary, not only

[2] [1921] 2 Ch. 563.
[3] [1920] 3 K.B. 571; 36 T.L.R. 895.
[4] [1915] 1 Ch. 292.
[5] [1921] 2 Ch. 563.
[6] [1920] 3 K.B. 571.

in the interests of the purchaser but in the interests of the vendor also, for they not only preserve the value to the purchaser of that which he buys but also enable the vendor to realize a satisfactory price. It is obvious that in many types of business the goodwill would be well-nigh unsaleable if it was unlawful for the vendor to enter into an adequate covenant against competition.

In this case, Roxburgh J. held that the covenant was severable, in the sense that it could be regarded as a twofold covenant, first, against carrying on, and so forth, any business similar to the business of the partnership, and secondly against carrying on, and so forth, any business competing with the business of the partnership; and, taking that view, the judge was of opinion that prima facie the covenant was not wider than was reasonably necessary for the protection of the plaintiff company; and, that being his prima facie view, he granted the interlocutory injunction to the terms of which I have already referred.

Mr Eastham has advanced all the arguments that could be advanced on behalf of the defendant, but I am not prepared to hold that Roxburgh J. came to a wrong conclusion in this case. It must be remembered that this is only an interlocutory proceeding, and that the result of this appeal in no way governs the result which may ensue at the trial. But, for the purposes of interlocutory relief, I find that what the defendant has been doing is plainly contrary to the terms of the restrictive covenant. I find further that prima facie the covenant, construed in the way that I have construed it, should not be held to be invalid. It follows that prima facie, and as a matter of interlocutory relief, Roxburgh J. was justified in granting the injunction under appeal. I am accordingly of opinion that this court should not interfere, and I would dismiss this appeal.

HODSON L.J. I agree. The plaintiff company was formed in November, 1951, with a view to entering into partnership with the defendant in his business, which was the publishing of a weekly newspaper known as "The Weekly Sporting Review and "Show Business," and the company paid to the defendant the sum of £10,000 for a 40 per cent. interest in his business. By an agreement of December 5, 1951, it was provided that, in the events which have now happened, the plaintiffs should become liable to pay for the balance of the business a further sum, which has been assessed at £7,000. By the agreement itself, so long as it was in operation, the defendant was entitled to expenses at the rate of £20 a week, and in addition to that a salary of £1,000 a year. Clause 21 of the agreement contains these words: "The "partner whose share is purchased shall not for five years from "such date directly or indirectly carry on or be engaged or "interested in any business similar to or competing with the "business of the partnership."

The first question to be determined is whether, on the construction of that clause, the defendant is in breach of his

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agreement by reason of the fact that he has been employed by a company incorporated on October 9, 1953—one of the directors being his wife—which is publishing in London a paper of the same kind as the one which he had sold to the partnership.

On behalf of the defendant, Mr. Eastham has contended that, being employed in that way, the defendant is not in breach of his covenant because he is not "carrying on" a business; nor, it is contended, is he "engaged or interested in any business similar "to or competing with the business of the partnership." I agree with my Lord that, on the true construction of that clause, the word "engaged" is apt to cover employment as a servant, as well as employment as a principal. That view is, I think, supported by the authorities, in particular by the opinion expressed, for example, by Swinfen Eady J. in *Gophir Diamond Co.* v. *Wood*,[7] where he used this language about another covenant: "The covenant departs materially from the common "form. It does not provide that the covenantor shall not be "'engaged or concerned or interested' in a similar business, but "merely that he shall not be 'interested' therein. Nor does it "contain the usual provision against accepting employment as a "servant in a similar business. If it was intended to prevent "the defendant accepting employment of that nature it would "have been quite easy to say so."

Mr. Eastham, I think, recognized that the authorities were not helpful to him on his construction of the word "engaged" as not being apt to cover employment as a servant; but he sought to argue that in the background of this case, the word "engaged" did not cover the facts, because his client had not been previously a servant, but a principal; and he argues, therefore, that the word "engaged" ought to be construed in the light of that background. Accepting the force of that argument, so far as it goes, I still think that the position remains the same and that the word "engaged" does comprise being engaged as a servant; and therefore, on the face of the language, assuming that the clause is valid, the defendant is in breach.

On the question whether the covenant was unreasonably wide, Mr. Hesketh conceded that, as it stood, the covenant was unreasonably wide because the words "similar to or" preceding the word "competing" would be unnecessary for the protection of the plaintiff company's interest. Recognizing that position, the judge has excised those words, and thereby severed the covenant; and the question principally argued on this appeal is whether it was legitimate so to do.

I have no doubt in my own mind that it is. It is quite clear that in a "vendor and purchaser case," in so far as matters of geography are concerned—as was pointed out by this court in *Goldsoll* v. *Goldman*[8] which has already been cited—it is quite

[7] [1902] 1 Ch. 950, 952; 18 T.L.R. 492.

[8] [1915] 1 Ch. 292.

legitimate to deal with the area by severance. Lord Cozens-Hardy M.R. referred to the judgment of Neville J. in the court below in this way [9]: "On the question of the space covered by "the covenant Neville J. has held, and I entirely agree with him, "that it is unnecessarily large in so far as it is intended to cover "not merely the United Kingdom and the Isle of Man but also "the foreign countries mentioned in the covenant. He has also "held, and his decision is consistent with a long series of autho-"rities, that the covenant can be severed as regards the space "covered by it. It is clear that part of the covenant dealing with "the area is reasonable, and the learned judge has limited the "injunction. . . ."

Mr. Eastham, as I understand it, accepts that, but he says that striking out the words "similar to or" is not a limitation of the area. In my judgment, it is, and as my Lord pointed out, it is really the only way in which in practice the area can be limited for the protection of the plaintiff company's business. In the case of a publication, which is said to be a rival publication, the competition of which is feared, it is, as I see it, impracticable to limit the area by drawing geographical lines upon a map; and the only way in which the area can be practically limited is in the way adopted by Roxburgh J., namely, by limiting the area to that covered by the words "competing with the business of the "partnership."

I agree with my Lord that this appeal fails, and should be dismissed.

HARMAN J. I agree that this appeal should be dismissed. There seems no doubt, on the evidence as it stands, that there is a strong prima facie case that the defendant has broken the covenant. The only question on the motion is whether he ought to be restrained until the trial from continuing to do so.

The test, I think, is whether the covenant is necessary for the protection of the covenantee; that was stated by Lord Birkenhead in *Fitch* v. *Dewes*.[10] Protection against what?—protection against competition in a vendor and purchaser case. The covenant, as limited by the judge of first instance, protects the purchaser from that very thing, and in my judgment, therefore, is necessary for his protection.

Appeal dismissed.

Solicitors: *Isadore Goldman & Son; Norris, Allen & Co.*

B. A. B.

[9] Ibid. 297.

[10] [1921] 2 A.C. 158; 37 T.L.R. 784.

[COURT OF APPEAL.]

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Apr. 28, 29.

Somervell, Birkett and Romer L.JJ.

* O'CONNOR *v.* HUME.

[Plaint K. 3075.]

Landlord and Tenant—Rent restriction—Rent Act avoidance—Agreement in writing—Letting for twelve months—Consideration sum of £47 and weekly rent of 2s. payable monthly—"Thereafter (should "tenant be desirous of continuing tenancy) on monthly tenancy at "rent of 2s. per week"—Rent less than two-thirds of rateable value —Tenant holding over—Tenant's claim to protection of Rent Acts as statutory tenant—Evidence that written agreement did not accurately record the intention of the parties.
Contract—Construction—Extrinsic evidence.

By an agreement of tenancy it was provided that in consideration of a payment of the sum of £47 the landlord let to the tenant a cottage for a period of one year, at a rent of 2s. a week (less than two-thirds of the rateable value), payable monthly, and afterwards, if the tenant so desired, on a monthly tenancy at the same rent of 2s. a week. At the end of the year the tenant held over, paying the rent of 2s. per week, and the landlord served on him a notice to quit. The landlord claimed possession; the tenant claimed to be protected as a statutory tenant. There was evidence that the £47 was to be payable periodically over twelve months:—

Held, that the tenant having held over under the agreement and continued the tenancy at a rent which was less than two-thirds of the rateable value of the premises, the notice to quit operated on a tenancy to which the Rent Acts did not apply, and the landlord was entitled to possession.

APPEAL from Judge Archer, sitting at Chichester County Court.

By an agreement of tenancy dated October 6, 1952, it was provided that "In consideration of the payment by the tenant "to the landlord of the sum of £47 the landlord lets and the "tenant takes the cottage and appurtenances at East Ashling, "Chichester, in the county of Sussex, known as 3, Cobdens "Cottage, for a period of one year from the first day of October, "1952, at a rental of 2s. per week payable in advance on the "first day of each month, and thereafter (should the tenant be "desirous of continuing his tenancy) on a monthly tenancy at "the said rent of 2s. per week." At the end of the twelve months the tenant remained in occupation, and on December 22, 1953, the solicitors on behalf of the landlord served a notice to quit to take effect on February 1, 1954. The tenant refused to quit, claiming protection as a statutory tenant under the Rent Acts, and the present proceedings were brought in the county court by the landlord, who contended that as a rental of 2s. per week was less than two-thirds of their rateable value the premises were outside the Rent Acts. For the tenant it was contended that the real bargain was that the rent should be £1 a week, payable as to 2s. in money, and as to the sum of

£47 in produce and not as a lump sum. The county court judge decided against the tenant, upholding the agreement, and made an order for possession.

The tenant appealed.

J. T. Plume for the tenant.
R. C. Chope for the landlord.

Cases referred to in argument: *Regor Estates Ld.* v. *Wright* [1]; *Rush* v. *Matthews* [2]; *Alliance Property Co. Ld.* v. *Shaffer* [3]; *Maclay* v. *Dickson* [4]; *Insall* v. *Nottingham Corporation* [5]; *Stone (J. & F.) Lighting and Radio Co.* v. *Levitt.* [6]

Somervell L.J., having read the clause in the agreement, said: Two shillings per week is below two-thirds of the rateable value and, therefore, if that had stood alone the landlord would plainly have been entitled to possession, because the tenancy would have been outside the Rent Acts. But it was sought to adduce evidence below, and in this court, to show that the agreement did not represent the real bargain between the parties. It was said that the real bargain was that the premises should be let for £1 a week. After trouble had arisen there was a letter from the landlord saying, "You made an offer of £52 per annum "and I accepted it for one year only." If the £52 represented the rent, whether paid at once or in weekly sums, that would have been more than two-thirds of the rateable value of the premises. It is clear, and admitted by both sides, that the basis of the negotiations was that the occupation should be for a year. The landlord made it clear that he did not want to part with possession of the premises for more than a year and whatever the agreement may be in law the tenant was accepting that basis. It is not the first example of a tenant who, having got into possession on an undertaking that he would surrender possession at a later date, when that date has come, seeks, sometimes successfully and sometimes unsuccessfully, to rely on the Rent Acts. The county court judge decided that this was a case in which there were no grounds for going behind the agreement.

Although it is unnecessary to come to a final conclusion on this first point, for reasons which will emerge, it is right to draw attention at this stage to the operative legislation with regard to premiums. It is now contained in section 2 of the Landlord and Tenant (Rent Control) Act, 1949, which prohibits premiums on the granting or assignment of tenancies, but that prohibition does not apply where the rent reserved is less than two-thirds of the

[1] [1951] 1 K.B. 689; [1951] 1 T.L.R. 242; [1951] 1 All E.R. 219.
[2] [1926] 1 K.B. 492; 42 T.L.R. 287.
[3] [1949] 1 K.B. 367; 65 T.L.R. 111; [1949] 1 All E.R. 312.
[4] [1944] 1 All E.R. 22.
[5] [1949] 1 K.B. 261; 64 T.L.R. 617; [1948] 2 All E.R. 232.
[6] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.

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rateable value of the dwelling-house. If the proper construction of this agreement, with any admissible extrinsic evidence, were that the £47 was a premium and the rent, with any sums which could properly be treated as rent, was only 2s., then it is plain —and this was the view of the county court judge—that the landlord is entitled to an order for possession.

We were referred to certain authorities which have indicated that, particularly in this field of rent restriction, if the court is satisfied that the document purporting to set out the rights between the parties is a sham—and I am not attempting to define what a sham is—then the court will accept and consider evidence as to the real bargain between the parties. I see no ground, having had the evidence and the letters read to us, for regarding this agreement as a sham, whatever that may mean. It is clear that there was no trickery or anything of that sort. The landlord made it perfectly plain that he wished the transaction arranged in this way at this low rent because he did not desire to part with possession for more than a year. The tenant's replies and the letters indicate, as, indeed, counsel agreed, that that was well understood. Although there is nothing contrary to the Act in agreeing to a premium in the case of a tenancy where the rent is below two-thirds of the rateable value, the court would scrutinize a sum in such a case which was put forward as a premium.

The sum is not so described in the present case and there is no provision, as will have been realized from the clause, as to the time of payment or as to when it was to be paid. In my opinion, extrinsic evidence was permissible to deal with that. It is clear that it was never intended that that sum should be paid as a lump sum at or about the time the tenant went into possession. According to his evidence, he was to pay 2s. a week and the idea originally was that a balance of about 18s. a week should be satisfied in produce, and the letters show that that was how the matter started to be worked out. The produce was not satisfactory to the landlord, who then started demanding money on a periodical basis spreading the £47 over the twelve months. The tenant was advised that he was not liable to pay the balance of £47, and he got into arrears. I think evidence was admissible to prove the intention of the parties, that the £47 should be periodic, spread over the year, because that is what the evidence leads to. On that basis there was a strong case made on behalf of the tenant for submitting that the principle of *Rush* v. *Matthews* [1] was applicable, and that notwithstanding the distinction between the facts in that case and in the present there should be added to the 2s. a sum, not technically rent, but to be treated as rent for the purposes of the Rent Acts, which would have brought the rent, for the purposes of those Acts, above the two-thirds provisions.

[1] [1926] 1 K.B. 492; 42 T.L.R. 287.

Apart from contesting that point, however, in this court counsel for the landlord took a further point in support of the judge's conclusion. It was not necessary to take it, and it was not taken before the judge but, of course, in this court his conclusions can be upheld on grounds which were not taken below. The point is based on the provision in the agreement "should the tenant be desirous "of continuing his tenancy on a monthly tenancy at the said "rent of 2s. per week." The £47, even admitting the extrinsic evidence, was to be satisfied under the contract within the year and was in respect of the year. At the end of the year the tenant stayed on. It was submitted that he should be regarded as having stayed on as a statutory tenant, but he did not assert that position in any letter. I think that the proper conclusion from the fact of his remaining in possession indicated his desire to continue the tenancy, and the tenancy therefore continued at a rent of 2s. per week under the agreement, and that sum is less than two-thirds of the rateable value. The notice to quit, therefore, operated on a tenancy to which the sections of the Rent Acts do not apply and the landlord is entitled to possession.

As against that, Mr. Plume submitted that we should disregard that part of the written agreement which refers to the period after the year was over. That was based on statements in the letters that the intention was that the tenancy should be for a year. I do not accept that. I think that it is quite impossible, on ordinary principles, to admit extrinsic evidence to contradict that term of the agreement. It may have been inserted because it was thought that the tenant might go back on his undertaking and seek to stay on. The landlord may, for all I know, have foreseen this point and was desirous of meeting it. That does not entitle the tenant, who accepted and signed this agreement, to say that it should be disregarded. In fact, it enables the intention of the parties, as admitted by the tenant, to be carried out.

We were referred to some observations by Evershed M.R. in *Foster* v. *Robinson*[2] where a sitting tenant, who was an old retainer of the landlord, after he had ceased work was allowed to stay on rent free. It was held that that was a new agreement and that his dependants could not claim the right conferred by section 12 (1) (*g*) of the Rent and Mortgage Interest (Restrictions) Act, 1920. It was said, however, that where you are dealing with a person who is already in occupation and entitled under his existing personal agreement to claim the rights of the Rent Acts, the court should scrutinize with great care an offer by a landlord of an apparently attractive substituted agreement with a view to enabling him to deprive the tenant of the rights which, as it were, he had already acquired, on the ground that the new rent was less than two-thirds of the rateable value. But that is not

[2] [1951] 1 K.B. 149; 66 T.L.R. (Pt. 2) 120; [1950] 2 All E.R. 342.

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the present case. It was all agreed at the beginning and the agreement was put before the tenant who signed it at a time when he was receiving legal advice. Once it is agreed, as Mr. Plume for the tenant submitted, that one can have a tenancy where rent is reduced so as to bring the two-thirds provision into operation, it is plain that such an agreement may be made, as here, in advance, and once one is clear that there is nothing in the nature of trickery and that the landlord is not taking advantage of his position against a sitting tenant, I can see no reason why the provision should not be enforced. For that reason I would dismiss the appeal.

Birkett L.J. I agree. The county court judge decided this case on the simple ground that here was a perfectly valid agreement which did not offend against any provisions of the Rent Acts. He said that in that agreement there were two separate and distinct things mentioned, one being the sum of £47 and a second being the rent of 2s. a week. The 2s. a week is clearly less than two-thirds of the rateable value and therefore it is not within the Act of 1920, and whether the £47 is called a premium or not it does not offend against the provisions of the Rent Acts. Upon that simple ground, having listened to the evidence, he said: "I shall give effect to the provisions of the agreement."

It is, of course, open to people, if they can, to avoid the Rent Acts applying to their particular transaction. Scott L.J. in *Maclay* v. *Dixon*,[3] dealing with the facts of that case said: "There was no shadow of deception practised by the landlord "upon the tenant. In my opinion, they were both entitled so to "arrange the matter, as not to attract the control of the Acts, or, "putting it positively, as to prevent the Acts from applying. If "the actual transaction was not within the Acts, it made no "legal difference that the parties had intentionally kept it out of "the Acts. It was argued that the intention to keep it out of "itself showed want of bona fides; but unless the court has "other material on which to hold that the whole thing was a "sham, that intention was irrelevant." In the present case the county court judge merely said: "Here is an agreement, per-"fectly legal, perfectly valid. It does not offend against the "Acts and I give expression to it and the tenant is not "protected."

In the grounds of appeal, the first contention was that the judge was wrong in holding that the tenant was not a statutory tenant of the premises under the Acts of 1920 to 1939. That argument was elaborated before us by Mr. Plume, who said that the agreement between the parties was for one year certain and at the end of that year the tenant was entitled to say that he had become a statutory tenant. The second submission was that the judge was wrong in deciding the case merely on the provisions of

[3] [1944] 1 All E.R. 22, 23.

the agreement. He said that the judge ought to have inquired into the surrounding circumstances to ascertain whether that agreement was a mere sham which did not accurately record the bargain made between the parties. In a word, Mr. Plume was seeking to say that the agreement between the parties was one for a tenancy at £1 a week, and the agreement that was subsequently signed went out of its way in its terms to depart from the agreement made between the parties.

A third ground of appeal was that the judge was wrong in law in holding that the sum of £47 named in the agreement could not be regarded as rent, and further, that he was wrong in holding that he should not inquire into the facts of the case in order to ascertain the true nature of that sum. All that it is now necessary for me to say on those matters is that when one has a written agreement it is not competent to call oral evidence to contradict the terms of that agreement. It was said by Mr. Plume that he was not seeking to do that, but to show by evidence that the sum of £47 was not a lump sum but one which was, in effect, to be split up into periodic payments. That did not offend against the Rent Acts. He was anxious, in that way, if he could, to show that in truth the real agreement between the parties was at a rent which would enable the tenant to claim the protection of the Acts.

Quite late in the argument Mr. Chope, for the landlord, introduced another point. He said that at the time when the notice to quit was given, and at the time of the plaint in the county court, the tenancy which then existed was, in fact, a monthly tenancy and that it was at a rental of 2s. a week. That arises because by the agreement "the tenant takes the cottage "and appurtenances . . . for a period of one year from October 1, "1952, at a rental of two shillings per week, payable in advance "on the first day of each month, and thereafter (should the "tenant be desirous of continuing his tenancy) on a monthly "tenancy at the said rent of two shillings per week."

It was submitted by Mr. Plume that we ought to disregard that latter paragraph "and thereafter (should the tenant be "desirous of continuing his tenancy)." In my view, it is impossible to do that, and it seems to me that what emerges from the evidence and the documents, is that as far as the landlord was concerned, he regarded it as an agreement for one year certain. The tenant does not speak with the same assurance as the landlord did, but to Mr. Plume, he said: "I cannot say that "the landlord ever asserted positively that it was for one year "only," but it was quite clear that he never denied it. Indeed, when the landlord made this assertion in the correspondence, there is no word saying that it was wrong.

When we find that the agreement is not just for one year certain but the words "and thereafter (should the tenant be "desirous of continuing his tenancy) on a monthly tenancy at the "said rent of 2s. per week" are added, nowhere is it found in

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the correspondence or, indeed, in the evidence, that the tenant said: "I desire to exercise that option and to continue." It is plain from his attitude and his conduct throughout that he did desire to remain, and therefore, must be taken to have remained on the terms which are set out in the agreement. As nobody doubts that 2s. a week is less than the rateable value, the tenancy is unaffected by the provisions of the Rent Acts if he did, in fact, hold under such a tenancy. Therefore the tenant is not protected and is not entitled to remain. Accordingly, in my view, this appeal should be dismissed.

Romer L.J. I also agree, and would only say a word on the alternative submission which Mr. Chope made to the effect that at the time when the landlord served the notice to quit, the tenant was not entitled to the protection of the Rent Acts. It seems to me that that was clearly so. The main way in which Mr. Plume sought to escape from it was to say that the court ought to look behind the language in which this agreement was expressed and find out what the true bargain between the parties was, and that if it did so it would find that the agreement was for a tenancy for one year only and that therefore the court should disregard the additional provision in the agreement that at the expiration of the first year the tenant should, if he were desirous of so doing, continue the tenancy on a monthly basis.

The obvious intention behind that submission was to ask us to look at the true nature of the bargain for the sole purpose of enabling the tenant to break it. I should not feel at all disposed so to do to achieve that object, even if the court were entitled to do it. I am satisfied that the court has no right to resort to correspondence and oral evidence for the purpose of striking out, for that is what it comes to, an important provision which the parties agreed upon and expressed in the agreement. The general rule with regard to extrinsic evidence is that such evidence is not admissible to add to, vary, modify, or contradict a written instrument. To that rule there are, of course, exceptions. The only exception which might be regarded as relevant—and I think indeed it was sought to rely upon it in effect—is if the written instrument is affected by illegality. I can see nothing illegal in the object which the parties sought to attain by entering into an agreement in this form. The bargain was, admittedly, that the tenant was to have occupation as tenant of the landlord's property for one year. The agreement was formed so as to give effect to that intention and to prevent the tenant from getting something additional to that for which he had asked and which the landlord had consented to give, namely, the additional status of irremovability which attaches to a statutory tenant. There is nothing illegal in that and it is wholly different from a case where a landlord attempts by contractual means or otherwise to deprive a statutory tenant of his rights, or to exact

from a statutory tenant, either by way of premium or rent, something to which he is not lawfully entitled, having regard to the provisions of the Act.

Therefore one has got to treat this agreement as one finds it, and one finds that at the end of the initial year the tenant, if he was desirous of continuing his tenancy on a monthly basis could do so. One finds that he did remain on in occupation at the end of the year. He did not, as he could have done before the year came to an end, communicate with the landlord and say that he did not desire to continue his tenancy in the manner contemplated by the contract, but he intended instead to remain on as a statutory tenant. He chose simply to remain there, and inasmuch as the agreement does not require any notice either in writing or otherwise from the tenant to the landlord of his intention to continue his tenancy, the obvious inference, as I see it, is that as he did not communicate with the landlord at all, but simply stayed on, he was staying on under the contract and not in any other capacity.

Therefore I do not think that, either on the ground that one must ignore the monthly tenancy provision, or on the ground that he was remaining on not as a contractual tenant but as a statutory tenant, the tenant can get out of the point which was raised by the landlord, with the result that the notice to quit was a valid notice and the tenant, accordingly, cannot succeed. In this result, though perhaps for different reasons to those of the county court judge, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile & Martin for Morris, Bew & Baily, Chichester; Williams & Poole.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

* MIDDLETON *v.* ROWLETT.

1954
May 5.

Lord Goddard C.J., Hilbery and Donovan JJ.

Justices—Submission of no case—Application by prosecution to call further evidence—Road traffic—Dangerous driving—Prosecution's omission of evidence identifying defendant as driver—Prosecution's case closed—Justices' refusal to allow case to be reopened—Whether judicial exercise of discretion—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 11.

In a prosecution for dangerous driving brought under section 11 of the Road Traffic Act, 1930, no evidence was tendered by the prosecution to identify the defendant as the driver of the car alleged to have been driven dangerously. The prosecutor having closed his case, counsel for the defendant submitted that there was no case to

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

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answer; whereupon the prosecutor asked the justices to permit him to reopen his case in order to call further evidence. The justices, being of opinion that the matter was within their discretion, refused to reopen the case and dismissed the information:—

Held, that the justices were not bound to allow the case to be reopened, but had a discretion whether to do so or not; and that in the circumstances, as the evidence fell short of proof of a material fact touching the substance of the case, and not a merely technical matter, the court could not say that the justices' discretion had been exercised unjudicially.

Duffin v. *Markham* (1918) 82 J.P. 281 distinguished.

Case stated by Loughborough justices.

On October 13, 1953, an information was preferred by John Henry Middleton, a police inspector, against the defendant, Jack Rowlett, alleging that on September 10, 1953, at Rothley, Leicestershire, he drove a motor-vehicle, namely, a motor-car, on Leicester Road in a manner dangerous to the public contrary to section 11 of the Road Traffic Act, 1930. At the hearing of the information on October 28, 1953, evidence was given by the prosecution that on September 10, 1953, a green Riley motor-car was being driven on a road in Rothley; that it was third in a line of traffic proceeding in the same direction; and that when a vehicle in front started to pull out the Riley motor-car also pulled out to overtake when it was unsafe to do so. No evidence was tendered to identify any person as the driver, owner or passenger in the car at the time of the occurrence or at any other time. The solicitor for the prosecution then closed his case and counsel for the defendant submitted that no evidence had been adduced by the prosecution that the defendant was the driver of the car or was in any way connected with the offence charged and that, therefore, he had no case to answer.

The solicitor for the prosecution contended that the justices had a bounden duty to permit the case to be reopened so that evidence might be tendered to prove that the defendant was the driver of the car.

Counsel for the defendant contended that it was not competent for the justices so to do, or, in the alternative, that if the justices had a discretion, in the circumstances of the present case, they should refuse the application.

The justices, being of the opinion (1) that the omission of the prosecutor to prove who was at the material time the driver of the car was one of substance and not merely of form, and (2) that they had a discretion, which must be exercised judicially, whether or not to permit the case for the prosecution to be reopened and additional evidence called, refused in the exercise of such discretion to permit the prosecutor to reopen his case, and dismissed the information.

The prosecutor appealed.

R. E. Seaton for the prosecutor.

H. A. Skinner for the defendant.

The case cited in argument is referred to in the judgment.

LORD GODDARD C.J. stated the facts and continued: The justices said that they exercised their discretion judicially, but the whole question is whether they did or did not; in other words, whether it is a judicial exercise of discretion to say: "We are "not going to allow the case to be reopened."

Mr. Seaton has relied on *Duffin* v. *Markham*,[1] but what it was sought to do there was really rather a different matter. It was a prosecution under a statutory Order, namely, the Bread Order, 1917, and the prosecutor, no doubt thinking that the Order proved itself or, rather, that the court had judicial notice of every Statutory Rule and Order as it had of every Act of Parliament, had not formally put in the Order before closing his case. The justices would not then allow the Order to be put in, and Avory J. said that the justices had a judicial duty to allow an adjournment in a case of that sort for the Bread Order to be found and produced. But this is a case in which the evidence falls short of proof. It is not the formal proof of a public document; it is proof of a fact which ought to have been proved in the case, indeed it ought to have been the first thing proved or proved at a very early stage. I do not think we could say that if the justices came to the conclusion that they were not going to encourage sloppiness and carelessness in prosecutions and that, therefore, they were not going to allow the case to be reoponed, that they were bound to allow it to be reopened. I think that it was a matter of discretion, and I do not think we can say that the justices who considered the case were bound to allow the case to be reopened.

It is rather a borderline case, and we do not need to lay down any particular rule on the subject beyond saying that we cannot say that the justices exercised their discretion unjudicially. There are many cases in which a prosecution is being conducted in magistrates' courts or even at the assizes or quarter sessions where somebody forgets to ask a material question. For instance, in a case of false pretences, as Donovan J. has reminded me, sometimes the question is not asked: "Would you, but for that "statement made to you, have acted in the way you did?" It may be a formal question, but it is a necessary one, and it is surprising sometimes when that question is put how witnesses will answer in a way which the prosecution least expects. If his attention has been called to it by a discussion which has taken place on a submission that there is no case to go to the jury, probably the witness will answer in the way he is expected to answer, and therefore one has to be careful in these matters. Although what has happened here is in some ways regrettable and although the court would not have interfered for a moment if the justices had exercised their discretion the other way, we cannot say that they were bound to exercise their discretion in

[1] (1918) 82 J.P. 281.

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favour of the prosecution. Therefore, this appeal fails and is dismissed with costs.

HILBERY J. I am of the same opinion. In this case those who were prosecuting the defendant for dangerous driving wholly omitted to give any evidence that he was the driver. That has only to be stated to be seen to be a most material step in establishing the prosecution's case against the defendant. It cannot be said that that was the omission of some merely technical matter. After the objection was taken at the close of the prosecution case that they had not proved that matter, the application was made to reopen the prosecution case and then to supplement it, one supposes, by evidence which would establish that fact. The justices, having to consider whether they would allow the case for the prosecution to be reopened, held quite properly that they had a judicial discretion, and the only question here is whether, in refusing in those circumstances to allow the prosecution case to be reopened, they exercised that discretion judicially. It is quite true that in *Duffin's* case,[1] speaking of the facts and circumstances of that case, Avory J. said that it was the duty of the justices to adjourn to allow the evidence which had been omitted to be given, but it has to be borne in mind that he was using those words in connexion with a case where a highly technical piece of formal evidence had been omitted. It was not a formal piece of evidence which in any way touched the substance of the matter under the consideration of the justices. Nothing could more materially touch the substance of the matter before the justices in the present case than proof of the defendant as the person who was driving the car which it was alleged was being driven dangerously. In the circumstances, therefore, I do not think that the matter is concluded by *Duffin's* case.[1] I think that the present case is easily distinguishable from *Duffin's* case,[1] and unless we were to say that in the circumstances of the present case the justices were bound to exercise their discretion one way, it is impossible to quarrel with what they did. I am clearly of opinion that, in the circumstances, they were not bound to exercise their discretion in the one way, and for these reasons I agree that this appeal fails.

DONOVAN J. I agree entirely with both judgments which have been delivered.

Appeal dismissed.

Solicitors: *Vizard, Oldham, Crowder & Cash for Bartlett, Walters & Parry, Loughborough; Taylor, Jelf & Co. for Philip J. Hammond, Leicester.*

[1] 82 J.P. 281.

[COURT OF APPEAL.]

* WATT v. HERTFORDSHIRE COUNTY COUNCIL.

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May 6, 7.

Singleton, Denning and Morris L.JJ.

[1952 W. No. 1451.]

Negligence — Safe system of work — Fireman — Fireman injured while travelling to emergency in vehicle with unlashed jack — Necessary risk—Object of saving life or limb justifying taking of abnormal risks—Standard of duty of employers.
Fire Brigade. Volenti non fit injuria.

A fireman was injured by lifting-gear while travelling in a lorry not specially fitted for carrying the gear to an emergency where a woman was trapped under a heavy vehicle:—

Held, that though the fire authorities were under a duty to provide proper appliances and to take reasonable care to avoid exposing their firemen to unnecessary risks, they were not negligent in requiring the firemen to take abnormal risks which they were ready to take in order to save life and limb.

Per Denning L.J. In balancing the risk against the measures necessary to eliminate it, the risk must be balanced against the end to be achieved.

Dictum of Asquith L.J. in *Daborn* v. *Bath Tramways Motor Co. Ld.* [1946] 2 All E.R. 333, 336, approved.

Decision of Barry J., ante, 208; [1954] 1 All E.R. 141 affirmed.

APPEAL from Barry J.

Since 1939 the plaintiff had been employed by the defendants, the local fire authority, as a fireman at Watford fire station. On July 27, 1951, the plaintiff was on duty at the fire station when an emergency call was received that a woman was trapped under a heavy vehicle about 200 or 300 yards away. The sub-officer in charge immediately left the station in a pump-escape vehicle, but before going he gave instructions that the plaintiff's team should follow him to the scene of the accident transporting with them in a Fordson lorry heavy lifting gear, namely a large jack standing on four small wheels and weighing about two or three hundredweight. The jack was loaded into the back of the lorry and was accompanied by the plaintiff and two other firemen who steadied the jack. The lorry had a plain floor and sides and there was nothing to which the jack could have been lashed. Shortly after the lorry had left the fire station the driver had to apply the brakes suddenly; all three men were thrown off their balance, the men steadying the jack were unable to hold it, and it slewed forward, catching the plaintiff's ankle and causing him serious injures.

Three vehicles were in regular use at the fire station, a pump-escape and a water tender, which were both unsuitable for the carriage of the jack, and an Austin tender which was used as an emergency tender and which was properly equipped for the carriage of the jack, and in which it could be properly secured. The Austin tender was put to other uses and was out of the

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station and not available for the carriage of the jack during about 30 hours in the week; at the time that the emergency call was received it was not in the station. The Fordson lorry on which the jack was carried on July 27, 1951, was not one of the regular vehicles used by the fire authority at the Watford station, but had been lent to the station for the transport of training equipment only a few days before the plaintiff's accident. Emergency calls other than fire calls were fairly frequent at the fire station, but it was rare for the heavy jack to be required, and in the normal course, if the jack was required when the Austin tender was not available to carry it, another station would be notified and would answer the call. On the occasion in question it would have taken at least ten minutes for assistance to arrive from the nearest fire station.

The plaintiff claimed that the defendants, his employers, were negligent in that they (a) failed to load or secure the jack in such a way that it could not become dislodged; (b) loaded the jack in such a way that they knew or ought to have known it was likely that if the lorry pulled up suddenly the jack would become dislodged and cause injuries to any person riding on the back of the lorry; (c) permitted and/or caused the plaintiff to ride on the back of the lorry on to which the jack had been loaded; (d) caused or permitted the jack to be transported on the lorry which, as the defendants knew or ought to have known, was not provided with clips, straps, or other suitable means to secure it; (e) failed to provide any or any adequate supervision of the loading of the jack on to the lorry; and it was claimed that the plaintiff's accident was due to negligence and that he was entitled to recover damages against the defendants.

Barry J., on December 16, 1953, gave judgment in favour of the defendants, holding that it was not shown that they had been guilty of any negligence towards the plaintiff or towards their other employees.

G. G. Baker Q.C. and *H. B. Grant* for the plaintiff.
Lord Hailsham Q.C. and *Roland Brown* for the defendants.

The cases referred to in argument are cited in the judgment of Singleton L.J.

Singleton L.J. stated the facts, and continued: I am in complete agreement with the judgment of Barry J.[1] but it is right that I should state my reasons for having formed that opinion.

The fire service is a service which must always involve risk for those who are employed in it, and, as Mr. Baker on behalf of the plaintiff pointed out, they are entitled to expect that their

[1] [1954] 1 W.L.R. 208; [1954] 1 All E.R. 141.

equipment shall be as good as reasonable care can secure. An emergency arose, as often happens. The sub-officer who had given the order, was asked in re-examination: "From your point "of view you thought it was a piece of luck, with this unfor-"tunate woman under the bus, that the Fordson was available "and you could use it? (A.) Yes. It is recognized in the "service that we use our initiative at all times, and in doing so "any reasonable step you take is considered satisfactory if it is "a question of saving life. You have to make a sudden decision."

It is not alleged that there was negligence on the part of any particular individual, nor that the driver was negligent in driving too fast, nor that the sub-officer was negligent in giving the order which he did. The case put forward in this court is that as the defendants had a jack, it was their duty to have a vehicle fitted in all respects to carry that jack, from which it follows, I suppose, that it is said that there must be a vehicle kept at the station at all times, or that if there is not one the lifting jack must not be taken out; indeed, Mr. Baker claimed that in the case of a happening such as this, if there was not a vehicle fitted to carry the jack the sub-officer ought to have telephoned to the fire station at St. Albans and arranged that they should attend to the emergency. St. Albans is some seven miles away, and it was said that an extra ten minutes or so would have elapsed if that had been done. I cannot think that that is the right way to approach the matter. There was a real emergency; the woman was under a heavy vehicle; these men in the fire service thought that they ought to go promptly and to take a lifting jack, and they did so. Most unfortunately this accident happened.

What is the duty owed by employers? It has been stated often, and never more clearly than it was by Lord Herschell in *Smith* v. *Baker & Sons*,[2] in these words: "It is quite clear that "the contract between employer and employed involves on the "part of the former the duty of taking reasonable care to provide "proper appliances, and to maintain them in a proper condition, "and so to carry on his operations as not to subject those "employed by him to unnecessary risk."

The employee in this case was a member of the fire service, who always undertake some risk—but, said Mr. Baker, not this risk. Is it to be said that if an emergency call reaches a fire station the one in charge has to ponder on the matter in this way: "Must I send out my men with the lifting jack in these "circumstances, or must I telephone to St. Albans, seven miles "away, to ask them to undertake the task?" I suppose he must think about his duty; but what would a reasonable man do, faced as he was? Would the reasonably careful head of the station have done anything other than that which the sub-officer did? I think not. Can it be said, then, that there is a duty on the employers here to have a vehicle built and fitted to

[2] [1891] A.C. 325, 362; 7 T.L.R. 679.

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carry this jack at all times, or if they have not, not to use the jack for a short journey of 200 or 300 yards? I do not think that that will do.

Asquith L.J., in *Daborn* v. *Bath Tramways Motor Co. Ld.*, said[3]: "In determining whether a party is negligent, the "standard of reasonable care is that which is reasonably to "be demanded in the circumstances. A relevant circumstance "to take into account may be the importance of the end to be "served by behaving in this way or in that. As has often been "pointed out, if all the trains in this country were restricted "to a speed of five miles an hour, there would be fewer accidents, "but our national life would be intolerably slowed down. The "purpose to be served, if sufficiently important, justifies the "assumption of abnormal risk."

The purpose to be served in this case was the saving of life. The men were prepared to take that risk. They were not, in my view, called on to take any risk other than that which normally might be encountered in this service. I agree with Barry J. that on the whole of the evidence it would not be right to find that the employers were guilty of any failure of the duty which they owed to their workmen. In my opinion the appeal should be dismissed.

DENNING L.J. It is well settled that in measuring due care you must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: you must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk, and I am glad to say that there have never been wanting in this country men of courage ready to take those risks, notably in the fire service.

In this case the risk involved in sending out the lorry was not so great as to prohibit the attempt to save life. I quite agree that fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. It is always a question of balancing the risk against the end. I agree that this appeal should be dismissed.

MORRIS L.J. I also agree. The accident in this case came about as a result of a somewhat unusual concatenation of circumstances. There had for a very long time been no call for the use of the jack. Any such call, according to the evidence, was extremely rare. It so happened that a call came at a time when the Austin vehicle which would normally have carried the

[3] [1946] 2 All E.R. 333, 336.

jack was otherwise engaged. I do not think it can be said to have been unreasonable to have had the Austin vehicle for use in the way that was arranged. Had the station been a larger station, had there been unlimited resources, unlimited space and an unlimited number of vehicles, it might be that another fitted vehicle would have been available; but that was not reasonably practicable or possible. What happened was that when the call for the jack came the sub-officer had to decide what to do, and I do not think that it would have been in accordance with the traditions of the wonderful service with which we are concerned if he had said that he could do nothing other than call on St. Albans. What he decided to do was in accordance with the practice of the fire service.

I would refer also to what the assistant chief officer in the London Fire Brigade said in regard to this matter. He spoke about the provision of jacks, and pointed out that in London there are 29 sets of lifting gear, one being provided for every two stations, and then this passage occurs: "Can you always undertake that that one vehicle will be available for the transport of a jack? (A.) No. (Q.) In your view is it reasonably practicable for a fire service to adapt all of its vehicles for the transport of jacks? (A.) No, I would not think it was reasonable. (Q.) You have been a station officer, have you not? (A.) I have. (Q.) Supposing you found yourself in charge of a station, and supposing the equipment available was not that most suitable for the purpose, but you found that human life was in danger and you might save it by adopting a method not entirely suitable, what, in your view, would be your duty as a station officer? (A.) I have had that experience, and I did not hesitate to get the equipment there as quickly as possible."

As I have said, I think this sub-officer acted in accordance with the traditions of the service, and I cannot for one moment think that the employers can be held responsible as having failed in the performance of their duties. I agree that the appeal fails.

Appeal dismissed.
Leave to appeal to the House of Lords refused.

Solicitors: *Denis Hayes for F. S. Ellis & Co., Watford; Berrymans.*

M. M. H.

[LEEDS ASSIZES.]

1954
Mar. 4.

Streatfeild J.

* WHALLEY *v.* BRIGGS MOTOR BODIES LD.

[1953 W. No. 69.]

Factory—Eyes—Protection—Provision of goggles or effective screens—Independent contractor using mechanical implement—Duty of normal occupier of factory to employee of contractor—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 49, 139—*Protection of Eyes Regulations,* 1938 (*S.R. & O.* 1938, *No.* 654).
Factory—Sub-contractor—Duty to employees. "Occupier."

Section 49 of the Factories Act, 1937, provides: "In the case "of any such process as may be specified by regulations of the "Secretary of State, being a process which involves a special risk "of injury to the eyes from particles or fragments thrown off in "the course of the process, suitable goggles or effective screens "shall, in accordance with any directions given by the regulations, "be provided to protect the eyes of the persons employed in the "process."

The plaintiff was employed by H. who had contracted with the defendants to make fresh bed plates at their factory. While the plaintiff was breaking up old concrete under the contract by means of a pneumatic pick which was either the property of or hired by H., some broken concrete flew up and injured his eye. No goggles had been provided for the plaintiff by either H. or the defendants. The plaintiff brought an action against the defendants alleging breach of statutory duty under the Protection of Eyes Regulations, 1938, made under section 49:—

Held, first, that the processes referred to in section 49 were those of the occupier of the factory and the words "persons employed in "the process" refer to employees of the occupier. In the present case the processes were not those of the defendants nor was the the plaintiff their employee and, therefore, the defendants were not in breach of section 49.

Held, secondly, that even assuming that there was a breach of section 49, the plaintiff was employed in connection with an implement moved by mechanical power which was either the property of or hired by H., and, by virtue of section 139, H. was deemed to be the occupier of the factory and not the defendants.

ACTION.

The plaintiff was employed by one Hanson, who had contracted with the defendants to make fresh bed plates at premises at Doncaster occupied by the defendants and admitted to be a factory within the Factories Act, 1937. On July 29, 1947, while the plaintiff was breaking up a concrete floor under the contract by means of a portable pneumatic pick, fragments of broken concrete flew into his eyes resulting in the loss of his left eye. The pneumatic pick was either the property of or hired by Hanson. No goggles had been provided for the plaintiff by either Hanson or the defendants. The plaintiff received payments of

[Reported by G. M. SMAILES, ESQ., Barrister-at-Law.]

workmen's compensation from Hanson in respect of the injury. He brought the present action against the defendants claiming damages for their negligence and breach of statutory duty under the Protection of Eyes Regulations, 1938, by failing to provide suitable goggles or effective screens to protect his eyes.

J. F. Drabble Q.C. for the plaintiff.
Geoffrey Veale Q.C. and *G. N. Black* for the defendants.

The following cases were referred to in argument: *Kerr* v. *Cook and Harland and Wolff Ld.*[1]; *Whincup* v. *Joseph Woodhead & Sons (Engineers) Ld.*[2]; *Lavender* v. *Diamints Ld.*[3]; *Olsen* v. *Magnesium Castings and Products Ld.*[4]; *Griffiths* v. *Evans*[5]; *Oliver* v. *Nautilus Steam Shipping Co. Ld.*[6]; *Page* v. *Burtwell*[7]; *Huckle* v. *London County Council*[8]; *Aldin* v. *Stewart*[9]; *Reid* v. *Stevenston.*[10]

STREATFEILD J. On July 29, 1947, the plaintiff John Whalley sustained an accident in the course of his work as the result of which he lost his left eye. On April 10, 1953, he issued a writ against the defendants, Briggs Motor Bodies Ld., claiming damages in respect of that injury.

The plaintiff was employed by a building contractor of the name of Hanson, who had a contract to make fresh bed plates for the machinery at the defendants' premises, where they carry on business as the makers of motor-car bodies. Hanson and his employees, including the plaintiff, had to break up some of the old existing concrete before it could be renewed in order to make bed plates. On July 29, 1947, he was operating a pneumatic pick which was either the property of or hired by his own employer Hanson. He was working it for some weeks before this date. He tells me that he had never worn goggles when he did so. Although he had asked his own employer for them they had not been forthcoming. On this particular date some of the broken concrete flew up and caused this injury to his left eye.

After his injury he was off work for 11 weeks. He then had to wait his turn to undergo an operation. He went back to work for some five months, but in the meanwhile he had drawn from his employer, Hanson, weekly payments which he described himself as being the compensation of workmen in lieu of wages, a slightly longer appellation than the well-known term of workmen's compensation. I am satisfied that the plaintiff had heard about

[1] Unreported (1953) L.J.Newsp. at p. 187.
[2] [1951] 1 All E.R. 387.
[3] [1949] 1 K.B. 585; 65 T.L.R. 163; [1949] 1 All E.R. 532.
[4] [1947] 1 All E.R. 333.
[5] [1953] 1 W.L.R. 1424; [1953] 2 All E.R. 1364.
[6] [1903] 2 K.B. 639; 19 T.L.R. 607.
[7] [1908] 2 K.B. 758.
[8] (1910) 26 T.L.R. 580.
[9] 1916 S.C. 13; 9 B.W.C.C. 418.
[10] 1928 S.L.T. 566; 21 B.W.C.C. 576.

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workmen's compensation. Whether he was aware of his alternative legal rights or not, he did receive weekly payments for which he signed. The receipts in no way indicated that his acceptance of workmen's compensation was without prejudice. He went on working for a time when his compensation ceased. He had four operations and during the time when he was off work he received compensation. Eventually, in 1949, the efforts to save the sight having failed, he had to have the eye removed to save the possibility of the other eye being affected. Once more when he was off work he received workmen's compensation. Shortly after that he consulted a solicitor with a view to obtaining a lump sum settlement of his workmen's compensation and £200 was offered but, because of its inadequacy, it was refused. He then changed his solicitors and the writ in this action was issued. In the meanwhile, he had ceased to accept workmen's compensation.

It is in that state of affairs that he brings this action against the occupiers of the premises where he was working at the time of his injury, not against his employer. His form of action against these occupiers is that, by their negligence or breach of statutory duty, they failed to provide suitable goggles or effective screens to protect his eyes. The statutory provision upon which reliance is placed is section 49 of the Factories Act, 1937.[1] In pursuance of section 49, the Protection of Eyes Regulations, 1938, were made by the Secretary of State. Amongst the processes to which the regulation is to apply is the breaking or dressing of stone, concrete or slag.

Mr. Drabble, for the plaintiff, contends that this was a process of breaking concrete and was a process which was one involving a special risk of injury to the eyes from flying particles or fragments, and, therefore, the occupiers were under a duty to the plaintiff to provide him with goggles. It is admitted that no goggles were provided in the sense that they were available for his use, although the defendants provided goggles for their own employees. The defendants' answer, both to the allegation of breach of statutory duty under section 49 and the allegation of negligence in failing to provide goggles, is that section 49 and common law impose no duty upon the occupiers to provide goggles for the protection of the employees of a contractor who is on their premises to carry out this special operation of breaking up concrete.

Mr. Veale for the defendants has drawn my attention to a large number of other sections in the Factories Act, 1937, throwing light on the meaning of the word "process" and the

[1] Factories Act, 1937, s. 49: "In "the case of any such process as may "be specified by regulations of the "Secretary of State, being a process "which involves a special risk of "injury to the eyes from particles or "fragments thrown off in the course "of the process, suitable goggles or "effective screens shall, in accordance "with any directions given by the "regulations, be provided to protect "the eyes of the persons employed in "the process."

words "persons employed in the process." He has drawn my attention, amongst others, to sections 12, 14 and 26, to mention three of them, and I have come to the conclusion, without going into an elaborate judgment on this point, that Mr. Veale's argument upon section 49 is correct. In my judgment, the processes which are referred to in section 49 are the processes of the occupiers of the factory and the words "persons employed "in the process," refer to employees of the occupier. In the present case, although it is true that it was on the premises of the defendants that these processes were being carried out, in fact they were not their processes and the plaintiff was not their employee. Under those circumstances I have come to the conclusion that Mr. Veale's first point, which really is a complete answer to this action, must prevail.

If I am wrong on that point, and for this purpose I will assume that there was a duty under that section, Mr. Veale goes on to argue that in any event section 139 [2] of the Act is fatal to the plaintiff's claim. Applying that section to this factory, although the defendants are the occupiers of the factory in the ordinary course of events, this being an accident which occurred to a man who was employed in connection with a machine or implement moved by mechanical power which was either the property of or hired by another person, then, for the purposes of that machine and any offence which may arise out of its use, it is the owner or hirer who is deemed to be the occupier and not the ordinary occupier of the factory.

Mr. Drabble contends that that argument is not open to the defendants in this case upon the pleadings by virtue of paragraph 1 of the defence, under which paragraph 1 of the statement of claim is admitted. Paragraph 1 of the statement of claim merely alleges that at all material times the defendants occupied for the purposes of their business as motor body builders and assemblers these premises which constituted a factory for the purposes of the Factories Act, 1937. That was admitted, but I do not think that that precludes the defendants from raising what is a pure point of law the moment the facts are established, and the fact is established that this was a machine or implement moved by mechanical power, and it was either the property of or hired by the plaintiff's employers other than the defendants.

I think that section 139 does apply, because, although in terms it says: "so far as respects any offence under this Act "committed in relation to a person who is employed in or about "or in connection with" the machine, by virtue of section 130, an offence is constituted if there is a contravention of the

[2] Factories Act, 1937, s. 139: "Where in a factory the owner or "hirer of a machine or implement "moved by mechanical power is some "person other than the occupier of "the factory, the owner or hirer shall, "so far as respects any offence under "this Act committed in relation to a "person who is employed in or about "or in connection with that machine "or implement, and is in the employ-"ment or pay of the owner or hirer, "be deemed to be the occupier of the "factory."

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provisions of the Act. Therefore, it is not confined merely to prosecution for an offence as opposed to a contravention of the Act. In my judgment Mr. Veale's second point is also correct and is likewise fatal to the plaintiff's claim.

If I am wrong about that, and if the defendants did owe a duty to the plaintiff and were in breach of it, the plaintiff would be entitled prima facie to damages, but the point has been taken against him that by virtue of section 30 of the Workmen's Compensation Act, 1925, his remedy against the defendants is now barred. Section 30 provides: "Where the injury for which "compensation is payable under this Act, or any scheme certified "under this Act, was caused under circumstances creating a legal "liability in some person other than the employer to pay damages "in respect thereof—(1) The workman may take proceedings "both against that person to recover damages and against any "person liable to pay compensation under this Act or such "scheme for such compensation, but shall not be entitled to "recover both damages and compensation; . . ."

It is to be observed that that section, like the corresponding section of the Act of 1906, differs from section 29, which deals with alternative remedies against the employer both under the Act and independently of it at common law. Under section 29 the workman in terms has an option to elect between two remedies. The words "at his option" are in that section but are absent from section 30. As it seems to me, and I think it is in accordance with authority, the matter to be decided under section 30 of the Act is whether the plaintiff has recovered workmen's compensation. If he has recovered it then his remedy against a third person for damages is barred. For that purpose, unlike the alternative remedies against his own employers under section 29, it seems to me that it is not a matter of inquiry whether the workman knew that he had an option between the two remedies, one under the Act and one at common law. Under section 29 he would not be barred unless he had, not only a knowledge of the nature of what he received, but also knew of his right to opt between two remedies. Under section 30 that is not a requirement and all that it is necessary to ascertain is whether he has in fact recovered compensation.

As has been pointed out in the cases to which my attention has been drawn, recovery of compensation does not necessitate the bringing of proceedings for that purpose. If in fact a man makes a claim and receives payment of compensation, and if he knows the nature of that compensation and receives it as such, then that is sufficient to constitute recovery of workmen's compensation under the Act.

In the present case I am satisfied that the plaintiff, although he may not have been aware of the fact that he might have had a remedy against some other party in 1947, nevertheless was fully aware of the nature of the compensation that he was receiving and signing for. I have come to the conclusion that, as a matter

of fact, the plaintiff did receive workmen's compensation under the Act and, that being so, section 30 of that Act bars his remedy against the third person on whose premises he was injured. On each of those grounds, therefore, the plaintiff's claim fails and there must be judgment for the defendants.

Judgment for the defendants.

Solicitors: *Ward, Bracewell & Co., Doncaster; Gardiner & Co.*

[PRIVY COUNCIL.]

J. C.†
1954
May 11.

* GIORGIO BORG OLIVIER AND OTHERS . . APPELLANTS;

AND

JOHN COLEIRO . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

Malta — Limitation of action — Action, brought within time, raising invalidity of statute—Subsequent ad hoc action to test validity—Second action instituted out of time—Both actions forming one set of legal proceedings—Second action not time-barred—Customs Duty (Appropriation) Act, No. XIV of 1950 — *Malta (Constitution) Letters Patent,* 1947, *s.* 39.

Limitation of action.

On May 25, 1950, the Governor of Malta issued a proclamation that the Minister of Finance had given notice of a Bill to increase the import duty on wine. Thereupon and pursuant to the Revenue (Safeguard) Act, 1928, of Malta, the Collector of Customs immediately began to levy the increased duty. The Revenue (Safeguard) Act provided that if such a Bill was not passed into law within four months of the first sitting of the Legislative Assembly after notice of the Bill had been so given any sums collected and held on deposit should be refunded to the depositor. The respondent, an importer of wine, following on the proclamation paid the increased duties to an amount of £15,201 for a period from May 25 to September 24, 1950. The requisite four months having elapsed without the Bill being passed into law, the respondent accordingly issued a writ on October 14, 1950, against the appropriate officials representing the Government of Malta claiming repayment of the £15,201 with interest.

Two days later, on October 18, 1950, the Customs Duty (Appropriation) Act, 1950, was passed, appropriating to the Government all customs duties levied between May 25 and September 24, 1950, and enacting that that provision should have effect notwithstanding any claim or judicial proceedings made or begun before the commencement of that Act. Accordingly, the defendants to the plaintiff's action took the plea, inter alia, that the action was

†*Present*: LORD PORTER, LORD OAKSEY, LORD KEITH OF AVONHOLM.

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barred by the Act of 1950, and in reply to that plea the respondent alleged that the Act of 1950 was invalid and sought leave to institute an action ad hoc in order to obtain a declaration of the nullity of that Act, and on October 5, 1951, it was ordered that the further hearing of the respondent's action should be suspended sine die and the respondent be allowed a period of one month within which to institute the action of impugnment. On October 31, 1951, within the month allowed, the respondent began the second action by a writ of summons by which he sought, inter alia, a declaration that the Act of 1950 was null and of no effect. That second action was also brought against persons representing the Government of Malta, who took the plea that the demand for a declaration of nullity of the Act of 1950, which had been in force for one year on October 16, 1951, which was about two weeks before the respondent's second action was begun, was time-barred under section 39 of the Malta (Constitution) Letters Patent, 1947 (under which the Act of 1950 was passed), which provided: "The validity "of any law made under section 22 of these Letters Patent . . . "shall not be questioned in any legal proceedings commenced after "the expiration of one year from the date on which the law comes "into operation . . .":—

Held, that the issue of the validity of the Act of 1950 had been clearly raised by the respondent in the first action and its validity questioned within the meaning of section 39 of the Letters Patent, and it continued to be a live issue in that action until determined by the machinery of the second action. It was intended under the procedure adopted by the courts of Malta that that issue should be determined in the second action, and the first and second actions in that matter were so closely connected as to form one set of legal proceedings. The validity of the Act of 1950 was therefore questioned in legal proceedings commenced before the expiration of one year from the date of the Act coming into force, and the respondent was not barred from seeking his declaration of nullity by section 39 of the Letters Patent.

Judgment of the Court of Appeal of Malta affirmed.

APPEAL (No. 25 of 1953) by the Government of Malta against a judgment of the Court of Appeal Malta (February 6, 1953) by which it was held (reversing a judgment of the First Hall of the Civil Court of Malta (October 25, 1952)) that the respondent, John Coleiro, on behalf of the firm of Coleiro Brothers Ld., was not barred from prosecuting an action to have it declared that a certain statute of the Maltese legislature was null and of no effect.

The following facts are taken from the judgment of the Judicial Committee: The present action was a sequel to an action initiated on October 14, 1950, by the present respondent (hereinafter referred to for the purposes of both actions as the plaintiff). The first action arose in the following circumstances. On May 25, 1950, the Governor of Malta issued a proclamation that the Minister of Finance had given notice of a Bill to increase the import duty on wine. Under a local statute known as the Revenue (Safeguard) Act, the Collector of Customs immediately began to levy the increased duty. The Revenue (Safeguard) Act provided that if such a Bill was not passed into law within four

months of the first sitting of the Legislative Assembly after notice of the Bill had been so given any sums collected and held on deposit should be refunded to the depositor with interest at 3 per cent. The plaintiff, who was an importer of wine, following on the proclamation paid the increased duties to an amount of £15,201 to the Collector of Customs for a period from May 25 to September 24, 1950. Four months elapsed from the first sitting of the Legislative Assembly after the notice of increase of duty was given without the Bill being passed into law. Accordingly, the plaintiff filed a writ of summons which was issued on October 14, 1950, against the Collector of Customs, the Minister of Commerce, the Minister of Finance and the Treasurer to the Government of Malta, all as representing the Government, claiming repayment of the sum of £15,201 with interest.

Two days after that action began, on October 18, 1950, the Legislative Assembly passed an Act, No. XIV of 1950, the Customs Duty (Appropriation) Act, 1950, appropriating to the Government all customs duties levied between May 25 and September 24, 1950, and enacting that that provision should have effect notwithstanding any claim or judicial proceedings made or begun prior to the commencement of the Act. Accordingly, the defendants to the action, in their statement of defence and declaration filed on November 7, 1950, took the plea, inter alia, that the action was barred by Act No. XIV of 1950. To that the plaintiff replied that the Act was invalid and sought leave to institute an action ad hoc in order to obtain a declaration of the nullity of that law. The defendants submitted that the question should be determined in the then action. On October 5, 1951, Colombo J., considering "that although this issue may also be "argued and determined in these proceedings, nevertheless, "having regard to its delicate nature, it seems that it would be "better if the same be dealt with on a separate action and on its "own merits and not as a counter-plea to the plea of the "defendants," ordered that further hearing in the cause be suspended and allowed the plaintiff a period of one month "with-"in which, if he so thinks, he may institute before the competent "court the action of impugnment mentioned by him" and adjourned the cause sine die.

On October 31, 1951, that was within the month allowed by Colombo J., the second action was begun on a writ of summons filed by the plaintiff by which he sought, inter alia, that it be declared and adjudged that Act No. XIV of 1950 was, for various reasons specified, null and of no effect. That action was brought against the Prime Minister of Malta representing the Government of Malta, and for any interest they might have the Collector of Customs and the Treasurer to the Government of Malta. For reasons depending no doubt upon the different reliefs sought in the respective actions the personality of the defendants differed to some extent in the two actions, but that was of no materiality as they could all be taken as representing in one capacity or

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another the Government of Malta and were indeed so called as defendants. In their statement of defence, filed on November 24, 1951, the defendants took a plea that the demand for a declaration of the nullity of Act No. XIV of 1950 was barred under section 39 of the Malta (Constitution) Letters Patent, 1947.

Act No. XIV of 1950 was passed under those Letters Patent, and the relevant portion of section 39 of the Letters Patent ran as follows: "The validity of any law made under section 22 of these "Letters Patent or of any provision of such law shall not be "questioned in any legal proceedings commenced after the expira-"tion of one year from the date on which the law comes into operation. . . ." Act No. XIV of 1950 had been in force for one year on October 16, 1951. The second action by the plaintiff was not started till October 31, 1951. The sole question in this appeal was whether he was barred from obtaining his declaration of nullity by section 39 of the Letters Patent.

The First Hall of the Civil Court (Magri J.) had held that the respondent's claim in the second action was barred by section 39 of the Letters Patent. On appeal, that decision was reversed by the Court of Appeal of Malta (Camilleri C.J., Montanaro Gauci and Harding JJ.).

The Government of Malta appealed.

1954. March 15, 16, 17; April 12. *C. T. Le Quesne Q.C.* and *J. G. Le Quesne* for the appellants.

T. G. Roche for the respondent.

The following cases were cited in argument: *Cilia* v. *Cuschieri*[1] and *In re Vexatious Actions Act, 1896, In re Boaler.*[2]

May 11. The judgment of their Lordships was delivered by Lord Keith of Avonholm, who stated the facts set out above, and continued: Magri J., before whom the second action first came, found that the plaintiff was barred. On the only point which was argued before their Lordships, he held that the first action could not be considered as one and the same thing with the second action because (1) the subject-matter of the two actions was different; (2) although in the first action the plaintiff intimated his intention of impugning Act No. XIV of 1950, he did not in fact do so in that action; (3) when he impugned it in the second action the legal time available for the purpose had already expired.

This judgment was reversed by the Court of Appeal in Malta, who held that the claim for a declaration of nullity was not barred and referred back the record to the first court for the hearing of this claim on its merits. They held that the issue of the validity of the Act of 1950 had been clearly raised by the plaintiff in the first action and its validity "questioned" within the

[1] (1948) 33 Malta L.R., P. 1, p. 356.

[2] [1915] 1 K.B. 21, 37; 30 T.L.R. 580.

meaning of section 39 of the Letters Patent. In their Lordships' opinion the Court of Appeal were fully warranted in arriving at this conclusion. Their Lordships find it unnecessary to examine the reasons given in detail. It is the view their Lordships would have reached on the material before them. The Court of Appeal further held that though the issue was raised in the other action it was being decided in this action as a matter of form for the reasons given by Colombo J. and already in part quoted by their Lordships. "As a consequence," they say, "the present cause "and the other one are so strictly connected that the other cause "is to remain in suspense until the present cause is disposed of "and until a solution is given to the point raised in that first "cause. In other words, the present cause is the *form* whereby "the point already raised in the former cause is brought for "judicial decision."

Their Lordships see no reason for interfering with this conclusion. The question appears to them to be largely one of domestic procedure in the courts of Malta with which their Lordships would be slow to interfere. If forms of process do not prohibit it, their Lordships see no reason why the second action should not be treated as ancillary to the first action in which the issue of validity has been raised and continues as a live issue until determined by the machinery of the second action. It was strenuously contended that there were two writs; that there could be no interconnexion between the two writs; and that, as the second writ was out of time, the issue of validity could not be determined in the action initiated by that writ. But the Letters Patent do not refer to a challenge of validity by the issue of a writ of summons. The words are "shall not be questioned in "any legal proceedings commenced after the expiration of one "year," etc. Though the first action was raised for recovery of a sum of money, when the defendants pleaded in defence Act No. XIV of 1950, the plaintiff contested the validity of that Act. The validity of the law was thus made an issue in the first action and it was intended, under the procedure adopted by the courts of Malta, that this issue should be determined in the second action. Their Lordships see no difficulty in holding that the two actions in this matter are so closely connected as to form one set of legal proceedings. The challenge of validity has been continuous since it was raised in the first action and accordingly, in their Lordships' opinion, the validity of the law in question was questioned in legal proceedings commenced before the expiration of one year from the date of the law coming into force.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed and the judgment of the Court of Appeal be affirmed. The appellants must pay the costs of the appeal.

Solicitors: *Burchells; Thomas Cooper & Co.*

C. C.

[QUEEN'S BENCH DIVISION.]

1954
May 7.

Lord Goddard C.J., Hilbery and Donovan JJ.

* BRITISH TRANSPORT COMMISSION *v.* WORCESTERSHIRE COUNTY COUNCIL.

Justices—Case stated—Case stated by consent—Application for declaration under National Parks and Access to the Countryside Act, 1949 *— Original jurisdiction of quarter sessions to make declaration — Jurisdiction in High Court to hear application on case stated — Quarter Sessions Act,* 1849 (12 *&* 13 *Vict. c.* 45), *s.* 11—*National Parks and Access to the Countryside Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 97), *s.* 31.

Highway—Easement—Right of way. Easement.

The application for a declaration which may be made to quarter sessions under section 31 of the National Parks and Access to the Countryside Act, 1949, by a land owner whose interests are affected by rights of way shown on a provisional map published in accordance with the provisions of the Act, is not by way of appeal, since the power to make declarations conferred on quarter sessions by section 31 is a new and original jurisdiction; and, therefore, the High Court has no jurisdiction to hear such an application on a case stated by consent under section 11 of the Quarter Sessions Act, 1849 (which section is concerned only with appeals).

Semble, that after the application has been heard and determined by quarter sessions, quarter sessions may state a case on a point of law for the opinion of the court.

CASE STATED by consent by order of Pearce J.

The respondents, the Worcestershire County Council, published, in accordance with section 30 (1) of the National Parks and Access to the Countryside Act, 1949, a provisional map and statement showing the public footpaths and bridle ways in their district. The applicants, the British Transport Commission, whose interests were affected by a certain public right shown on the provisional map, desired to apply for a declaration under section 31 [1] of the Act. The case in question was typical of a

[1] National Parks and Access to the Countryside Act, 1949, s. 31: "(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration. . . . (2) Provision may be made by or under regulations made by the Secretary of State (*a*) for prescribing the court of quarter sessions to which applications under this section are to be made or for requiring such applications to be made to a committee, being either an existing committee or a committee specially constituted for the purpose as may be prescribed by the regulations, of such court or quarter sessions as may be so prescribed; (*b*) for the form and manner in which such applications are to be made, and the persons who are to be entitled to be parties to the hearing of any such application; (*c*) as to the publication or service of notice of proposals to make such applications; (*d*) for the awarding of costs in any proceedings under this section."

Quarter Sessions Act, 1849, s. 11: "At any time after notice given of appeal to any court of quarter sessions against any judgment, order, rate, or other matter, . . . for which

number of cases arising under the Act affecting the interests of the applicants, and both parties desired to obtain the opinion of High Court and were anxious to save time and expense. Accordingly, instead of an application being made to quarter sessions, the parties having given notice of application to quarter sessions, purported to state a case by consent for the opinion of the court under section 11 of the Quarter Sessions Act, 1849. The preliminary point was taken as to whether section 11 of the Quarter Sessions Act, 1849, gave the court jurisdiction to hear the case.

Sir Frank Soskice Q.C. and *M. A. King-Hamilton Q.C.* for the applicants.

J. P. Widgery for the defendants.

No cases were referred to in argument.

Lord Goddard C.J. The British Transport Commission and the Worcestershire County Council have purported to state a case by consent for the opinion of this court under section 11 of the Quarter Sessions Act, 1849.

The matter arises in this way: The National Parks and Access to the Countryside Act, 1949, lays down a fairly elaborate procedure which obliges county councils to prepare and publish maps showing public rights of way, footpaths and bridle paths within their district. I gather that once that provisional map becomes effective in the sense that no further objection to it or application to the court can be made, it is conclusive as to the existence of public rights of way within the county. The scheme of the Act is that county councils must prepare a draft map, and to do so they may get documents such as ancient terriers and ancient maps, conveyances and so forth, which they must disclose to the landowner whose land is likely to be affected. When the draft map has been prepared it must be made available, and there are certain matters on which the landowners and other people can appeal to the Minister. For instance, on an objection being made to a right of way shown on the draft map there can be an appeal to the Minister. When all the appeals or objections to the draft map have been disposed of, the county council must publish what is called a provisional map. That is the important map from the landowner's point of view because, if a right of way is shown over his land and he does not get a declaration in

"the remedy is by such appeal, it "shall be lawful for the parties, "by consent, and by order of any "judge of one of the superior courts "of common law at Westminster, to "state the facts of the case in the "form of a special case for the "opinion of such superior court, and "to agree that a judgment in con-"formity with the decision of such "court, and for such costs as such "court shall adjudge, may be "entered on motion by either party "at the sessions next or next but "one after such decision shall have "been given."

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his favour that it does not exist, the right of way will exist for all time.

[His Lordship read section 31, and continued:] I cannot think of anything more emphatic than subsection (2) of that section to show that the application for a declaration is not an appeal to quarter sessions. It is an original jurisdiction and one which quarter sessions never had before. The nearest approach to it is the jurisdiction under which quarter sessions can act in matters relating to the closing of highways under the Highways Acts, but this is a new jurisdiction which is conferred on quarter sessions, empowering them to make declarations. Quarter sessions make orders on appeal, as a rule in civil matters, from a magistrates' court, but I think I am right in saying that there was no such thing as quarter sessions making a declaration until this Act.

The Quarter Sessions Act, 1849 (Baines's Act), was passed to amend the procedure at quarter sessions generally. At the time when that Act was passed the administrative local government work of quarter sessions was very great because, until the Local Government Act, 1888, the justices of the country conducted the whole of the county business other than that done by guardians and overseers of the poor.

[His Lordship read section 11 of the Act of 1849, and continued:] The common form in appeals, whether they were rating appeals or appeals against such things as orders of removal, orders adjudging a settlement and matters of that sort, was to go to quarter sessions; and very often the facts were largely agreed, or quarter sessions found the facts, and used to give their judgment subject to a case, which would come before the Queen's Bench to be argued. Section 11 is an endeavour, I think, to leave out one particular hearing, the hearing before quarter sessions, of the appeal. But it is clear that the section only deals with appeals, and the administrative tribunals which are now so frequent were not known in the days when the Act was passed. It is equally clear, to my mind, that the proceeding under section 31 of the National Parks and Access to the Countryside Act, 1949, is not an appeal; it is an original jurisdiction. Quarter sessions have the power, I think, although I am not expressing a concluded opinion about it, if the matter comes before them as a matter of their original jurisdiction, to state a case on a point of law for the opinion of this court, but that is by virtue of the terms of the commission which gives justices the power to consult the judges. As soon as the present matter is put before quarter sessions, they may agree—it will be entirely a matter for them—to state a case, and it may be in this form, but that must be the act of the sessions; I am satisfied that the jurisdiction given by section 31 to quarter sessions is an original jurisdiction. Section 11 cannot apply and we have no jurisdiction to hear this case.

Hilbery J. I, too, am of the opinion that we have no jurisdiction to hear this application. The Act of 1949 makes it plain that the jurisdiction given to quarter sessions is an original jurisdiction and is recognized as being such. That Act imposes a duty on the council of every county in England and Wales to make in consultation with the councils of county districts and parishes in their area, a survey in the county and prepare a draft map showing what they found to be footpaths, bridleways or rights of ways. That draft map and a statement has to be published and objection can be made to it, and on the objections being made the surveying authority can determine or modify the particulars contained in the map and statement either by the deletion of a public path or by the addition of a right of way. If an objection as to that deletion or addition is duly made to the authority, the authority is empowered to appoint a person to hear the objection, to hear both parties, and to decide whether to maintain or revoke the determination which has been made, and notice of that decision has to be served on the person to whom the representation or objection has been made. If that person is still aggrieved by that decision, the Act expressly gives him a right of appeal to the Minister. The Minister having determined the objection in accordance with the provisions in the Act, the county authority is then required to publish a provisional map. When the provisional map is published, unless objection is made to it, it becomes the final and conclusive evidence of the existence of the public right of way. But on the publication of the provisional map, if a person still objects to what it contains, probably as affecting his land or his rights, he has a specific right to make an application to quarter sessions to have certain declarations made. Section 31 (3) of the Act expressly uses the words "application "for a declaration." It does not anywhere use the word "appeal," though it is noticeable from what I have already said that where there has been a hearing and determination by a person appointed by the county council, the word "appeal" is used, and it is an appeal to the Minister. Section 31 does not give a right of appeal to quarter sessions, but it empowers the party to apply to quarter sessions for a declaration. Undoubtedly quarter sessions will have to determine the matter, and it may well be that then, as my Lord has pointed out, they may be asked to state a case and the matter can come before this court.

[His Lordship referred to section 31 (2), and continued:] It appears to me to be plain that this was intended to be an original jurisdiction conferred upon quarter sessions and that section 11 of Baines's Act, therefore, has no application.

Donovan J. I agree that the application to quarter sessions under section 31 (1) of the Act of 1949 cannot properly be called an appeal within the meaning of section 11 of Baines's Act. The application to quarter sessions is for the purpose, among

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other things, of a declaration that no public right of way existed: see section 31 (1) (*a*). It is not an appeal against any judgment or order or anything ejusdem generis. The language of section 31 (5) of the Act of 1949 should be contrasted with section 29 (5) of that Act, where a right of appeal is expressly given against "a determination of the surveying authority."

It is urged, in effect, that in substance the proceedings are just the same in their nature as if they were called an appeal. They are an objection to what someone lower down in this administration hierarchy has decided. That may be so, but it is not enough. The Act of 1949 draws the distinction between proceedings by a person aggrieved by an order or determination and a person who simply thinks that a map is wrong. It calls the first an appeal, the second an application for a declaration, a distinction which recognizes the legal difference between the two.

The Public Rights of Way (Applications to Quarter Sessions) Regulations, 1952, para. 6, provides: "The provisions of section 5 "of the Quarter Sessions Act, 1949 (which relates to the costs of "appeals to quarter sessions), shall apply to any such application "as aforesaid as if the application were an appeal to which that "section applied." Clearly, if this were an appeal paragraph 6 would be unnecessary. For these reasons, I agree that we have no jurisdiction to entertain this special case.

No order.

Solicitors: *M. H. B. Gilmour; Sharpe, Pritchard & Co. for W. R. Scurfield, Worcester.*

J. F. L.

[PROBATE, ETC., DIVISION.]

1954

May 4.

* PRACTICE DIRECTION (PROBATE GRANTS).

Probate—Probate registry—Administration—Leave to swear death—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 162.

The President has authorized the registrars of the Principal Probate Registry to make orders for grants under section 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, or for leave to swear death, in estates not exceeding £3,000 gross value.

The previous limits, as notified in the practice notes of February 6, 1951,[1] and November 6, 1942, were £2,000 in the first case and £1,000 in the second.

J. B. G.

[1] [1951] W.N. 141.

[COURT OF APPEAL.]

* DAVIES v. HALL.

C. A.

1954
Apr. 30;
May 3.

Somervell, Birkett and Romer L.JJ.

[Plaint J. 1968.]

Settled Land—Tenant for life—Powers—Grant of weekly tenancy—Whether letting was at the "best rent"—Onus of proof—No provision for re-entry on non-payment of rent—Pleadings—"Best rent" point not pleaded—Settled Land Act, 1925 (15 *Geo.* 5, *c.* 18), *ss.* 42 (5), 110.

County Court—Practice—Pleadings.

A tenant for life granted to the defendant a weekly tenancy of a dwelling-house for a term not exceeding three years. On the death of the tenant for life the plaintiff, an executor of the tenant for life's husband and a trustee of the settlement, claimed possession of the dwelling-house on the ground that a vesting assent had never been executed in favour of the tenant for life and she had granted the tenancy without the trustees' knowledge or consent. The defendant claimed the protection of the Rent Acts.

The county court judge, while holding that the letting by the tenant for life was within her powers under the Settled Land Act, 1925, felt himself bound by a statement in the judgment of Farwell J. in *Kisch* v. *Hawes Bros. Ld.* [1935] Ch. 102, 109, 110, that the onus of proving that the letting was at the "best rent" obtainable (section 42 of the Act) was on the defendant. The defendant, he held, had failed to discharge that burden and the plaintiff was entitled to possession.

That point had not been pleaded by the plaintiff, and had not been raised until after all the evidence had been called. On appeal:—

Held, that the point, not having been pleaded, and the defendant having had no opportunity of dealing with it, could not be raised by the plaintiff on appeal, and the appeal must be allowed.

Per Somervell L.J. I do not accept the suggestion that without such a point being raised on the pleadings a defendant must come into court with all the necessary evidence to show that all the conditions of the Settled Land Act, 1925, have been fulfilled.

Dictum of Farwell J. in *Kisch* v. *Hawes Bros. Ld.* considered.

Per Somervell and Romer L.JJ. The county court judge put a rather too wide interpretation on that dictum.

Per Romer L.J. I should be inclined to take the view that section 42 (5) of the Act of 1925 is a comprehensive code in relation to leases for less than three years.

APPEAL from Judge Bensley Wells, sitting at Marylebone County Court.

By virtue of section 19 (1) of the Settled Land Act, 1925, Mrs. Frances Eliza Oliver, on the death of her husband, Thomas Oliver, became tenant for life of a dwelling-house under a settlement within the meaning of the Act. A vesting assent was admittedly never executed in favour of Mrs. Oliver, but the defendant claimed that she had granted him a weekly tenancy of the dwelling-house for a term not exceeding three years. On the death of Mrs. Oliver the plaintiff, Walter Everett Davies, as an

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executor of Thomas Oliver and a trustee of the settlement, claimed possession of the premises. The defendant claimed the protection of the Rent Acts.

The plaintiff, by his pleadings, relied on the fact that a vesting assent had never been executed in favour of Mrs. Oliver, and alleged that she had let the premises to the defendant without the knowledge or consent of the executors and trustees.

The county court judge said that he was satisfied by the correspondence and other evidence that the letting by Mrs. Oliver to the defendant was within her powers as tenant for life under the Settled Land Act, 1925, except in one respect, namely, that there was no evidence that the rent obtained from the defendant was the "best rent" within section 42.[1] He had, he said, no reason to think that the rent obtained was not a perfectly fair and adequate rent, but in the absence of any evidence with regard to the matter he felt unable to say that the best rent was obtained. He therefore gave judgment for the plaintiff.

The point on which the judge based his judgment had not been pleaded and was not raised until the evidence had been concluded.

The defendant appealed.

Ian C. Duthie for the defendant.
Michael Fox for the plaintiff.

SOMERVELL L.J. The plaintiff, who is executor and trustee of Thomas Oliver, deceased, sues for possession. It is common ground between the parties that there was a settlement within the meaning of the Settled Land Act, 1925, and that a Mrs. Oliver, now deceased, became tenant for life by virtue of section 19 (1) of that Act when her husband died. It is also common ground that there was no vesting assent, but the defendant claims, and is prima facie entitled to claim, under an agreement for a weekly tenancy granted by Mrs. Oliver. On the pleadings reliance was placed on the fact that a vesting assent had never been executed in favour of the life tenant, Mrs. Oliver. It is also alleged that

[1] Settled Land Act, 1925, s. 42: "(1) Save as hereinafter provided, every lease—(i) shall be by deed, and be made to take effect in possession not later than twelve months after its date, or in reversion after an existing lease having not more than seven years to run at the date of the new lease; (ii) shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case; (iii) shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days. . . . (5) A lease at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made—(i) Where the term does not exceed twenty-one years—(*a*) without any notice of an intention to make the lease having been given under this Act; and (*b*) notwithstanding that there are no trustees of the settlement; and (ii) Where the term does not extend beyond three years from the rate of the writing, by any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent."

"At dates unknown to the plaintiff and without his or his co-"trustee's consent the said Frances Eliza Oliver purported to let "a part, and later the whole, of the said dwelling-house to the "defendant, who went into possession of the same." The defendant seeks to rely on the Rent Acts, but it is said that the matters set out in the particulars of claim preclude him from doing so.

The points raised on the pleadings failed before the county court judge and were not pursued before us, but, according to the note, after the evidence had been called the point relied on before us was taken, which was: "Was there a disposition which was "authorized by the Act. If it was not a disposition which was "'authorized' it was not a 'purported disposition' within the "meaning of section 13," and then this is the point, "Submit "there is no evidence that the letting was at the 'best rent.' "Onus of proof is on defendant. See *per* Farwell J. in *Kisch* v. "*Hawes Bros. Ld.*[1]" It is common ground that there was no indication of this point in the pleadings and no question was put with regard to the rent to the defendant, who gave evidence.

The provision with regard to "best rent" is contained in the first instance in section 42 of the Settled Land Act, 1925. [His Lordship read the section, and continued:] The judge held that he was bound by a statement in the judgment of Farwell J. in *Kisch* v. *Hawes Bros. Ld.*,[1] to hold that the onus of proof was on the defendant in the circumstances of the present case and that, as the defendant had called no evidence, he must proceed on the basis that the rent was not the best rent. I have come to the conclusion in the first place that this point is not and was not open to the plaintiff, not having been pleaded. It seems to me plain that a matter of this sort must be raised by the party who seeks to raise it, because it is a question on which evidence would have to be called. I do not accept, wherever the onus may be, the suggestion that without such a point being raised on the pleadings, a defendant must come into court with all the necessary evidence to show that all the conditions in the Act have been fulfilled, although it may turn out that no challenge is being made by anybody. That would be to defeat the very object which Parliament had in mind.

That would be enough to dispose of the case but, as the judge based his decision—he would clearly otherwise have decided in favour of the defendant—on this statement in Farwell J.'s judgment, I would like to say a word about it though there are some points raised in it which it is unnecessary to consider or to express any opinion upon. The headnote to that case reads: "A tenant for life by deed granted a lease of certain premises to "the defendants to take effect more than twelve months after "its date. The grantor died, and her successor sued for posses-"sion of the premises. The defendants pleaded possession

[1] [1935] Ch. 102, 109, 110.

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"under Ord. 21, r. 21, but were allowed to amend their "defence so as to rely on the lease granted to them by the "plaintiff's predecessor and claim protection under section 152 (1) "of the Law of Property Act, 1925:—*Held*, that the plea of "possession denied plaintiff's title, and therefore that was a "forfeiture which entitled her to re-enter. *Held*, further, that "assuming there had been no forfeiture, it was for the defendants "to show that the lease granted to them was valid and within "the power of the then tenant for life to grant. This they had "failed to do, and the plaintiff was therefore entitled to the "relief claimed."

On the question of "best rent," section 110 of the Settled Land Act, 1925, provides: "On a sale . . . or other disposition, "a purchaser dealing in good faith with a tenant for life or "statutory owner shall, as against all parties entitled under the "settlement, be conclusively taken to have given the best price, "consideration, or rent, as the case may require, that could "reasonably be obtained by the tenant for life or statutory owner, "and to have complied with all the requisitions of this Act." From the argument as set out in the report it is quite plain that this point as to the best rent was taken with the other points. First, having said that the lease was, on the face of it, in contravention of the Act, it was then said in the argument of counsel "the defendants say the lease takes effect in equity, and it is "for them to show that the rent reserved was the best rent." The judge interposed: "The lease of 1919 was a lease which . . . "is, on the fact of it an invalid lease: the burden of proof is "therefore on the defendants." Then Mr. Nesbitt , for the defendants, relied on section 54 of the Settled Land Act, 1882, which was the predecessor of section 110 of the present Act.

Farwell J., having decided the case on the grounds set out in the headnote, went on to consider whether the other defects alleged were covered by section 152 of the Law of Property Act, 1925. After dealing with that he said: "Even assuming that, "the section, in my judgment, does not assist the defendants, "and for this reason. It is essential, in my judgment, for the "defendants to prove that apart from the fact that the lease is to "take effect more than twelve months after its date it is otherwise such a lease as Mrs. Ramus could properly have granted "on December 25, 1919, and in this respect section 54 of the "Settled Land Act, 1882, does not assist them."

I quite agree, substituting section 110 of the Act of 1925 for section 54, that if a party cannot get himself within the Act, section 110 does not prima facie apply to the transaction. I think the passage in Farwell J.'s judgment is difficult to follow and it may be that the various facts and admissions in argument, so far as this particular point was concerned, are not apparent, either in the judgment or in the argument of counsel as reported. All I wish to say is that I think it would be wrong to treat that sentence in Farwell J.'s judgment as of any general application.

The facts, I think, must have been very special to put the onus on the defendant. Prima facie, if one had to consider the question under the Act, section 110 could properly be relied on; and in any event prima facie it would be for the party who is attacking a disposition on this type of ground to produce at any rate a prima facie case to show that the disposition was defective. It is right to say that, because I think that the county court judge regarded this decision as laying down some general principle with regard to the onus of proof in this class of case which, I am quite certain, Farwell J. did not intend to do. For these reasons I would allow the appeal.

BIRKETT L.J. I am of the same opinion. I do not wish to add anything to what my Lord has said about the judgment of Farwell J. in *Kisch* v. *Hawes Bros. Ld.*[2] It seems to me that the present case can be decided upon the one point on which the county court judge decided it. In his judgment he said: "I am "satisfied by the correspondence and other evidence put before "me that the letting by Mrs. Oliver to the defendant was within "her powers as tenant for life under the Settled Land Act, 1925 "(sections 41 and 42), except in one respect, viz., there is "no evidence that the rent obtained from the defendant was "the 'best rent.' I have no reason to think that the rent "obtained was not a perfectly fair and adequate rent, but there "is no evidence at all before me with regard to the matter and "in the circumstances I feel unable to say that I am satisfied "that the 'best rent' was obtained." He then says: "For "this reason, and for this reason only, I have come to the "conclusion that my judgment must be for the plaintiff."

It would appear to be plain also from the notes of the evidence before us, and, indeed, from the pleadings, that this particular point was not pleaded. It seems a singular thing that a county court judge should decide a case upon one point when that point was not pleaded. Furthermore, from an examination of the note of the evidence, while "best rent" was certainly referred to by counsel in connexion with section 110, it is clear that no evidence was tendered about it and, most important of all, the final submission about "best rent" was made for the first time when all the evidence was concluded. It is obvious that had people been forewarned "this is the crucial point of the case," they could have come armed and prepared to deal with it; but in the absence of pleadings and having regard to the way the matter was raised, they clearly had no opportunity of doing that. I, therefore, would content myself with the first matter which my Lord dealt with, that this matter not having been pleaded it was not open. I agree, therefore, with the judgment which my Lord has delivered.

[2] [1935] Ch. 102.

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Romer L.J. I also agree. I have nothing to add on the question of the deficiency in the pleadings which plainly, as I think, disabled the plaintiff from seeking to impeach the letting which was granted by Mrs. Oliver, the life tenant, on the ground that it failed to reserve the best rent. Such a matter as that is clearly one of evidence and must be put in issue if anybody who is concerned to challenge the validity of a lease desires to attack it on that ground.

This morning, Mr. Fox for the plaintiff, suggested that the agreement to grant a tenancy by Mrs. Oliver was invalid on the face of it because it did not contain any provision for re-entry on failure of the tenant to pay the rent reserved. He relied on the terms of section 42 of the Settled Land Act, 1925, which prescribes the conditions on which a tenant may grant leases of the settled estate. Section 42 (5) is the provision which applies to the present case because the tenancy which Mrs. Oliver granted was a weekly tenancy and, therefore, was for a term not extending beyond three years.

Mr. Fox says that, notwithstanding those provisions the requirements which appear in paragraph (i) of section 42 (5) nevertheless must be observed, even in regard to tenancies for less than three years. One of them is that prescribed by section 42 (iii), that the lease "shall contain a covenant by the "lessee for payment of the rent, and a condition of re-entry "on the rent not being paid within a time therein specified not "exceeding thirty days." He says that the tenancy granted by Mrs. Oliver did not contain any provision for re-entry on non-payment of the rent and, therefore, is invalid on the face of it. The matter has not been very fully argued and no authorities have been brought to our attention on the point, but I should be inclined to take the view myself that section 42 (5) is a comprehensive code in relation to leases for less than three years, with the result that the requirement as to re-entry in regard to longer leases is not introduced into those short leases. Indeed, in regard to weekly tenancies, it would not be apt to have such a provision for re-entry, because the tenancy may be determined at any time on non-payment of rent at a week's notice. Be that as it may, for my part I can see no reason why, if in fact the agreement was open to criticism in that respect, the defect, if any, was not cured by section 152 of the Law of Property Act, 1925. I do not think, therefore, there is anything in that point.

I will add only one word regarding *Kisch* v. *Hawes Bros. Ld.*[3] Section 110 of the Settled Land Act, 1925, which was formerly section 54 of the Settled Land Act, 1882, applies only in favour of a lessee who deals in good faith with a tenant for life who has let the settled estate. In *Kisch's* case Farwell J. held that that section did not apply in favour of the tenant because the lease, on the face of it, was outside the powers of the tenant for life

[3] [1935] Ch. 102.

to grant. I think Farwell J. was accepting the argument of Mr. Morton, where he said[4]: "Under the Settled Land Acts "the tenant for life is a trustee and section 54 of the Settled "Land Act, 1882, does not assist the lessee where the lease on "the face of it is in contravention of the Act." It would follow from that that it would be of no avail to the tenant to cure the particular defect in that case, which arose from the fact that the lease was to take effect in possession more than twelve months after its date, if the lease was one which was invalid by reason of the best rent not having been received; because, although section 152 of the Law of Property Act, 1925, might cure the particular defect to which I have referred, there would still remain the question of whether it was a proper lease in the matter of rent.

If it was challenged, as it was challenged, then the tenant could not rely on section 110 of the Settled Land Act, 1925, because, as I have already said, it could not be said of him that he was a person acting in good faith, because on the face of it the lease was an improper one. Therefore, if the rent was challenged on the ground of insufficiency, he would have to prove, as a matter of fact, that the rent was a proper rent for the life tenant to receive. I do not think Farwell J. was going any further than that. Certainly I do not think that he was suggesting as a general proposition that where an attack is made on a lease which has been granted by a tenant for life for reasons other than insufficiency of rent, then the lessee cannot rely on section 110. In my opinion, he could, provided that he had acted in good faith. I think the county court judge put a rather wider interpretation on what Farwell J. said than the judge intended them to bear. I agree that this appeal must be allowed.

Appeal allowed.

Solicitors: *P R. Kimber; Ellis, Peirs & Co.*

A. W. G.

[4] Ibid. 105.

[COURT OF APPEAL.]

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Feb. 18, 19, 22, 23, 24, 25, 26; *Mar.* 29.

Somervell, Birkett and Romer L.JJ.

*TOOL METAL MANUFACTURING CO. LD. *v.* TUNGSTEN ELECTRIC CO. LD.

Contract — Notice to determine — Nature of notice — Patent — Licence subject to compensation for exceeding quota—Agreement to suspend payments of compensation—Counterclaim seeking to enforce payments not sufficient notice.

Patent.

The plaintiffs, the registered proprietors of certain British letters patent, entered into an agreement with the defendants that the defendants should be authorized to manufacture under the patents, subject to a quota. They were to pay a penalty or compensation on production in excess of the quota. As a result of discussions between the parties in or prior to 1942, the plaintiffs agreed to suspend enforcement of payments of compensation due after December 31, 1939, pending the formulation of a new agreement.

On July 17, 1945, the defendants issued a writ against the plaintiffs alleging that the original agreement had been induced by fraudulent misrepresentation and referred to an oral agreement for discontinuance of payments of compensation as being relevant to the amount of damages they would recover if successful in the action. The plaintiffs, by their defence, denied the agreement, alleging that since March 31, 1942, the defendants had not rendered accounts or paid sums due for royalties or compensation on the sale or use of "contract material," and counterclaimed an order upon the defendants to deliver accounts and an inquiry as to the sum due excluding payments of compensation between December, 1939, and the end of the war with Germany. The action was dismissed.

The plaintiffs then commenced the present action to recover from the defendants a sum of over £84,000 alleged to be due in respect of payments of royalties and compensation during the period January 1, 1947, a date some nine months after the delivery of the counterclaim in the previous action, to January 26, 1950:—

Held, that the restrictions on the power of a licensor to determine a revocable licence must depend on the circumstances of each case; where the circumstances are such that the determination would have far-reaching effects upon the licensee involving decisions of importance the licensee is entitled to an express and unambiguous notice of determination specifying either the date on which or a reasonable period after which the licence will cease to operate; the counterclaim in the present case did not satisfy these requirements and the plaintiffs' claim, therefore, failed.

Canadian Pacific Railway v. *The King* [1931] A.C. 414 and *Minister of Health* v. *Bellotti* [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238 applied.

Decision of Pearson J. reversed.

APPEAL from Pearson J.

The facts are sufficiently set out in the judgment of Romer L.J.

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

Gilbert Beyfus Q.C., *Kenneth Johnston Q.C.* and *A. C. Warshaw* for the appellants.

F. W. Beney Q.C. and *T. G. Roche* for the respondents.

The cases cited in argument are set out in the judgment.

Cur. adv. vult.

March 29. SOMERVELL L.J. I will ask Romer L.J. to read the first judgment.

ROMER L.J. The action is brought by the plaintiffs Tool Metal Manufacturing Co. Ld. (T.M.M.C.) to recover from the defendants Tungsten Electric Co. (T.E.C.O.) a sum of over £84,000, which they allege to be due to them in respect of the period January 1, 1947, to January 26, 1950, under the provisions of a deed dated April 2, 1938, and for an account and payment of further sums alleged to be payable under the same deed in respect of the period from January 26 to July 27, 1950.

This is the second action between these parties. In the first action, in which the writ was issued on July 17, 1945, T.E.C.O. and another company called Tungsten Industrial Products Ld. sued T.M.M.C. for damages for fraud and damages for breach of contract. Those proceedings, which came first before Devlin J., and subsequently before this court, have a bearing upon the present litigation, although the question which is now in issue between T.M.M.C. and T.E.C.O. was not in issue then.

I will confine myself to stating in the briefest possible outline the matters which are relevant to the particular point upon which I am of the opinion that this appeal should be decided in the defendants' favour.

In 1931 T.M.M.C. was incorporated in this country by Krupps of Essen, for the purpose of developing, as their subsidiary, certain patents which Krupps had acquired from the Osram Company in relation to tungsten carbide. Under these patents T.M.M.C. manufactured articles which were, in the main, machine tool tips, and they marketed them under the name of Wilmet. In or about 1934 T.M.M.C. brought proceedings against the British Thomson-Houston Company (shortly called in this judgment B.T.H.) for the infringement of their patents, but these proceedings were settled after two years' negotiation upon the terms of an agreement into which the parties entered. For present purposes it is only necessary to say that B.T.H. acknowledged the validity of T.M.M.C.'s patents (which they had previously challenged) and were granted an exclusive licence to manufacture under such patents in territory which included the United Kingdom. One result of this was that T.M.M.C. could only grant subsequent licences under the patents in this country with the consent of B.T.H. T.M.M.C. were, however, themselves entitled to continue to manufacture

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under the patents and it was in contemplation between the parties, in entering into the agreement, that they should co-operate in the exploitation of the patents in England.

Some little time later the activities of T.E.C.O., who were carrying on business in this country, came to the notice of T.M.M.C., who took the view that T.E.C.O. were infringing their patents. One Dr. Louis was at that time the head of Krupps' patent department and was a director of T.M.M.C. and controlled that company's policy in relation to patents. Dr. Louis was not minded to enforce a patentee's full rights against an infringer, but was content to permit T.E.C.O. to continue in business provided that terms could be arranged on a basis that would be mutually acceptable. After some negotiation a meeting accordingly took place on April 7, 1937, between Dr. Louis and others on behalf of T.M.M.C. and representatives of T.E.C.O. who included a Mr. McLeod, who was a shareholder and director of that company.

The result of the meeting was that Dr. Louis offered T.E.C.O. a licence more or less on the lines of the agreement between T.M.M.C. and B.T.H., and the broad effect of Dr. Louis' proposal was that T.E.C.O. should be authorized to continue to manufacture under the patents, but with a quota of 50 kilograms a month, and that T.E.C.O. should pay a 10 per cent. royalty and a penalty or compensation of 30 per cent. on production in excess of the quota in respect of material not supplied by T.M.M.C. B.T.H. gave their consent to the proposal and a further meeting was held on April 21, 1937, between Dr. Louis, Mr. McLeod and others, and it was at this meeting principally that Dr. Louis was alleged to have made the misrepresentations which formed the subject of the first action.

Following upon this further meeting a considerable amount of discussion took place between the respective parties. Ultimately, on June 1, 1937, heads of agreement to be made between T.M.M.C. and T.E.C.O. were signed. I do not propose to consider these heads of agreement, which incorporated the principal features of the offer which Dr. Louis had made, because they were in substance reintroduced into the more formal documents which were executed by the parties on April 2, 1938.

From June, 1937, to the end of March, 1938, T.E.C.O. continued in active production under the heads of agreement and made monthly returns of their output to T.M.M.C.. Such output was in every month considerably in excess of 50 kilograms and indeed for the last month (March) of this period amounted to 168 kilograms.

The formal documents of April 2, 1938, consisted of a licence and of a deed which was expressed to be executed contemporaneously therewith. Each of the instruments was made between T.M.M.C. of the first part, T.E.C.O. of the second part and Tungsten Industrial Products Ld. (who were T.E.C.O.'s distributing associate) of the third part.

So far as relevant the provisions of the licence were as follows. It recited that the grantors, T.M.M.C., were the registered proprietors of British letters patent, short particulars whereof were set forth in the schedule, and had agreed to grant to T.E.C.O. and T.E.C.O. had agreed to take a licence under such patents for the consideration and upon the terms and conditions thereinafter mentioned, and it recited that Tungsten Industrial Products Ld. were the distributors of the products of T.E.C.O. and that in the construction of the licence certain definitions were to apply. The first one was: "The United Kingdom of Great Britain, Northern Ireland and the Isle of Man shall be called 'territory A.'" The second one was that "territory B" should comprise the Dominions and certain other territories. The third definition was that hard metal alloys made in accordance with the inventions, the subjects of the said patents, or any of them, whether made before or after expiry of such patent or patents, should be called "contract material."

The licence continues: "Now this deed witnesseth as follows. "(1) In pursuance of the said agreement and in consideration of "the execution by T.E.C.O. of a deed bearing even date herewith and made between the parties hereto and of the royalties "reserved by and the covenants on the part of T.E.C.O. contained in the said deed the grantors hereby grant unto T.E.C.O. "a non-exclusive licence under the said patents to import, make, "use and (subject as hereinafter provided) sell contract material "in territory A and also to sell contract material in or for export "to territory B upon and subject to the conditions herein and in "the said deed contained.

"(2) This licence shall commence as from June 1, 1937, and "shall continue until September 18, 1947, and thereafter until "terminated by either the grantors or T.E.C.O. giving to the "other six months' notice in writing terminating this licence, "provided that the grantors shall be at liberty to terminate the "same by giving to T.E.C.O. six months' notice in writing at "any time during the continuance of this licence or by giving "immediate notice in writing in the event of liquidation or insolvency of T.E.C.O. or unremedied breach by T.E.C.O. of the "terms hereof or of the said deed.

"(3) The licence hereby granted to sell contract material shall "only extend to cover: (i) The sale by T.E.C.O. directly or "through Industrial of contract material for use otherwise than "for drawing dies to the following companies so long as each "shall remain bound by the terms of the memorandum appended "to the said deed."

Then it sets out a number of named companies. "And "T.E.C.O. and Industrial shall not sell or otherwise dispose of "any contract material except to the person or companies aforesaid (hereinafter called 'T.E.C.O. customers') and for the purposes above mentioned (save that T.E.C.O. may sell to "Industrial for resale to T.E.C.O. customers)."

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It was then provided that T.E.C.O. should impose on each of its customers certain obligations as therein set forth. Then in the schedule to the licence there are specified 15 letters patent with their numbers and their respective dates of sealing and their respective titles. Finally in the schedule there is set out one patent application with its date and title.

By the accompanying deed of the same date, after reciting that " T.E.C.O. have heretofore made and sold hard metal alloys " of a composition and by a process which (as the grantors allege " and T.E.C.O. and Industrial for the purpose only of these " presents and of the licence hereinafter referred to admit) fall " within the scope of " the letters patent therein mentioned, it was provided, so far as is material, as follows:

" (2) The grantors hereby waive all claims against T.E.C.O. " and Industrial and T.E.C.O. customers in respect of the sale " or use of contract material manufactured by T.E.C.O. prior " to June 1, 1937.

" (3) T.E.C.O. shall pay to the grantors in the manner herein- " after set forth a royalty of 10 per cent. on the net value of all " contract material sold or used by T.E.C.O. and/or Industrial " (other than contract material supplied to T.E.C.O. by the " grantors or any licensees under the said patents) during the " continuance of the said licence and made in accordance with " one or more of the said patents " (other than or in addition to " a certain letters patent " which is mentioned) " which shall " be in force at the date of sale or use thereof by T.E.C.O. and/ " or Industrial, such royalty being payable in the case of contract " material sold by T.E.C.O. to Industrial only upon its use or " sale by Industrial.

" (4) (a). The grantors shall from time to time after consul- " tation with T.E.C.O. fix minimum prices and terms and " conditions for the sale of contract material to the various " classes of customers in territory A and territory B. During the " continuance of the said licence T.E.C.O. and Industrial shall " comply and shall impose an obligation upon and shall cause " T.E.C.O. customers and " (a certain customer therein named) " to comply with the prices and the terms and conditions of sale " fixed as aforesaid.

" (b) During the continuance of the said licence the grantors " shall observe and shall cause their other licensees to observe " the same minimum prices and terms and conditions for sale " of contract material as are fixed pursuant to paragraph (a) of " this clause.

" (c) Should T.E.C.O. and/or Industrial at any time during " the continuance of the said licence place upon the market any " other hard metal alloy or alloys not being contract material " T.E.C.O. and/or Industrial shall inform the grantors forth- " with what other hard alloy or alloys is or are being so placed " upon the market and the provisions of paragraph (a) of this

"clause shall apply to such alloy or alloys as if the same were "included in the definition of contract material."

Clause 5 is an important clause. "If in any month during "the continuance of the said licence the aggregate quantity of "contract material sold or used by T.E.C.O. and Industrial "(other than contract material supplied to T.E.C.O. by the "grantors or any licensees under the said patents) shall exceed "a quota of 50 kilograms T.E.C.O. shall, whether all or any of "such materials shall be subject to royalty hereunder or not, pay "to the grantors compensation equal to 30 per cent. of the sum "which represents the excess net value, that is to say, the "average net value per kilogram of all contract material sold "or used by T.E.C.O. and Industrial in the said month, multi-"plied by the weight in kilograms of all such contract material "as aforesaid sold or used by T.E.C.O. and Industrial during "such month in excess of 50 kilograms, provided that contract "material sold by T.E.C.O. to Industrial shall only be taken into "account for the purposes of this clause on the occasion of its "sale or use by Industrial."

Clause 6 defines the meaning of net value of contract material.

Clause 7 provides: "Within the 20 days next following the "first day of each month T.E.C.O. shall send to the grantors a "written report setting forth for each brand or kind of contract "material (distinguishing contract material supplied to T.E.C.O. "by the grantors or licensees under the said patents from other "contract material) sold or used by T.E.C.O. and Industrial "respectively during the preceding month the following informa-"tion." Then there is set out what the information is to be.

Clause 8 provides: "Within 40 days next following the first "day of each month T.E.C.O. shall pay to the grantors all sums "due in respect of the preceding month by way of royalty and "compensation."

Clause 9 provides for the keeping by T.E.C.O. and Industrial of books of account in England.

Clause 10 reads: "Neither T.E.C.O. nor Industrial shall at "any time hereafter dispute the validity of the said patents or "any of them or the novelty or utility of the inventions, the "subjects thereof, and shall not in any way assist any other "person so to do."

Clause 12 reads: "In the event that during the continuance "of the said licence the grantors shall become entitled to grant "licences under patents in territory A or territory B covering any "improvement upon or modification of the inventions the sub-"jects of the said patents or any of them the same shall be "regarded as included in the expression 'the said patents' for "the purposes of this deed and the said licence."

By Clause 15 there was a provision for terminating the arrangement between the parties if T.E.C.O. or Industrial committed any breach of their respective obligations and allowed the same to remain unremedied for 30 days.

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Finally, by Clause 17 it was provided that T.M.M.C. should not grant any other licence under the said patents "without first "consulting with T.E.C.O. and Industrial and T.E.C.O. "customers as to the advisability of so doing."

As stated by Pearson J. in his judgment, the effect of the compensation or penalty provisions in Clause 5 of the deed, having regard to the respective lives of the various patents, was as follows: "June 1, 1937, to March, 1939: Both the iron grades "and the steel grades are protected by patents, and bear royalty, "and also bear compensation on the excess over the quota. For "the period March, 1939, to December, 1941, the iron grades "are still protected by the patent No. 4 in the schedule, they "do not bear royalty, but they bear compensation on the excess "over quota. The steel grades are still protected by patents and "still bear royalty and compensation on the excess over the "quota. In the third period, December, 1941, to July, 1947, "the iron grades are not protected by any patent (unless possibly "there might be some later patents under clause 12), they do "not bear royalty, but they do bear compensation on the excess "over the quota. The steel grades are protected by patents, or "at least one patent, and bear royalty and bear compensation "on the excess over the quota. Then there is the fourth short "period, July to September, 1947, and both the iron grades and "the steel grades are unprotected by patents (unless conceivably "there might be some later patents under Clause 12) and they "do not bear royalty but they do bear compensation on the excess "over quota.

"The overall rate of compensation on the total output, "including both the quota and the excess over quota, varies "according to the size of the output, steeply at lower levels, "gradually at higher levels. This is shown by the compensation "rate curve on the graph which was produced and proved by Mr. "Bateman. If the total output in any month is 100 kilograms "the overall compensation rate is 15 per cent. If such output "is 150 kilograms, the overall rate is slightly under 20 per cent. "If the output is 200 kilograms, the rate is about 22½ per cent. "If the output is 300 kilograms, the rate is about 25¼ per cent. If "the output is 500 kilograms, the rate is 27 per cent."

Shortly before the outbreak of war in 1939 arrangements were made and carried into effect for T.M.M.C. to shed its German control and to be taken over by Kleinworts; and soon after the war began the shares in T.M.M.C. were acquired from that banking house by A. C. Wickman Ld. (who had been T.M.M.C.'s distributors) and by Firth Brown & Co. in equal proportions.

In the meanwhile, Mr. McLeod, who had originally viewed the agreements of April 2, 1938, with some contentment, had discovered that the anticipation which he had formed that T.E.C.O.'s distributors would absorb the compensation or penalty rates which had been imposed was erroneous, and that these rates were

bearing very hardly, as he thought, upon T.E.C.O. themselves. The company's production before the war was already in the order of 150 kilograms a month (in July, 1939, it was 180 kilograms), but the seriousness of the position, in Mr. McLeod's view, was greatly enhanced by the very considerable production which resulted almost at once from the outbreak of hostilities. Even before the war Mr. McLeod had complained to Dr. Louis of the impact of the penalty rates upon T.E.C.O. and a draft supplemental agreement had been prepared with a view to easing the position somewhat, but nothing came of it. When Mr. McLeod discovered the ever-increasing burden which accompanied the growing production which resulted from war-time requirements he renewed his complaints and, as Dr. Louis had vanished from the scene, directed them to Mr. Wickman, on behalf of A. C. Wickman Ld. Discussions ensued between these gentlemen and also other persons interested in the industry, all of whom had formed themselves into an association. As a result T.M.M.C., under its new control, decided that it would not continue to demand payment of the compensation under their licensees' agreements because it was clearly in the national interest that production of hard alloy material should reach the highest possible level; and in fact, T.M.M.C. did not enforce this payment throughout the war.

It seemed, however, desirable to Mr. Wickman and his associates that the principle of compensation should be preserved (subject to its suspension during the war) but that the sums paid should be distributed among the licensees themselves instead of going into the coffers of T.M.M.C. Mr. McLeod, however, refused to accept this new policy, but exacted, as he said, a promise from Mr. Wickman that, so far as T.E.C.O. were concerned, compensation should be "washed out" altogether. Draft agreements were eventually (sometime during 1944, I think) prepared to give effect to the new arrangement with regard to the compensation by the various licensees, but Mr. McLeod, on behalf of T.E.C.O., refused to accept the draft which was sent to them. Negotiations and discussions ensued, but ended in a deadlock, and on July 17, 1945, T.E.C.O. issued their writ against T.M.M.C.

The gravamen of their case as pleaded was that Dr. Louis, on behalf of T.M.M.C., had more than once represented to Mr. McLeod, and in particular at their meeting on April 21, 1937, that the terms which were subsequently embodied in the licence and deed of April 2, 1938, relating to royalty, quota and compensation were on a par with or were at least as favourable to T.E.C.O. as the corresponding terms of the licence which T.M.M.C. had previously granted to B.T.H. and that, having regard to that licence, were the best terms that T.M.M.C. were in a position to offer; that T.E.C.O. had entered into the licence and deed on the faith of such representations; and that the representations were false.

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By paragraph 10 of their statement of claim T.E.C.O. alleged that they had paid certain sums for compensation under the said deed, and that "thereafter the plaintiffs and defendants agreed "that no sums should be payable in respect of compensation "after December 31, 1939, or alternatively, that the defendants "would accept the amount of the royalties in full satisfaction of "all sums payable under the said deeds as from December 31, "1939." T.E.C.O. claimed damages for fraud and also certain other relief in respect of alleged breach of contract which is immaterial.

T.M.M.C., by their defence, denied the charges of fraudulent misrepresentation and with regard to paragraph 10 of the statement of claim they denied the agreements therein alleged. In paragraph 8 they say: "Further the said agreements, if made "(which is denied), would be agreements not to be performed "within a year or alternatively variations of the deeds of April 2, "1938, which were agreements not to be performed within a "year either from the date thereof or from the alleged variation "thereof. There is no written memorandum of the alleged oral "agreements and the defendants will rely upon the provisions "of the Statute of Frauds. Further, if the alleged agreements "were made (which is denied), there was no consideration "therefor."

By their counterclaim (which was delivered with the defence on March 26, 1946), T.M.M.C., after setting forth clauses 3, 5 and 7 of the deed of April 2, 1938, alleged in paragraph 17 that since March 31, 1942, T.E.C.O. had sold and used contract material, some of which was made in accordance with the relevant patents but, in breach of their obligations under the deed, had not since that date rendered any accounts or paid the sums due for royalties or compensation. By the same paragraph they further pleaded: "The defendants do not desire to enforce pay-"ment of compensation in respect of deliveries made after "December 31, 1939, but before the end of hostilities with "Germany."

They claimed an order upon T.E.C.O. to deliver accounts of all contract material sold or used by either plaintiff since March 31, 1942, an inquiry as to the sum due from T.E.C.O. in respect of royalties during the period covered by the said accounts, and for compensation for the period since June 1, 1945, and an order on T.E.C.O. to pay to T.M.M.C. the sum found to be due on the said inquiry.

By paragraph 3 of their reply and defence to the counterclaim the plaintiffs pleaded that there was good consideration (which they specified) for the agreement which they had alleged by paragraph 10 of the statement of claim. They further pleaded that the said agreement had been part performed in that subsequent to its date T.E.C.O. had not paid any compensation and had received no complaint or demand from T.M.M.C. in respect of such non-payment. As to paragraph 17 of the counterclaim

T.E.C.O. admitted that they had not, since March 31, 1942, rendered accounts nor paid any sum to T.M.M.C., but save as aforesaid they did not admit the allegations contained in the said paragraph.

No rejoinder was delivered by T.M.M.C.

On these pleadings, then, the substantial issue as between T.E.C.O. and T.M.M.C. in the action was whether T.M.M.C. were liable to pay damages for fraudulent misrepresentation. T.E.C.O. had introduced into their statement of claim the alleged oral agreement for the discontinuance of compensation after December 31, 1939, only as being relevant to the amount of damages which they would recover if they were successful. They were not founding any claim to alternative relief upon it if they failed on the issue of fraud. Nevertheless, T.M.M.C. denied that the agreement had ever been made and this question accordingly became a direct issue between the parties on the counterclaim for an account and inquiry as to sums due for royalties and for compensation.

Devlin J. dismissed the action, being well satisfied that T.E.C.O. had failed to establish the charges of fraudulent misrepresentation by Dr. Louis which formed the basis of the plaintiffs' claim. With regard to the counterclaim the judge came to the conclusion that an arrangement was in fact made between Mr. Wickman and Mr. McLeod in or prior to 1942 for the discontinuance of the payment of compensation by T.E.C.O., and that such arrangement was a temporary one pending the formulation of different terms in the new agreement, that is, the agreement which was some time later accepted by T.M.M.C.'s other licensees but rejected by T.E.C.O.

In his judgment he summed up his conclusions on the matter as follows: "The result is, that I reject the view that there was "any agreement that was intended to continue, which was to "vary the original agreement. The agreement that was made "was, in my view, one of two things. I do not think there was "anything in it which could be said to limit its operation for the "duration of the war, although that may have been the intention "of the defendant company. But I think it fairly emerges, from "the language which Mr. Wickman was heard to use, that it "was intended to be a temporary modification pending the new "agreement. Accordingly, I think that when the new agreement "was presented to Mr. McLeod and was rejected by him the "temporary relief which he had been granted came to an end. "I do not mean that it came at once to an end. It is obvious "that it would be a reasonable provision that he should have "some reasonable notice in order to make the necessary altera-"tions. Compensation is now claimed from June, 1945, which "is some nine months after the new agreement was presented "to him, and I think that gives him sufficient time. If I should "be wrong about that view, then I should hold that it was a "temporary arrangement which was made subject to the right

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"of the defendant company to terminate by giving reasonable "notice. I should regard the presentation of a new agreement "in such circumstances as amounting to a reasonable notice. I "do not think that in this type of case it is necessary that "the notice should be express. The rule that protects a party "in circumstances such as these is a broad rule of equity and "justice. It is not thought right that a man who has indicated "that he is not going to insist upon his strict rights, as a "result of which the other party has altered his position, should "be able to turn round at a minute's notice and insist upon "his rights, however inconvenient it may be to the party who "thought he was temporarily relieved. Equity requires that he "should give reasonable notice that he is going to resume his "strict rights. But all that is necessary to comply with that "broad rule of equity is that the notice should be such as to put "an ordinary person clearly in mind that the other party is "going to resume his strict rights. I think it is plain that when "a man is served with a draft of a new agreement which shows "that the compensation provisions are going to be set in force "again, he should understand from that that he must either "accept the new agreement or return to the strict position under "the old agreement."

In the result the judge gave judgment for T.M.M.C. on the counterclaim.

T.E.C.O. appealed to this court, both from the order of Devlin J., dismissing the action, and from the order in T.M.M.C.'s favour on the counterclaim. The court consisted of Somervell, Cohen and Singleton L.JJ., and argument was delivered on April 4, 1950.

The plaintiffs' appeal from the dismissal of their claim failed, this court agreeing with the conclusions at which Devlin J. had arrived on the issue of fraudulent misrepresentation. On the counterclaim the Lords Justices agreed with Devlin J. in holding that the arrangement for suspension of compensation at which Mr. Wickman and Mr. McLeod had arrived, whether legally enforceable or not, brought into play, in T.E.C.O.'s favour, the principle of equity which was enunciated by Lord Cairns in *Hughes* v. *Metropolitan Railway Co.*,[1] and was formulated by Bowen L.J. in *Birmingham and District Land Co.* v. *London and North Western Railway Co.*[2] in the following terms: "It seems "to me to amount to this, that if persons who have contractual "rights against others induce by their conduct those against "whom they have such rights to believe that such rights will "either not be enforced or will be kept in suspense or abeyance "for some particular time, those persons will not be allowed by a "court of equity to enforce the rights until such time has elapsed, "without at all events placing the parties in the same position "as they were before."

[1] (1877) 2 App.Cas. 439. [2] (1888) 40 Ch.D. 268, 286.

It seemed clear to their Lordships upon the evidence that (in the words of Cohen L.J.) "there was the plainest possible "indication by the defendants that they did not intend for the "time being to claim compensation, and that they conveyed that "intimation in terms which amounted to an invitation to the "plaintiffs to continue to conduct their business on the basis "that until something was done, until notice was given, no "royalty would be demanded," and that that invitation was acted upon by T.E.C.O. in the various ways to which their Lordships referred, which included the basing by T.E.C.O. of their production policy on the footing that only the 10 per cent. royalty would be payable while the arrangement continued in force.

The next question, therefore, which had to be considered was the manner in which T.M.M.C. could terminate the arrangement, and whether (as Devlin J. had held), they had in fact terminated it by presenting the new draft agreement to T.E.C.O. The court held (differing from Devlin J. upon this point) that the presentation of this draft did not operate to determine the arrangement, and it is necessary to state the terms in which Somervell and Cohen L.JJ., respectively, expressed their views upon this matter.

Somervell L.J. said: "The question then is, when does the "arrangement come to an end? It is not suggested that the "promise covered the whole of the remainder of the contractual "period and, no doubt, the defendants hoped that everybody "would accept the new draft agreement which, after three and a "half years' labour, finally came to light. It is said, and this is "the view which Devlin J., I think, has taken, that the presenta-"tion of that draft terminated the position with regard to the "30 per cent. I find a difficulty about that. I do not see how "the presentation of the draft by itself could do so. You must "allow, as it seems to me, some time for negotiations. Drafts "are presented not as final documents but as documents to be "discussed, and, therefore, I find a difficulty in accepting that "conclusion. Then it is said: 'Well, when negotiations broke "'down.' I do not take that view. I take the view in this case, "having regard to the fact, as it seems to me, that Mr. Wick-"man throughout had plainly indicated that the defendants were "going to reorganize this business, the basis of the old agree-"ments in one way or another, as they had been entered into "for the licences by Krupps had really gone and there were very "good reasons for saying so. Here we were in a war, when "everybody, I should think, would be encouraged to produce, "anyway, as much as was wanted of these types of metal. I "think, against that background, the plaintiffs were entitled to "an express notice if the old terms were to be enforced again "according to their literal provisions. If you read the correspon-"dence, the plaintiffs wrote objecting to the agreement. There "was ample opportunity for the defendants to say: 'Well, you

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"'know, if you do not like this agreement we shall withdraw "'our terms of not collecting the 30 per cent. and you will be "'back on the letter of the old pre-war contract.' They not "having done that, I do not think they can rely on anything "until we come to the counterclaim. That plainly indicates the "view that they were taking. I think the plaintiffs would be "entitled to a reasonable time after that. We were asked to say "what that reasonable time was, but I do not think we can do "that; it is not in issue in these proceedings, but the defendants "have already addressed their mind to this question when they "decided at what time after the new agreement had been served "they thought it proper to begin claiming their compensation. "I think it was about nine months. It may be that, on that "matter, they made a good guess, but it is impossible, I think, "for us to decide that as a matter binding on the parties in these "proceedings."

Cohen L.J. said: "That being the arrangement, I am unable "to agree, however, with Devlin J., that any reasonable notice "was given bringing to an end the temporary suspension of the "right to compensation until the counterclaim was delivered in "this action. As Somervell L.J. has said, the new draft licence "was not submitted until September, 1944; correspondence "ensued, and the last material letter was that written by the "plaintiff company to Mr. Bateman on November 7, 1944, which "starts with this paragraph: 'Have you by any chance overlooked "'the fact that we have been expecting a letter from you in full "'reply to ours of September 29 last?' and ending with the "paragraph: 'May I have your assurance, please, that these "'and the other matters referred to in our September 29 letter "'will have attention within some definite time?' I think "that the plaintiffs were clearly entitled to an answer to that "letter, and in so far as the correspondence before us goes, "they never got one. I think the plaintiffs were entitled not "only to expect a reply but to receive notice if the defendants "were proposing to enforce a right to compensation which had "been in suspense for five years or thereabouts. So far as I "can see, nothing equivalent to such notice was given before, "as I have said, the counterclaim was delivered, and, in my "opinion, therefore, compensation did not become payable until "a reasonable time after delivery of the counterclaim."

Singleton L.J. agreed with the judgments of Somervell and Cohen L.JJ., and did not deliver a separate judgment of his own.

A discussion subsequently took place on the question of costs, and as to the form of the order which would be appropriate to give effect to the decision of the court and, in the course of it, Cohen L.J. said: "I wonder whether it is possible to put that in. "You see, this is a declaration, is it not?" Mr. Beyfus said: "Yes." The discussion continues: "Cohen L.J.: 'Are not "'liable to account for compensation calculated in accordance

"'with the terms of the said deed until the expiration of a "'reasonable time from the delivery of the counterclaim,' "because that is what we have decided. I do not know whether "it is desirable for that to go in. I was wondering whether we "could do what Mr. Roche suggested. Singleton L.J.: It was "not an issue. Mr. Beyfus: It was not an issue, my Lord." The order, accordingly, contained no declaration on the lines which Cohen L.J. had suggested, and was confined (so far as the present point is concerned) to striking out from the order made by Devlin J., the declaration that T.E.C.O. were bound to account for compensation as from June 1, 1945.

We have been supplied with the transcript of part of a discussion which took place upon an interlocutory application which was made to Devlin J. subsequently. On that occasion, Mr. Warshaw was appearing for T.E.C.O., and T.M.M.C. were represented by Mr. Barry. The shorthand note records the following: "Mr. Warshaw: If I might intervene for a "moment, it is perfectly true that one of the Lords Justices "expressed the opinion that the delivery of the counterclaim "would be such a notice as to bring the arrangement to a con-"clusion, the arrangement not to claim compensation, but the "matter was not argued by my learned leader, Mr. Beyfus, at "all, and we expressly reserved the right in any future proceed-"ings to maintain that the delivery of that counterclaim was not "and could not be a notice bringing the arrangement to an end. "Devlin J.: The Court of Appeal must have varied my order "in some way, must they not? Mr. Barry: I am going to draw "your Lordship's attention to the order in a moment. I entirely "agree that what my learned friend has said is correct. The "Court of Appeal did not formally decide any matters for the "future; they were not before the court. All that they held "was that, in fact, up to the date of the counterclaim no "notice requiring the payment of compensation had been made "and on the authorities, which your Lordship will remember "were cited by Denning J., as he then was, in the *Central "London Property Trust Ld.* v. *High Trees House Ld.*[3] on the "authority of those cases that we had not brought the "suspension properly to an end. In those circumstances, we "were not entitled to recover compensation on our counterclaim. "I am not suggesting that there is any binding decision that we "are entitled to recover it afterwards. That would be, of course, "a matter for argument in some future litigation."

In these circumstances it is, I think, quite clear (nor, indeed, has it been disputed) that T.E.C.O. were not precluded by the order of this court, or by anything that was said in the judgment of the Lords Justices, from contending in future proceedings that the arrangement which was concluded between Mr. Wickman and Mr. McLeod was not determined by the delivery of the

[3] [1947] K.B. 130; 62 T.L.R. 557.

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counterclaim; and T.E.C.O. have so contended in the present action. By paragraph 4 of their defence they plead: "In or "about March, 1943, and on an occasion prior thereto, which "the defendants cannot now more particularly specify, the plain-"tiffs agreed to forgo the payment of compensation by the "defendants until a reasonable time should elapse after notice "given by the plaintiffs to the defendants to resume such pay-"ment. No such notice has been given to the defendants. "Alternatively, if such notice has been given to the defendants, "a reasonable time thereafter had not elapsed by January 1, "1947, or by any date during the currency of the 1938 deeds."

These allegations are answered by T.M.M.C. in paragraph 5 of their reply as follows: "T.M.M.C. do not admit there was "any contract or agreement with T.E.C.O. to the effect stated "in paragraph 4 of the defence. Further, there was no considera-"tion therefor and T.M.M.C. will, if necessary, rely on the "Statute of Frauds. T.M.M.C. admit, however, that upon some "occasion between March, 1940, and March, 1943, which "T.M.M.C. cannot particularize, they had intimated to T.E.C.O. "that as a temporary measure they would not for the time being "enforce payment of compensation, and that the effect of such "intimation was to preclude T.M.M.C. from enforcing payment "of compensation until they had intimated to T.E.C.O. they "desired and/or intended to enforce payment, and until the "lapse of a further reasonable time after such intimation, or in "respect of any period prior to the end of such reasonable time. "Further, both parties are estopped by the judgment of the "Court of Appeal in the first action from contending that the "effect of the arrangements between them as to compensation "were otherwise than as stated in the last sentence. The "counterclaim in the first action was a sufficient notice or inti-"mation of T.M.M.C.'s desire or intention to enforce payment "of compensation, and the time between the delivery of the "counterclaim and January 1, 1947, was a reasonable time. "Alternatively, if such period was not sufficient, a reasonable "time had elapsed by some date (which T.M.M.C. will ask the "court to fix) between January 1, 1947, and the issue of the writ "herein."

In dealing with this issue, Pearson J. said that prima facie the judgments of this court in the first action appeared to decide that the suspensory arrangement came to an end on the expiration of a reasonable time after the delivery of the counterclaim in that action; but that it appeared to him that there was at least a real doubt whether the expressions of opinion in those judgments should be regarded as conclusive; and the arguments had accordingly proceeded on the basis that they were not. The substance of the arguments which Mr. Beyfus presented to the judge was, first, that the suspensory arrangement had to be determined by a notice of termination; secondly, that such notice must be a proper prospective notice; and, thirdly, that as the

counterclaim satisfied neither of these requirements it could not, and did not, operate so as to determine the arrangement.

After considering these contentions and reviewing the authorities which had been brought to his attention, Pearson J. came to the conclusion, independently of the views which the members of this court expressed on the appeal in the earlier action, that the delivery of the counterclaim in that action effectively terminated the temporary, or suspensory, arrangement.

He expressed his decision upon this question in the following words: "The result of" the authorities "in my opinion is that, "where the rule of equity applies, the period of suspension comes "to an end when it is in all the circumstances equitable that "it should come to an end, and that is, normally, at any rate, "according to the circumstances, either at, or within a reason- "able time after, the termination of the state of affairs which "is the cause or basis of the suspension. It is not necessary that "the person whose legal rights have been suspended should give "a notice purporting to terminate the suspension, although, of "course, it would be fair and reasonable and advisable for him "to do so.

"In this case the state of affairs which was the cause or "basis of the suspension would have been, according to the view "taken in the court of first instance in the former action, the "continuance of the negotiations for new licensing arrangements, "but, according to the view of the Court of Appeal, the state of "affairs was, I think, the attitude of T.M.M.C. in not requiring "payment of the compensation for the time being. When that "attitude was reversed, a reasonable time for resumption of "compensation payments began to run. The making of the "counterclaim in the first action clearly involved a reversal of "the previous attitude, and, therefore, it started running a "reasonable time for resumption of compensation payments.

"Finally, having come to that conclusion on an examination "of the earlier authorities, I am entitled to pray in aid of that "conclusion the expressions of opinion given by the Court of "Appeal in the first action. Even if they must be regarded as "obiter dicta, these expressions of opinion must carry great "weight.

"On the question as to whether the nine months which "T.M.M.C. proposed to allow was a reasonable time in this case, "Mr. Beyfus elected to present no argument. As under the "deeds T.M.M.C. were entitled to terminate the licence by a "six months' notice, I hold that the nine months' period "proposed to be allowed was a sufficient period."

As a preliminary to considering further the decision of Pearson J. upon this issue, it would be convenient to say a word or two about the views which the Lords Justices expressed in relation to the matter in their judgments on the previous appeal. It has not been, and could not be, contended that the question constituted an issue as between T.E.C.O. on the one hand and

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T.M.M.C. on the other in the litigation which was then before the court. The issue on the counterclaim, as plainly appears from the pleadings, was whether, as T.E.C.O. alleged and T.M.M.C. denied, the obligation imposed on T.E.C.O. to pay compensation had been "washed out" (as Mr. McLeod said) by agreement with Mr. Wickman. Devlin J. held that it had not, but that the result of equitable intervention, upon the facts as proved, was to establish a suspensory arrangement which was determinable upon notice given by T.M.M.C. Such an arrangement had not in fact been pleaded by way of alternative defence to T.M.M.C.'s claim for an account. Devlin J. further held that such arrangement had been determined previously to the litigation, and the only question for decision by the Court of Appeal was whether this latter finding was right or wrong. This court held that it was wrong and gave effect to its decision by discharging the declaration which Devlin J. had made.

The alternative possibility that the delivery of the counterclaim in the action might have terminated the arrangement emerged, it seems, at some time during the hearing of the appeal, but was not argued by counsel on either side; indeed, so little was this point regarded as being before the court as an issue between the parties that I gather that at one stage of the argument Mr. Beyfus, for T.E.C.O., intimated by way of a casual concession, as it were, that the counterclaim might have had the suggested effect, although he formally reserved the rights of his clients on the matter on the following day.

It is true that the members of the court did in their judgments express opinions to the effect that the counterclaim terminated the arrangement, and that view would certainly seem at first sight to be the logical outcome of the reasoning which led them to their decision upon the issue which was before them. That those opinions were intended to be no more than provisional, however, necessarily follows from the fact that the question was not before the court and from the consequential absence of any argument upon it.

In my opinion, accordingly, Pearson J. was perfectly right in thinking that, in so far as the judgments in the previous appeal dealt with the counterclaim as a factor relevant to the ending of the suspensory arrangement, they should be regarded as no more than obiter.

As a result of the careful and elaborate arguments which have now been presented to us on this appeal, I have arrived at the conclusion that the arrangement for suspending payment of compensation by T.E.C.O. was not terminated by the delivery of the counterclaim in the previous action. I respectfully agree with the view of Somervell L.J. as expressed in his judgment on the former appeal, that T.E.C.O. "were entitled "to an express notice if the old terms were to be enforced "again according to their literal provisions." A return to the former policy of exacting compensation in accordance with

the deed of 1938 would have such far-reaching effects on T.E.C.O.'s production policy and would involve decisions of such importance by those in charge of the management of the company that a notification by T.M.M.C. of their intention to revert to the old regime must at least be communicated in unequivocal terms. But, further than this, it appears to me to be consistent both with fair dealing and with authority that such notification should specify either some future date, or at least a reasonable period, from which, or on the expiration of which, the payments were to be resumed.

T.E.C.O. had been for many years past manufacturing and selling their products in quantities which by far exceeded the quotas laid down in the deed, and they had been doing so on the basis of the suspensory agreement. If the benefit of this agreement were to be withdrawn, T.E.C.O. would be confronted with the necessity of considering and ultimately deciding upon their future course of action. To continue their existing production in face of the reimposition of the penalty provisions might be quite impracticable commercially. Alternatively to such continuance, three, and perhaps more, ways of dealing with the problem might be open to them. First, they could decrease their production and sales. Secondly (and either alone or in conjunction with the first) they could increase the prices to their customers. But neither of these changes could be brought about without a reasonable period for discussion and planning and reorganization. Moreover, manufacturers frequently sell ahead which adds to the difficulties of putting into immediate effect such drastic changes of policy as alterations in production and prices. Finally, the company would have to consider whether the best solution might not be to terminate the licence, which they could only do on six months' notice to T.M.M.C.

In my opinion, although in many cases the equity, to which *Hughes* v. *Metropolitan Railway Co.*[4] gave recognition and high authority, is satisfied by merely conforming to the terms in which Lord Cairns (and subsequently Bowen L.J.) formulated it, there are other cases where justice requires that the resumption of legal rights which have been suspended for a period must be preceded by a notification to the other party concerned specifying a fixed period of grace during which that party can put his house in order; and that in such cases a notification such as that will be a condition precedent to the valid reassumption of the owner's legal rights.

Such a case was *Canadian Pacific Railway Co.* v. *The King.*[5] In that case the appellants had erected certain poles, carrying telegraph wires, on property which belonged to the Crown. Some of the poles had been erected between 1905 and 1910 without leave or licence; others had been erected in 1893 and 1911, in each case while agreements were in negotiation, though none

[4] (1877) 2 App.Cas. 439.

[5] [1931] A.C. 414.

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was eventually concluded. In 1926 the Crown proceeded against the appellants for trespass and damages; and, in the alternative asked for a declaration of the appellants' rights, if any. The Privy Council held, on the facts, that at the date of the proceedings all the poles were on the property with the licence of the Crown.

On this finding three points then fell to be decided: (1) whether the licence was revocable; (2) if so, whether it had been revoked either before action or by the institution of the proceedings; and (3) if revocable, but unrevoked, how and in what circumstances the licence was revocable. On the first question the Judicial Committee decided, for reasons which are not material for present purposes, that the licence from the Crown was revocable. The next question then was whether it had been in fact revoked before action brought. This depended upon certain discussions and correspondence which had taken place between the parties concerned. In 1917 an agreement had been submitted to the appellants which was designed to regularize the position, but nothing effectual came of it and the matter was then allowed to lapse for six or seven years.

On March 20, 1924, Mr. Edwards (representing the Department of Justice of Canada) wrote to the appellants' President, Mr. Beatty, as follows[6]: "'I have been instructed by the "'Department of Railways and Canals to take up with you the "'question of certain lines of telegraph wires and poles belonging "'to you which are situate on the lands of the Canadian "'Government Railway, and which lines extend from the City "'of St. John to the City of Halifax; from Truro to Sydney, and "'from Painsec Junction to Point du Chene. I am instructed to "'inform you that all offers of settlement or otherwise, hereto- "'fore made to the Canadian Pacific Railway Company or to the "'Canadian Pacific Telegraph Company by the Government, or "'anyone on its behalf, are withdrawn and to say that the wires "'and poles must be removed from off the Government Rail- "'ways' lands, and that otherwise the said poles and wires will "'be removed. No time has been fixed within which you must "'effect this removal, but unless you agree to act at once in the "'matter, a date will be fixed by the Department of Railways "'and Canals.'"

After further negotiations Mr. Edwards, on January 29, 1926, wrote to the appellants' solicitor[7]: "'Referring to previous "'correspondence with regard to the demand of the Department "'of Railways and Canals that the lines of telegraph wires and "'poles operated by your company on the lands of the Canadian "'Government Railways be removed therefrom, or satisfactory "'arrangements made with the department for the rental thereof, "'I understand that certain negotiations have taken place "'between officials of your company and of the Government, but

[6] [1931] A.C. 414, 422. [7] Ibid. 423.

" ' that it has not been found possible to reach an agreement, " ' and I am instructed therefore to inform you that it is the " ' intention of the department to at once proceed with the " ' action outlined in my letter to Mr. Beatty of March 20, " ' 1924.' "

Notwithstanding the peremptory and compelling nature of these letters from Mr. Edwards, the Privy Council held that they did not operate as a revocation of the licence. Lord Russell of Killowen, in delivering the judgment of the board, said that the first letter amounted at most to an intimation that a date would in future be fixed for the removal of the telegraph line, that is, it was an intimation that the licence would be put an end to at some future time; and all that the second letter did was to state the intention of the department at once to proceed with the action outlined in the first letter, namely, to fix a date, and no date was ever fixed.

Their Lordships' conclusion, therefore, was that the licence had not been determined prior to the action and the judgment then passed to the question whether the institution of the proceedings ipso facto determined the licence. This inquiry in effect formed part of the third question above referred to, namely, how and in what circumstances was the licence revocable? Upon this Lord Russell of Killowen said, in delivering the judgment [8]: " Whether any and what restrictions exist on the power of a " licensor to determine a revocable licence must, their Lordships " think, depend upon the circumstances of each case. The " general proposition would appear to be that a licensee whose " licence is revocable is entitled to reasonable notice of revoca- " tion. For this proposition reference may be made to *Cornish* " v. *Stubbs* [9] and *Mellor* v. *Watkins*,[10] in the latter of which cases " Blackburn J. states that a person giving a revocable licence ' is " ' bound to give the licensee reasonable notice.' When the exer- " cise of the rights conferred by the licence involves nothing " beyond, there can be no reason to urge against the existence " of a power to determine the licence brevi manu at the will of " the licensor. But the exercise of the rights may have involved " the licensee in obligations in other directions, which the deter- " mination of the licence would disable him from fulfilling, unless " the licence were determined after a notice sufficient, in point " of time, for the making of substituted arrangements. In such " circumstances the licensee would, their Lordships conceive, be " entitled to breathing space sufficient for this purpose. The case " before the board would appear to be peculiarly a case in which " grave injustice might ensue if the Crown were at liberty by the " mere initiation of legal proceedings to determine summarily the " rights of the appellant, and turn the appellant's occupancy " into trespass. For the appellant is not the only one concerned;

[8] Ibid. 432.
[9] (1870) L.R. 5 C.P. 334.
[10] (1874) L.R. 9 Q.B. 400.

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"the telegraph line is part of a system in the existence and continuance of which the public has a very considerable interest. It appears to their Lordships that this is a case in which the licence can only be effectively ended, after notice has been served upon the appellant determining the licence on such a specified date in the future, as will give the appellant an interval of time between the service of the notice and the specified date, sufficient not only to allow the removal of the poles and wires from off the property of the Crown, but also to enable the appellant to make arrangements for the continuance of the telegraph line by the erection of poles and wires elsewhere than on Crown property. Their Lordships are accordingly of opinion that the appellant's licence was not determined by the institution of the proceedings. . . ."

"Their Lordships feel little doubt that as between the Canadian Pacific Railway Co. and the Crown suitable contractual arrangements will be made which will obviate further litigation. If, however, this anticipation proves to be ill-founded, it will be for the Crown to determine the licence by service of a notice the suffciency of which, if called in question, will have to be decided, upon proper evidence, in subsequent proceedings. It will be for the Crown, at its risk, to fix the length of notice."

Canadian Pacific Railway Co. v. *The King*[11] was considered by this court in *Minister of Health* v. *Bellotti*.[12] The headnote in that case reads: "To house the defendants and other persons evacuated from Gibraltar in 1940 for reasons connected with the war, large blocks of flats were requisitioned and furnished by the Commissioner of Works and then handed over to the Minister of Health who granted licences to evacuees to reside in them. Difficulties as to discipline having arisen, letters dated June 8, 1943, were sent on behalf of the Minister to the defendants requiring them to leave their rooms together with their dependants, taking all their possessions with them, within one week. Attempts to expel them having failed, the Minister commenced proceedings on September 11, 1943, for damages for trespass and an injunction:—*Held*, (1) that the Minister was entitled to bring such an action by virtue of section 7 of the Ministry of Health Act, 1919, although he held the flats for the Crown; (2) that, in the special circumstances, that the defendants had been brought away from their homes and friends and needed time to find rooms for themselves, their families and belongings, a week was not a reasonable time to allow them for leaving their rooms; and (3) that, although the time allowed was unreasonable the letters were valid notices revoking the licences, and as, by the time these proceedings were commenced, sufficient time had elapsed for the defendants to

[11] [1931] A.C. 414.

[12] [1944] K.B. 298; 60 T.L.R. 228; [1944] 1 All E.R. 238.

"vacate their rooms, the Minister was entitled to injunctions "restraining the defendants from trespassing in the blocks of "flats."

Lord Greene M.R., in his judgment,[13] said that it was agreed that the defendants were in the position of licensees, though not gratuitous licensees, as, by the payment or contribution which they made under a scheme which was set up by the Minister, they were entitled to be regarded as licensees paying a consideration in money for the licence which they enjoyed. He then referred in some detail to the circumstances in which the defendants, who had been resident in Gibraltar, had been removed with their wives and families by governmental action and given accommodation in this country; and he said that it was unthinkable that in those circumstances the Government should act otherwise than under a very strong sense of responsibility for the care and welfare of the individuals concerned, and that the grant of the licence to use the accommodation provided was incumbent on the Minister.

The Master of the Rolls then said[14]: "I refer to that because "it appears to me that where a question arises as to the lawful "method of terminating a licence, the circumstances in which "the licence came to be granted are most relevant to consider. "Where a licence is granted under a contract, it may very well "be that the contract will make express provision for those "matters which must be observed, but what is to happen where "the contract is silent in that regard? I cannot take the view "that there is some cast-iron principle of law which lays down "for every type of contract, whatever the circumstances and "whatever the purposes for which it was entered into, some "rule which is always to operate. In my opinion, the true rule "is that the implications of the contract are to be determined by "regard to all the relevant circumstances of the case. Thus, in "the judgment of the Privy Council in *Canadian Pacific Railway "Co.* v. *The King* the following paragraph appears[15]: 'Whether "'any and what restrictions exist on the power of a licensor to "'determine a revocable licence must, their Lordships think, "'depend upon the circumstances of each case.' That is the "only proposition of general application which I find it possible "to extract from that authority; and although the case is not "binding on this court, the law there is, in my opinion, laid "down with complete accuracy."

Then the Master of the Rolls, after saying that the Minister's letters to the defendants requiring them to give up possession operated as a clear determination of the licence at the expiration of one week, said[16] that such operation was valid but that the time limit attached to it was too short, having regard to all the circumstances of the case, including the necessity of the defendants searching for and obtaining other accommodation.

[13] [1944] K.B. 298, 303.
[14] Ibid. 304.
[15] [1931] A.C. 414, 432.
[16] [1944] K.B. 298, 305.

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He later returned to *Canadian Pacific Railway Co.* v. *The King*[17] and again rejected the view that that case purported to lay down any general rule that in all cases of a revocable licence the licensor can only determine it by a notice specifying a reasonable date in the future for it to become effective and that if he fails to do so or gives insufficient time to the licensee the notice would be a bad notice. It was, he said, a special case and[18] "It "is clear to my mind that the judgment was directed only to "the special facts of that case, and is not of general application "as laying down a rule that in every case of licence the notice "to revoke must specify a time at the licensor's risk."

MacKinnon L.J. and Goddard L.J. did not express views upon this point which differed from those of the Master of the Rolls.

In *Canadian Pacific Railway Co.* v. *The King*[19] the question was as to the revocation of a licence, but in my opinion there is no relevant difference for present purposes between a licence and a suspensory arrangement such as was brought into being in the present case. And, in my opinion, the reasoning and principles which the Judicial Committee applied are equally applicable to the position which existed between T.E.C.O. and T.M.M.C. after the arrangement between them was made. The Canadian Pacific Railway would have been subjected to the most grievous hardship by a sudden revocation of the licences which they had for so long enjoyed; and justice required that they should be informed with precision, and a reasonable time beforehand, of the date from which the enjoyment of those licences was to be forfeited.

So here, for the reasons which I have earlier explained, it was imperative that T.E.C.O. should be notified in advance of a reasonable period which would be available to them for decision and planning and reorganization before the strictness of their contractual obligations was reimposed upon them.

Canadian Pacific Railway Co. v. *The King*[20] is not binding upon this court; and I have no hesitation in accepting the view expressed in *Bellotti's* case[21] that the principle upon which it was decided is not applicable to all cases. On the other hand, it was, if I may respectfully say so, quite rightly decided, in my judgment, upon the facts which founded the decision; and I think it clearly points the way to the decision of the present case.

On the assumption, then, that the counterclaim by T.M.M.C. could in other respects be regarded as notice of their intention to terminate the arrangement, it was not effectual for the purpose, in that it neither specified a date nor indicated a period (whether reasonable or unreasonable) from and after which the obligations of T.E.C.O. in the matter of compensation would once more be enforced.

[17] [1931] A.C. 414.
[18] [1944] K.B. 298, 308.
[19] [1931] A.C. 414.
[20] Ibid.
[21] [1944] K.B. 298, 307.

I do not think that, even apart from this deficiency in the counterclaim, it could be regarded as a notice to determine the arrangement; for, as I have previously indicated, such a notice must at least be express and unambiguous. All that the counterclaim did was to deny the agreement which T.E.C.O. had alleged for a suspension of the compensation arrangement and it cannot, in my opinion, be said that the denial operated as a notice (much less an express notice) of their intention to terminate the alleged suspension. I know of no authority for the proposition that a licence is ipso facto determined by the licensor's denial that the licence was ever granted. But, further than this, it is to be observed that the agreement which T.E.C.O. alleged and which T.M.M.C. denied was an irrevocable agreement and not the terminable arrangement which both Devlin J. and this court subsequently held it to be; that arrangement, which resulted from the application of equitable principles, was not pleaded by T.E.C.O. and could not, therefore, have been, and was not, denied by T.M.M.C. in their defence and counterclaim. It is, accordingly, difficult to see how on any view the denial of an irrevocable agreement can constitute notice of determination of a different and terminable arrangement which was not present to the mind of either party at the time.

It seems to me extremely difficult to hold, consistently with the rejection by the Privy Council in the *Canadian Pacific Railway Co.* case [22] of the arguments founded upon the institution of the proceedings and the letters which preceded them, that the delivery by T.M.M.C. of their counterclaim had ipso facto the indirect and vicarious effect of determining an arrangement to which it did not even refer. I have, accordingly, for the above reasons, reached the conclusion that the arrangement was not determined by the counterclaim, and as it was not determined in any other way previous to the bringing of these proceedings the action necessarily fails and should have been dismissed.

[His Lordship then considered certain points concerning contracts in restraint of trade, relief against penalties and infringements of the Patents and Designs Act, 1907, s. 38 (1) which do not call for report.]

Somervell L.J. I agree and have nothing to add.

Birkett L.J. I also agree.

Appeal allowed.

Solicitors: *Hancock & Willis; Bristows, Cooke & Carpmael.*

[22] [1931] A.C. 414.

[COURT OF APPEAL.]

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May 6, 7.

Somervell, Birkett and Romer L.JJ.

* STOCKBRIDGE MILL CO. LD. *v.* CENTRAL LAND BOARD.

Town and Country Planning—Development—Assessment of development value—Evidence—Particulars of agreed assessments of comparable land in same area—Admissibility—Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *Part VI—Lands Tribunal Rules,* 1949 (*S.I.* 1949, *No.* 2263), *r.* 31 (4) (*ii*).

In an appeal to the Lands Tribunal from a determination by the Central Land Board of the development value, for the purposes of the Town and Country Planning Act, 1947, of four parcels of land, comprising 7¾ acres, it was sought on behalf of the Central Land Board to put in evidence particulars of a number of cases, concerning what were claimed to be comparable lands in the same area, the development value of which had been agreed in negotiations by the same valuation officer. Objection was taken by the landowner, and the tribunal refused to admit the evidence, but stated a case for the opinion of the court whether the evidence was admissible:—

Held, that, notwithstanding that the register in which the development values were to be found was not a public document, the evidence was admissible, but it would be open to the claimant to show that the cases were not really comparable. It would then be a matter of weight, to which the tribunal would have regard in assessing the value of the evidence.

Pointer v. *Norwich Assessment Committee* [1922] 2 K.B. 471 applied.

Case stated by the Lands Tribunal, in a matter under the Town and Country Planning Act, 1947.

The Stockbridge Mill Co. Ld. appealed to the Lands Tribunal against a determination by the Central Land Board of the development value of four parcels of land, comprising 7¾ acres, situate at Hornby in the county of Lancashire. The board had determined the development value at £1,230. On appeal the Lands Tribunal increased the development value to £1,920, being the difference between an unrestricted value of £2,880 and a restricted value of £960. Before the tribunal it was sought on behalf of the board to put in evidence a number of assessments which had been negotiated by one Collins, the district valuer, in respect of lands in Hornby and the neighbourhood, which were said to be comparable to the land in the present case. Objection was raised by the company to the admission of this evidence, and it was held by the tribunal to be inadmissible.

At the request of the Central Land Board the tribunal (Mr. J. L. Milne) stated a case, and submitted the following question for the decision of the court: "Whether in declining to admit the "particulars in the said exhibits as part of the evidence in chief

"of Mr. T. A. Collins I came to a correct decision in point of "law?"

J. P. Ashworth for the Central Land Board.
B. S. Wingate-Saul for the appellant.

SOMERVELL L.J. This is a case stated by the Lands Tribunal in a matter under the Town and Country Planning Act, 1947. The appellants, the Stockbridge Mill Co. Ld., appealed to the Lands Tribunal against a determination by the Central Land Board of the development value of an interest in land. The case is stated on the question of the admissibility of certain evidence. The development value under the Act is the difference between the present user with minor modifications, which is called the restricted value, and the unrestricted value as if the Act had not been passed. At the time when the Act was passed, though there have been modifications since, that was the basis of the claim which could be put forward to share in what has been called the global sum. Under the rules applicable to evidence before the Lands Tribunal certain documents, if it is sought to tender them in evidence, have to be sent to the registrar of the court and they are sent to the other side. One of the documents which was sent was a "Schedule of eleven claims under Part VI of the Town "and Country Planning Act, 1947, alleged to have been negotiated "by T. A. Collins (in his capacity as district valuer, Inland "Revenue) on behalf of the Central Land Board and to have been "agreed with persons, other than the appellants, in respect of "lands in Hornby and district," including lands in other districts which are set out. They were objected to as inadmissible. That objection was upheld and a case was stated on that issue.

Mr. Milne, who constituted the tribunal, has had this question before him previously in *Mason* v. *Central Land Board*,[1] when similar evidence had been tendered. It was objected to and he upheld the objection. I will read what he said: "There can be "no doubt that such proved facts as are relevant to an issue can "be received in evidence in chief, and that these may include "rents, sale prices, and the like, in transactions relating to "comparable lands which took place prior to the material date; "furthermore, particulars of any valuations agreed to by the "opposing party in the case would be receivable as being in the "nature of admissions. But none of the particulars which "were included in Mr. Woollaston's rejected documents were "said to be admissions by Mr. Mason. The particulars were of "valuations which were of the nature of admissions by persons "not parties to this case and that could not be a ground for "admitting them as evidence in chief, although they might well "have been admissible in re-examination if the cross-examination "of Mr. Woollaston had taken a certain line." He goes on to

[1] [1953] 3 P. & C.R. 391, 394.

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Somervell L.J.

say what, of course, is quite true, that evidence of this kind in regard to comparable transactions or assessments, or whatever it may be, in respect of comparable land, is often of very little value. That is the view which he has taken and we are asked to consider whether it is right or not.

Subject to one exception which might be made, I think that the issue has been decided in principle by a previous decision of this court, *Pointer* v. *Norwich Assessment Committee*,[2] which is reported in the Divisional Court, and in this court on appeal. The headnote in the Court of Appeal reads: "On an appeal to "quarter sessions by a person who alleges that he has been over-"assessed in respect of his premises, evidence of the rateable "value of other similar premises in the same Union is in point "of law admissible; whether in any particular case such evidence "will be of any value when admitted must depend upon the "circumstances and the degree of closeness with which the two "sets of premises resemble one another."

Then there was a point which does not arise here whether notice ought to have been given to the occupiers whose assessments were said to be comparable and therefore relevant. One of the points which had been made in the Divisional Court, and also in the Court of Appeal, was that although evidence of actual rents paid for comparable premises was admissible the assessments, which was what was sought to be brought in in that case, were not admissible. Bankes L.J., who had some doubt on the matter, said[3]: "But although evidence of the rateable value of "such other premises is in the majority of cases of but little value, "I agree with the Deputy Recorder and the Divisional Court "that it cannot as matter of law be regarded as inadmissible." Scrutton L.J. agreed. Atkin L.J. said that in the first place the assessments could be regarded—in that case it was the ratepayer who was introducing them—as admissions against the assessment committee, but he says[4]: "And secondly, it may be the only "way in which you can get at the rent at which the appellant's "premises are worth to let by the year." Then he gives an example in support of that proposition: "It seems impossible to "say that the rateable value of the former houses"—that is the comparable houses—"which contain precisely the same accom-"modation, is not admissible as evidence of the rent which the "hypothetical tenant would pay for the house last built."

These determinations by agreement of development value seem to be in law in the same position, and I think that the point which Mr. Wingate-Saul took in the first part of his argument, having regard to that decision, goes plainly to weight and not to admissibility. He said, for instance, that many of those concerned would regard the claim based on development value as something like a windfall and would not bother very much about the amount.

[2] [1922] 2 K.B. 471 (C.A.); sub nom. *Norwich Assessment Committee* v. *Pointer* [1922] 2 K.B. 47 (Div.Ct.).

[3] Ibid. 476.

[4] Ibid. 477.

That may be true with regard to some of the smaller sums, but we are asked to decide whether these determinations are inadmissible as such. One might well get a case where there was a large claim which had been dealt with at great length and in great detail between surveyors and so on. He also said, and I think rightly, that in some cases what the party is interested in is the difference between the two values and that the surveyor or other person acting for the claimant would not spend very long arguing about the absolute amount of the restricted value if he found that the surveyor for the development board, who had put it higher, was equally prepared to put the unrestricted value higher. But that goes to weight, I think, and not to admissibility.

There was one point which I think ought to have a word or two said about it. The rating and valuation list is a public document, and therefore if the rating authorities sought to rely on what they had agreed was the rateable value of comparable houses the other side would be able to look at the list and see if they could produce some cases which might help their case. The register in which these development values are to be found is not a public document. Again I think that that goes to weight and not to admissibility. I think it may well be that if the Central Land Board, having produced what they suggested were certain comparable figures, were unwilling to let the claimant see whether there might not be some other figures which he wanted to say were comparable, the court might well disregard altogether the figures which they sought to produce. Equally, if, having produced figures of this kind in a number of cases, they did not produce them in a particular case, it might well be that an adverse inference would be drawn against them if they put any difficulty in the way of the claimant looking at the register.

I do not think that that affects the question of admissibility. Once one comes to the conclusion—and I think that it is plainly right in principle—that actual transactions are admissible if sufficiently comparable, then agreed figures must be also admissible if the subject-matter of the agreed figures is comparable land. Of course, it is open to a claimant to show that these figures are not really comparable and throw very little light on the actual problem. In the present case Mr. Milne had the figures before him for the purpose of considering admissibility. I am not suggesting for a moment that he allowed them to influence his mind, but he was satisfied that there was sufficient other evidence to enable him to decide the present case. I think that he indicates —for what reason does not matter, possibly the distance of this land from some or other of the cases alleged to be comparable— that they would not have given him any real help in this case. It does not follow that they might not give another tribunal assistance in another case.

We were asked on that aspect of the matter by Mr. Wingate-Saul to say that, having decided the legal issue, we should not remit the award. I think, having decided the point of law, that

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we must remit the award. On the other hand, Mr. Ashworth indicated that what he was interested in was the point of law, and I think that he felt the force of the argument that it looked as if in this case the evidence rejected would not have affected the mind of the tribunal. It may be that although the case has to be sent back it will be disposed of without any further costs and without a further hearing and argument.

For these reasons I think that this point of law must be answered in the negative.

Birkett L.J. I am entirely of the same opinion. It is important to keep in mind that the only issue to be decided by this court is the question of admissibility, and considerations affecting the weight and cogency of the evidence are not really material for our consideration. I can quite see that many of the matters which have been raised by Mr. Wingate-Saul in this court affected the mind of the tribunal when deciding this issue. If one is to give in evidence figures relating to other land, the subject of agreement between the district valuer on behalf of the Central Land Board and other appellants, at first sight one would say: "That evidence must be considered with great care and great "circumspection." But, of course, it does not touch the question of admissibility.

The main ground upon which the tribunal proceeded was that the evidence was not admissible, quite apart from its cogency or weight, because it was not relevant. It was sought to put in a schedule of eleven claims under Part VI of the Town and Country Planning Act, 1947, which were negotiated by Mr. Collins in his capacity as district valuer for the Inland Revenue on behalf of the Central Land Board. It was said that those figures were agreed by negotiation between surveyors or chartered land agents and all the details of them were set out in the document which was produced. The land comprised in the eleven claims was land, some of it adjacent to Hornby, and it was said therefore that evidence of those claims could not be admissible because it was not relevant.

I think that we are bound in the present case by the decision of the Court of Appeal in *Pointer* v. *Norwich Assessment Committee*,[5] one of the strongest courts that one could imagine (Bankes, Scrutton and Atkin L.JJ.). The question in that case was concerned with a different subject-matter, namely, the rateable value of other similar premises in the same union, but it was there submitted that that was not admissible on the same grounds as it was submitted in the present case. In the Divisional Court Salter J. gave expression to his doubt largely based on many of the considerations urged here by Mr. Wingate-Saul. In the Court of Appeal Bankes L.J. said[6]: "The Deputy Recorder "admitted the evidence, but says he attached no weight to it, and

[5] [1922] 2 K.B. 471. [6] Ibid. 476.

"one of the questions that we are asked is whether he was right "in so disregarding it. But that is not a question of law at all; it "is a question as to the weight of evidence, and that is a matter "with which we have nothing to do." A little later he said: "But the reason why it" this class of evidence "has been dis-"couraged"—referring to what Salter J. had said—"is not "because it is inadmissible, but because there are so many "circumstances to be taken into consideration that comparisons "of that kind are practically valueless." Then there is the passage which my Lord has already cited.

Atkin L.J. said [7]: "If the objection is to the incorrectness or "unfairness of the valuation of the objector's premises, it seems "to me plain that it is open to him to say that their valuation is "incorrect or unfair because certain other premises, which corre-"spond very closely to his, are assessed at a different value, "subject to this, that if he is going to complain that those other "premises are assessed too low he must give the occupier notice "of the intended objection;" Then a little later: "When the "Assessment Committee are considering the rent which the hypo-"thetical tenant would give for the appellant's premises, any "evidence which is relevant to that question is in law admissible, "and it must depend on the circumstances of the case whether "evidence of the rateable value of premises which are said to be "in approximately the same position as the appellant's premises "is worth admitting or not. It is a question of degree. I confess "I do not quite appreciate the view taken by Salter J., that while "you may give evidence of the actual rent paid for the other "premises you may not give evidence of their rateable value. In "my opinion evidence of the rateable value must be admissible, "and for two reasons."; and then he cites again the passage which my Lord has already cited.

The only other observation I wish to make is this: Mr. Ashworth relied upon the Lands Tribunal Rules, 1949 (S.I. 1949, No. 2263), and in particular rule 31 (4) (ii) of those Rules.[8] It is to be observed that the whole of rule 31 is dealing generally with expert evidence, and Mr. Wingate-Saul reminded us from the section of the Act of the extraordinary width of the questions which the tribunal has on occasion to deal with. For example, in this rule there are references to claims for compensation in respect of minerals or disturbance of business, and so on. The rule is concerned with the number of expert witnesses who should be called, the restriction on the number to be called, the special

[7] Ibid. 477.

[8] Lands Tribunal Rules, 1949, r. 31 (4): "Where more than one "party intends to call an expert wit-"ness, each such party shall . . . "send to the registrar a copy of each "of the following documents . . . "(ii) a statement of any prices, costs, "or other particulars, and any plans, "relating to a property or properties "other than the [land which is the "subject of the proceedings] which "are proposed to be given in evidence "in support of any such valuation, "or a statement that no such prices, "costs, particulars, or plans will be "relied upon."

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circumstances in which more than one may be called, and if evidence is going to be given of other land the necessity of giving notice, and so on. He relied further on section 32 referring to the power which is given to the tribunal to view the land in question and comparable land.

I do not think that Mr. Ashworth's argument is advanced very far merely by a consideration of the Rules. I think that his stronger ground is the general law as laid down in the Court of Appeal. The weight and cogency are not for us and I observe that the tribunal in the present case said: "The evidence of the opinions "of value of the expert witnesses called before me by the appel-"lants and by the respondents respectively, when considered in "the light of the other evidence received and of my own inspection "of the land and its neighbourhood, would be adequate to enable "me to arrive at a proper determination as to the development "value of the said interest in land." I can quite conceive of cases where the Lands Tribunal would say: "We cannot say that "this evidence is inadmissible. Strictly it is admissible, but it "is going to give very little assistance to me in the determination "of this case." The parties would thereupon probably say: "Very well; we will dispense with it." It happens not infrequently in the ordinary courts that counsel wants to submit some particular matter and the judge says: "I cannot exclude "it, but I do not think it will help me very much," and counsel almost invariably says: "I will not proceed with it." That is an entirely different matter.

I have some sympathy with the submission made by Mr. Wingate-Saul that if we were to decide that the evidence was admissible the parties ought not to be put to much further expense by having the case sent back. My Lord has pointed out that the moment we decide that the evidence is admissible it is impossible to avoid the formal order sending the case back, but in view of what Mr. Ashworth said yesterday, that the real point of this appeal was the determination of the point of admissibility, and no more, I anticipate that Mr. Wingate-Saul need have no fear about additional expense being laid upon him because of our decision. For these reasons I agree with the judgment which my Lord has already delivered.

Romer L.J. I also agree. The only issues which were before the Lands Tribunal to determine were, first, the restricted value of the hereditaments in question, and, secondly, the unrestricted value of those hereditaments. Mr. Wingate-Saul quite rightly said that no evidence should be admitted unless it was relevant to one or other or both of those issues. He conceded, and rightly, that evidence of sales effected of comparable land in the district would be admissible; and, indeed, it is clear to me that evidence of contracts for sale which for some reason or other had not been carried to completion would be equally admissible, and for this reason, that provided that the land is comparable land, if two

parties have for any purpose of their own agreed upon its value that fact would surely be admissible whatever the purpose might be. It is said that this case is different because here the several claims which were put forward were as the result of an agreement between a third party and the Central Land Board itself. I can see no principle on which it can be excluded for that reason, although, of course, it would be a matter of weight to which the tribunal would have regard in assessing the value of the evidence.

It is to be further observed that if the occupiers managed to secure claims of this character which the board possess, they, the occupiers, could themselves, as I think, put them in as admissions by the Central Land Board if they thought they were likely to help their own case. For these reasons, and those which my brethren have given, I am clearly of opinion that these settled claims are admissible in evidence and, indeed, I think that to hold the contrary would be to run counter to the reasoning both of this court and the Divisional Court in the case to which my Lord referred. It is, of course, plain that the question of what weight, if any—and I advisedly say "if any" because some of the claims may be of no assistance—is to be attached to the claims is one solely and exclusively for the tribunal itself. I agree with the order which my Lord has proposed.

Question answered in negative.
Case remitted.

Solicitors: *Treasury Solicitor; Vizard, Oldham, Crowder & Cash for Clark, Oglethorpe & Sons, Lancaster*

A. W. G.

[LEEDS ASSIZES.]

* REGINA *v.* MOORE.

1954
Mar. 15, 16.

Pearson J.

Criminal Law—Evidence—Witnesses—Competency—Husband and wife—Husband charged with arson of wife's property—Competence of wife as witness—"Offence involving bodily injury to child"—Child in house set on fire—Married Women's Property Act, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 12—*Criminal Evidence Act,* 1898 (61 *&* 62 *Vict. c.* 36), *s.* 4 (1)—*Larceny Act,* 1916 (6 *&* 7 *Geo.* 5, *c.* 50), *s.* 36—*Children and Young Persons Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 12), *Sch. I.*
Children and Young Persons.

On a charge against a husband of arson of his wife's property the wife is a competent witness to give evidence against him, by virtue of section 12 of the Married Women's Property Act, 1882; the provision therein is not restricted to offences under the Larceny Act, 1916.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

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Regina
v.
Moore.

Preliminary point on a trial on indictment.

The accused, Harry Moore, was charged on an indictment by the first count with arson contrary to section 2 of the Malicious Damage Act, 1861, the particulars being that on November 20, 1953, he maliciously set fire to a certain dwelling-house, namely, 293, Mount Street, Bradford [the property of and] in the occupation of Annie Moore—James Moore, Ann Moore and Edith May Moore being therein; by the second count with arson contrary to section 3 of the Act of 1861, the particulars being that on the same date he maliciously set fire to the dwelling-house with intent to injure or defraud; and by the third count with arson contrary to section 7 of the Act, the particulars being that on the same date he maliciously set fire to certain curtains [the property of the said Annie Moore] in the dwelling-house under such circumstances that, if the building had thereby been set fire to, the offence would amount to felony. The words in brackets were added by way of amendment after the ruling of Pearson J. on the admissibility of the evidence of the wife of the accused.

When the wife was called to give evidence for the prosecution counsel for the defence submitted that she was not a competent witness against her husband.

J. S. Snowden for the Crown.
Barry Payton for the accused.

Pearson J. In this case there is a preliminary question as to the admissibility of the evidence of Mrs. Moore, the wife of the accused, as a witness for the prosecution. She was called as a witness before the magistrates, so that her deposition is available. The prosecution is for arson, and the charges are under sections 2, 3 and 7 of the Malicious Damage Act, 1861. It is argued on behalf of the defence that her evidence is not admissible because she is neither a competent nor a compellable witness. The prosecution, while not contending or conceding that her evidence is necessarily essential to their case, ask that the question may be decided. I am invited to assume that it is common ground that the house property which was either set on fire or was in danger of being set on fire was in a sense the property of Mrs. Moore because she held the lease or tenancy of it, so that the house would be her leasehold property.

The starting-point is the general rule which I take to be correctly set out in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 497: "At common law, as a general rule, "the husband or wife of a prisoner is not a competent witness "for the Crown *against* the prisoner." From that general rule there are, first, certain exceptions at common law which are set out in the same edition of Archbold (pp. 497 and 498), but none of those exceptions is relied upon here. There are, however, certain statutory exceptions under section 4 (1) of the Criminal Evidence

Act, 1898, as it has been amended by subsequent Acts, and either or both of two of those are relied upon by the prosecution as applicable to this case. The first is section 12 of the Married Women's Property Act, 1882, which provides: "Every woman, "whether married before or after this Act, shall have in her own "name against all persons whomsoever, including her husband, "the same civil remedies, and also (subject, as regards her hus-"band, to the proviso herein-after contained) the same remedies "and redress by way of criminal proceedings, for the protection "and security of her own separate property, as if she were a "feme sole, but except as aforesaid, no husband or wife shall be "entitled to sue the other for a tort." In my view, the question falls to be decided mainly upon the wording of that main clause. The criminal proceedings here are to punish an alleged act of arson in respect of the wife's own separate property, as I assume it to be, and clearly, in my view, unless the scope of the words is restricted by some later part of the section, the words "have . . . the same remedies and redress by way of criminal "proceedings, for the protection and security of her own separate "property" are wide enough to cover this case. Obviously her property requires to be particularly secured against arson as well as against other offences.

It is contended by the defence that the section does not apply because this prosecution was not by Mrs. Moore, but on the facts before me that appears to be incorrect, because I have a recognizance by Mrs. Moore, the conditions being that she is to appear at the assizes and prefer or cause to be preferred a bill of indictment against the accused in respect of the offence in question, which is arson. So that on the facts it seems that this is a prosecution brought by her. It is also contended that the scope of this provision is restricted to offences of larceny and possibly other offences under the Larceny Act, 1916. The matters relied on for that contention on the part of the defence are, first, derived from further words in section 12: "In any "indictment or other proceeding under this section it shall be "sufficient to allege such property to be her property. . . ." That is not in fact alleged in terms in this present indictment, but that can be cured by an amendment. Although the indictment does not use the word "property," it does refer to this house being "in the occupation of Annie Moore." Then the section goes on: ". . . and in any proceeding under this section "a husband or wife shall be competent to give evidence against "each other, any statute or rule of law to the contrary notwith-"standing: Provided always, that no criminal proceeding shall "be taken by any wife against her husband by virtue of this Act "while they are living together, as to or concerning any property "claimed by her, nor while they are living apart, as to or con-"cerning any act done by the husband while they were living "together, concerning property claimed by the wife, unless such "property shall have been wrongfully taken by the husband

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"when leaving or deserting, or about to leave or desert, his "wife."

The defence stress the wording "unless such property shall "have been wrongfully taken by the husband," which certainly tends to suggest that the subject-matter finally contemplated is an offence under the Larceny Act, or some similar offence, because the wording is "shall have been wrongfully taken" and not "shall have been wrongfully taken or set on fire." That is an argument which I think has some merit, but I do not think that one can assume that the scope of the exception is necessarily the same as the scope of the main clause. Prima facie, one would expect it to be rather less wide than the scope of the main clause. My view on that is that the main clause should have its proper effect according to the meaning of the words and should therefore include this case of arson.

The other matters relied on in support of that contention are, first, section 36 of the Larceny Act, 1916, which refers only to offences under that Act, but the answer seems to me to be that any section of the Larceny Act, 1916, could refer only to offences under that Act. The point would have been much stronger there if there had been some other Act relating to arson which did not contain some provision similar to section 36 of the Larceny Act, 1916, but I am not aware of any such Act relating to arson and no such Act has been cited to me. The present action is brought under the Malicious Damage Act, 1861. Secondly, a passage was cited to me from *Rex* v. *Creamer*,[1] which in terms refers only to larceny. Darling J., delivering the judgment of the court, said[2]: "At common law a wife could not "commit larceny of her husband's property, but by sections 12 "and 16 of the Married Women's Property Act, 1882, it was for "the first time made possible to prosecute a wife for stealing her "husband's goods. Those sections have been reproduced in "section 36 of the Larceny Act, 1916, which provides that no "proceedings under the Act shall be taken by a husband against "his wife while they are living together, nor while they are living "apart as to any act done by the wife while they were living "together, unless the property has been wrongfully taken by the "wife when leaving or deserting or about to leave or desert her "husband." But that case was concerned with an indictment for receiving certain money well knowing it to have been stolen, and I do not think that that passage in the judgment of the court contains any implication that the provision of section 12 of the Married Women's Property Act, 1882, is necessarily limited to larceny and kindred offences.

There was also cited to me a passage from Eversley on Domestic Relations, 6th ed. At p. 171 it says: "A special "exception was created by the Married Women's Property Act,

[1] [1919] 1 K.B. 564; 35 T.L.R. 281.

[2] Ibid. 569.

"1882, and the Married Women's Property Act, 1884, enabling "husband or wife to give evidence against each other, on the "prosecution of the one by the other for larceny of his or her "property committed on desertion." That sentence would certainly seem to be, or perhaps seem to convey, an implication that the scope of the provision is limited to matters of larceny only, but it is only a short sentence, and, at any rate, section 36 of the Act of 1916 would apply to more than cases of larceny as such. Once more, I think that one should come back in the end to the wording of the section itself. As I have said, the main provision primarily governs the decision, and I think that this case falls within that main provision.

There is a further question raised by the defence under section 12 of the Married Women's Property Act, 1882. The proviso states ". . . that no criminal proceeding shall be taken by any "wife against her husband by virtue of this Act while they are "living together . . ." The contention of the defence was that they were at the material time living together, or, at any rate, it has not been shown that they were at that time separated. That, of course, is primarily a question to be decided on the facts. The only evidence before me at present is that on the depositions, and I must decide it on those depositions. The effect of the depositions on my mind is that on a particular date the parties did separate, either because the husband deserted the wife or by the husband and the wife agreeing to live apart from that time onwards. After that, it would appear that the husband wished to come back or wished the wife to come back to him, but she refused. The question is whether the consortium ceased on the earlier date I have referred to. On the evidence which is now before me, I hold that the consortium did cease and, therefore, that part of the proviso is not applicable.

The prosecution rely on another statutory exception to the general rule which I have mentioned, and that is under the First Schedule to the Children and Young Persons Act, 1933, because the Act of 1898 as amended refers to that schedule. The First Schedule to the Act of 1933 mentions a number of other offences under various sections, and then there is a general clause at the end: "Any other offence involving bodily injury to a child or "young person." The argument is that the charge in the present indictment is that the accused set fire to a certain house in which three children were at that time. It was suggested, therefore, that the offence charged was one which involved bodily injury to a child or young person. The wording of that last item I have mentioned tends to suggest that perhaps it should be read to some extent ejusdem generis to the offences which have been previously specified. I have looked at the sections referred to, in so far as they can be found, in Archbold, but I did not get much help from them one way or the other. I therefore think that it is reasonable to consider whether, within the meaning of those words, the offence charged does involve "bodily injury to a child or young person."

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Regina v. Moore.

Pearson J.

It seems to me that the answer is "No," for this reason. The prosecution have to prove under that count two things: (1) that the accused set fire to the house; and (2) that at the time he set fire to the house certain persons were therein. If those two facts are proved the offence is made out, and it is not necessary for the prosecution to prove the "bodily injury to a child or young "person," nor, in the circumstances of this case, was it to be expected that bodily injury would be inflicted upon a child or young person, and the prosecution would be entitled to succeed even if the defence were able to establish that it was impossible that any injury would be inflicted upon any other person. That being the situation, under the first count I hold that the charge is not one which involves bodily injury to a child or young person within the meaning of that schedule.

For those reasons, under section 12 of the Married Women's Property Act, 1882, and section 4 (1) of the Criminal Evidence Act, 1898, I hold that the evidence is admissible.

[Leave was given to amend the indictment as indicated previously in this report. The witness Annie Moore, on being recalled, declined to give evidence. After all the other evidence had been heard and his Lordship had summed up the accused was found Guilty on the first count.]

Verdict: Guilty.

Solicitors: *W. H. Leathem, Town Clerk, Bradford; H. Duxbury, Bradford.*

[PROBATE, ETC., DIVISION.]

1954
May 28.

* PRACTICE DIRECTION (ANCILLARY RELIEF).

Husband and Wife—Maintenance—High Court—Practice—Ancillary relief—Application out of time—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940 (*L.* 27)), *r.* 44 (1).

In future applications under Matrimonial Causes Rules, 1950, r. 44 (1), for leave to apply for ancillary relief out of time may be made to a registrar ex parte on affidavit. Thereupon, the registrar will decide whether to give leave forthwith or to require a summons to be issued and served on the respondent, the summons to be returnable before a registrar or a judge as he may direct.

B. LONG,
Senior Registrar,
Principal Probate Registry.

[QUEEN'S BENCH DIVISION.]

* *In re* CORKE.

1954
May 28.

Lord Goddard C.J. and Slade J.

PRACTICE NOTE.

Habeas Corpus — Writ — Application by prisoner serving sentence — Conviction and sentence by competent court—Applicant lawfully in custody—No grounds for issue of writ.

On April 23, 1954, the applicant, William Corke, was convicted by a Bow Street magistrate on a charge of being a suspected person loitering with intent, and was sentenced to three months' imprisonment. He did not appeal against his conviction, but while serving his sentence forwarded to the court an affidavit asking for a writ of habeas corpus, his complaint being that he was wrongfully convicted or convicted on perjured evidence.

LORD GODDARD C.J. It is as well that persons serving sentences passed upon them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal. If they complain that they are wrongly convicted, they should appeal to quarter sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of habeas corpus. The affidavit here shows that the applicant is in prison serving a sentence passed by the Bow Street Magistrates' Court under the Vagrancy Act, 1824. It has always been the law as it was laid down by Wilmot C.J., in giving his opinion on the writ of habeas corpus,[1] that the writ is a writ of right and not a writ of course. That means that, before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can see that the applicant may be unlawfully detained.

In the present case, it is clear that, unless the conviction was set aside on appeal (and the time for appeal has long gone by), the applicant is lawfully in custody, serving a lawful sentence; and his application for a writ of habeas corpus is, therefore, refused.

Application refused.

J. F. L.

[1] Wilmot's Notes of Opinions and Judgments, pp. 77 et seq. (1802).

[COURT OF APPEAL.]

C. A.

1954
May 13, 14.

Evershed M.R., Jenkins and Hodson L.JJ.

* STEVENS *v.* STEVENS.

Court of Appeal—Evidence—Transcript—Reading by members of court out of court—Alternative use of judge's note—Saving of costs—R.S.C., Ord. 66A, *rr.* 3, 4.

Practice and Procedure—Trial—Parties seen by judge privately—Seen separately—Undesirability. Divorce.

A wife petitioned for divorce on the grounds of her husband's cruelty. The commissioner who heard the petition, after the close of the wife's case when the husband was giving evidence, adjourned and saw the wife and the husband separately in his private room with their counsel's consent with a view to effecting a reconciliation between them. The parties were not reconciled and the commissioner, after a three days' hearing, dismissed the petition. On the wife's appeal a transcript of all the evidence was made. With the parties' consent and in order to save time and to prevent the appeal standing over for a substantial period part heard, the members of the Court of Appeal read the transcript of the evidence themselves in private:—

Held, that, on the evidence, the wife's petition was rightly dismissed.

Per curiam. On an appeal advantage should be taken in appropriate cases of rule 3 of R.S.C., Ord. 66A, and the judge's note used on the appeal and the evidence not transcribed.

It would not be right as a common practice for the court to adjourn and read the transcript of the evidence for itself. If that were done, it might be thought that, having read the evidence and conferred privately together, the court had reached conclusions which it would be difficult to change, so that the decision would be come to, not on argument addressed in open court but on what had happened behind closed doors.

Excluding matters relating to infants and custody, which were in a class by themselves, it was not desirable that a judge, at any stage of the trial, should see the parties separately and individually. Where the judge desired to see the parties apart from their legal advisers, he should see them together.

Appeal from Judge Rewcastle, sitting as special commissioner.

The petitioner, Sylvia Stevens, sought a divorce on the ground of her husband Ronald Stevens's cruelty. The commissioner who tried the action, after hearing the wife's evidence and when the husband was giving evidence, adjourned and saw counsel in his private room and, with a view to effecting a reconciliation between the parties, subsequently saw the wife alone twice and the husband once. The efforts at reconciliation failed and after a three-day hearing the commissioner dismissed the wife's petition.

The wife appealed. A transcript of all the evidence was made for the Court of Appeal. When the appeal was opened it became clear that if counsel for the wife read all the evidence the appeal would not be concluded next day and the appeal would

have to stand over for a substantial period. In these circumstances their lordships, with the parties' consent, agreed to read the transcript to themselves.

The grounds on which the wife claimed a divorce based on cruelty do not call for report.

J. L. Elson Rees for the wife.
John Perrett for the husband.

EVERSHED M.R. Before I give my judgment in this case, I wish to refer to the terms of Order 66A, which are not (I believe) always borne in mind. That order was made part of the Rules of the Supreme Court in 1940 and provided for the taking of what is called an "official shorthand note" of trials in the High Court, the payment of the fees required for taking the notes being paid out of public funds. Rule 4 of that order provides that any transcript required for the Court of Appeal—that is, of the evidence or judgment—of which a shorthand note has officially been taken, "shall be paid for by the appellant in the first "instance, and the costs thereof shall, unless the Court of "Appeal otherwise directs, be costs in the appeal." There are provisions for special cases of hardship, where the court is entitled to say that the costs of providing transcripts shall be at the public expense—that provision having, of course, been made before the Legal Aid scheme came into operation. But by rule 3 of the same order: "If the judge intimates that in the event of "an appeal his note will be sufficient, the shorthand note of the "evidence need not be transcribed for the purposes of an "appeal"; and by sub-rule (2): "If the parties agree or the "judge is of opinion that the evidence or some part of the "evidence of any witness or witnesses would, in the event of an "appeal, be of no assistance to the Court of Appeal, the short-"hand note of such evidence need not be transcribed for the "purposes of an appeal."

The taking of a shorthand note and its transcribing are skilled operations, and the costs of preparing the necessary transcripts for the Court of Appeal of the evidence in a trial which had lasted many days are, naturally enough, not inconsiderable. A party who is not affluent may find the burden of those costs severe. It seems to me sometimes to be assumed that, in all cases in which there is an appeal on questions of fact, the whole of the evidence must be transcribed as a matter of course. I am carefully avoiding making any special case of legal aid cases. It is a principle of the Legal Aid scheme that a legally-aided litigant shall, so far as possible, be in exactly the same position as what is called a dives litigant. Therefore, in his case, the same course is followed—a transcript is made.

I venture to call attention to rule 3 and to express the hope that advantage will, whenever appropriate, be taken of that rule to save the considerable costs of making these transcripts of

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evidence; adding that which is quite obvious, namely, that the costs incurred are not confined to the making of the transcript, but include the added costs occasioned by the extended character of the hearing in the Court of Appeal when these transcripts are read.

I refer again to what occurred yesterday, when we came to the conclusion (and I pointed out carefully that this was not to be taken as a precedent) that we would adjourn in order that we might read carefully for ourselves the whole of the transcript of the evidence, in order to save the time which would necessarily be taken if, as Mr. Elson Rees intimated to us would otherwise be necessary, the whole of the transcript would have to be read to us in court. I add one thing and that is this: one powerful reason why we took that special course in this case (with the consent of the parties and for the convenience of everybody, including the parties) was because, had it been necessary for this transcript to be read, it is quite clear that this case could not have been finished by the mid-day adjournment today; and, if it had not been so finished, the case would, for certain reasons, have had to go over possibly for a long period. That special circumstance is to be emphasized, because I am far from saying that it would be right, as a common practice, for the court to adjourn and read the transcript to itself. If that were done, it might be thought that the court, having read the evidence and conferred privately together, had reached conclusions from which it would be difficult to move them; so that the decision would be come to, not on argument addressed in open court, but on what had happened behind closed doors.

[His Lordship reviewed the evidence, and continued:] Without pursuing the matter at greater length, it is sufficient for me to say that, having carefully read the whole of the transcript and the correspondence, I can see no possible ground upon which the Court of Appeal, not having seen these witnesses, would be justified in saying that, contrary to the commissioner's impression of the witnesses and their credibility, we ought to hold a case of cruelty proved. I need not take up time by expounding what I mean by "a case of cruelty." The judge referred to the well-known passages in Asquith L.J.'s judgment in *Buchler* v. *Buchler*.[1] In order to establish cruelty it is necessary to go much further than merely to prove the kind of rough and tumble (if I may use that expression) which to some degree must be attendant upon any cohabitation by husband and wife.

I pass, therefore, to the second matter which Mr. Elson Rees has raised, which is this: the wife gave her evidence and was cross-examined and re-examined, further cross-examined and further re-examined. She was then supported by two other witnesses, and her case concluded somewhere during the latter part of the second day. Thereupon, the husband went into the

[1] [1947] P. 25; 63 T.L.R. 100; [1947] 1 All E.R. 319.

witness box, was examined by his counsel Mr. Perrett, and at the end of the day for a short time he was cross-examined by Mr. Elson Rees. Judging from what I read in the shorthand note, the judge (even at that stage) was more than a little anxious about his condition and suggested that he might sit down, an invitation which the husband did not accept. On the third day, after the cross-examination had been resumed for a relatively short period, it became quite plain that the husband would require a rest. The court accordingly adjourned. According to the official note, the case was adjourned at 11 o'clock and not resumed until 12.40. It may be that that period of an hour and 40 minutes comprehends a very short resumption which is represented by some three or four questions.

But during that period of time, these further events also took place: first, the commissioner appears to have seen the two counsel and indicated to them the desirability, if possible, of effecting a reconciliation. Counsel would, as I understand it, have gladly assisted to that end if and so far as they respectively thought it practicable. Then, with the consent of counsel, the commissioner saw, individually and separately and without the presence of any of their legal advisers, the wife and the husband. Having done that, he again saw counsel. Finally, he saw the wife for the second time; and at the end of that second interview the wife (according to Mr. Elson Rees, and I think Mr. Perrett agrees) was seen to emerge from the commissioner's room in tears, whereas she had retained, I gather, a phlegmatic composure during her examination and cross-examination in court. At some stage (and Mr. Elson Rees's recollection is that it was on the second occasion when the commissioner saw Mr. Perrett and himself) the commissioner intimated in unmistakable terms that, having heard as much of the evidence as I have indicated, he was clearly of opinion that he could not find cruelty—that is, could not grant the relief which the wife sought—and he also intimated, as regards a defence of condonation which had been raised, that he was also unprepared to find condonation.

Having expressed that view, suspicion is understandable that, when the wife went again to the commissioner's room and came out in tears, she may have been given to understand by the commissioner that, as her husband was ready for a reconciliation, it would be all the worse for her if she was not similarly ready herself, because she was not going to obtain a decree. Mr. Elson Rees has not suggested that the commissioner used any sort of improper pressure, and he has not therefore said that this commissioner was guilty of any irregularity in his conduct of the case; but he has said that the effect of his seeing individually and separately the wife and the husband inevitably led, in the mind of his foreign client, to the suspicion which I have mentioned.

I am bound to say that in cases of this kind—I exclude matters relating to infants and custody, which are always in a class

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entirely by themselves—it is not desirable that a judge, at any stage of the trial, should see the two parties separately, by which I mean not only separately from their legal advisers but each individually and separately; because, however regular, discreet and proper the judge may be—and one may assume that he will be—the losing party will always be liable to feel that something occurred, when the judge was seeing either that party or the other, the one behind the back of the other, and not in open court, which affected the judge's conclusion; and it is, of course, of the essence of our system of administration of justice that it should be done openly and that things should not be done, as is said, behind closed doors, and particularly that there should not be communications passing between the judge and one party of which the other knows nothing.

I quite see that, in a case of this very special kind, where the judge has got so far in the case that he feels quite clear in his own mind that he will not be able to grant the relief which the petitioner seeks, the petitioner's case being wholly concluded, he might well feel that no harm could be done and that it was just possible that some good might emerge; but, without intending to reflect in any way upon the obviously patient conduct of this case by this commissioner, I think it better that, if the judge desires (as he well may, in order to effect a reconciliation) to see the parties apart from their legal advisers, he should see them together. Particularly in such cases as this, where the petitioner is not English by birth, this incident may have caused a suspicion to arise in her breast of the way in which the commissioner treated the case, which is unhappy and unfortunate.

I have referred to that matter and treated it as I have because, in the end of all, I am quite satisfied that the commissioner, having heard the witnesses, was amply entitled to conclude, as he did, that the wife had failed to establish the case she set out to establish. That being so, the question of condonation, of course, never arose, and I do not propose to take up time by referring to it; as the commissioner found (and, as it seems to me, on the material which we have, justifiably found) no cruelty proved, the result is that the petition was rightly dismissed and, in my judgment, there is no ground upon which we could disturb that finding. For these reasons, I think that this appeal fails and must be dismissed.

Jenkins L.J. I agree.

Hodson L.J. I agree.

Appeal dismissed.

Solicitors: *Adrian de Fleury, Gassman & Co.; Hunters.*

B. A. B.

[CHANCERY DIVISION.]

* WESTALL RICHARDSON LD. *v.* ROULSON.

1954
May 18, 27.

Vaisey J.

Master and Servant — Wages — Holidays with pay — "Worker" — "Employer"—Contract of service—Independent contractor—Degree of control — Whether person employed "worker" entitled to holidays with pay—Wages Councils Act, 1945 (8 *&* 9 *Geo.* 6, *c.* 17), *ss.* 10 (1), 16 (1), 23 (1)—*Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order,* 1952 (*S.I.* 1952, *No.* 957), *Schedule.*

An "outworker" (so described) occupied as tenant part of the premises of a company of cutlery manufacturers, by whom he was supplied with basic materials for further processing under contracts under which he used his own methods, employed and paid employees as he chose who were in no way controlled by the company, bought his own tools and working materials, was paid a price fixed on the basis of quantities processed, and was free to work for others:—

Held, that the "outworker" was not a "worker" within the meaning of section 23 (1) of the Wages Councils Act, 1945, since he did not work under contract with an "employer." "Employer" within that definition presupposed that the "worker" should be an "employee," and the outworker did not work as a servant under a contract with an employer, but as an independent contractor under a contract or series of contracts with a customer, so that he was not a "worker" entitled to holidays with pay under the Act and regulations.

WITNESS ACTION.

An action, in the nature of a test case, was brought by Westall Richardson Ld. against Joseph Roulson to determine whether the defendant was a "worker" within the meaning of the provisions of the Wages Councils Act, 1945, and whether he or any person employed by him was "in the employment" of the plaintiffs for any purpose of that Act, the question at issue being whether or not the defendant was entitled to holidays with pay.

The plaintiff company carried on the business of a manufacturer of cutlery at Sheffield.

Since January 12, 1953, the defendant occupied a portion of a shop forming part of the company's factory, under a verbal weekly tenancy, at a rental of £2 10s. per week, covering power, heat and light and the hire of machinery, the property of the company, which was installed in the portion of the premises occupied by the defendant. The defendant carried on in that portion of the shop a process known as mirror polishing of cutlery and for that purpose employed persons varying in number, but, at the date of the writ, numbering seven women and two men.

From time to time the company (among other manufacturers) supplied the defendant with basic materials, such as blades, with or without handles, and carving forks, both of which had already undergone certain processes, for further processing or finishing by the defendant, and entered into contracts with the defendant

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on the terms customary in the cutlery industry, which were to the following effect: (i) that the defendant should process the basic materials supplied by the company using his own methods; (ii) that the defendant might employ in such processing and was responsible for and paid as many employees as he chose and neither the defendant nor any employee of his was in any way controlled by the company—in particular there was no control with regard to the number of hours worked or the wages paid or the period or periods within which such work was done by the defendant or his employees; (iii) that subject to the payment of any statutory remuneration fixed by any wages regulation order made under section 10 of the Wages Councils Act, 1945,[1] and allowing his said employees the holidays and the holiday remuneration fixed by the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952,[2] also made under section 10 of the said Act, the defendant might make his own terms of employment with his employees and that the company had no voice in the fixing thereof; (iv) that the defendant might carry out the said processes at that part of the company's premises of which he was the tenant or at such other place as he thought fit and was at liberty to subcontract; (v) that the defendant bought his own tools and working materials; (vi) that the price paid by the company for processing work done by the defendant was fixed by the piece on the basis of quantities processed and was quoted and fixed by reference to dozens; (vii) that the defendant was free to work or carry out processes for persons, firms or companies other than the company and was not obliged

[1] Wages Councils Act, 1945, s. 10: "(1) Subject to and in accordance "with the provisions of this section, "any wages council shall have power "to submit to the Minister proposals ". . . (*a*) for fixing the remuneration "to be paid, either generally or for "any particular work, by their em- "ployers to all or any of the workers "in relation to whom the council oper- "ates; (*b*) for requiring all or any "such workers as aforesaid to be "allowed holidays by their employers. "The power to submit proposals for "fixing remuneration shall include "power to submit proposals for fixing "holiday remuneration."

S. 16: "(1) Where the immediate "employer of any worker is himself "in the employment of some other "person and that worker is employed "on the premises of that other person, "that other person shall for the pur- "poses of this Part of this Act be "deemed to be the employer of that "worker jointly with the immediate "employer."

S. 23: "(1) . . . 'Worker' means "any person who has entered into or "works under a contract with an em- "ployer, whether the contract be for "manual labour, clerical work or "otherwise, be expressed or implied, "oral or in writing and whether it "be a contract of service or of appren- "ticeship or a contract personally to "execute any work or labour, except "that it does not include any person "who is employed casually and other- "wise than for the purposes of the em- "ployer's business."

[2] Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, Sch. Part III, para 3: ". . . An employer shall . . . allow "a holiday (hereinafter in this sche- "dule referred to as an 'annual holi- "'day') to every worker in his "employment to whom this part of "this schedule applies." [Then follow provisions for the holidays of workers and outworkers.]

Part IV, para. 7, provides that a worker qualified to be allowed an annual holiday under this schedule shall be paid "holiday remuneration" [in manner therein specified].

to work or carry out processes solely for the company; (viii) that the defendant was not obliged to give to the company any priority in point of time or otherwise over other persons, firms or companies for whom he might work; (ix) that the defendant should process goods for the company when and in what manner he chose and according to his own production methods without any supervision by the company; (x) that the company was entitled to deduct the rent of the shop from the agreed price of the goods manufactured for it by the defendant; (xi) that the company should make payment for goods processed on delivery after making deductions as hereinbefore stated; and (xii) that the company did not require the defendant to supply parts or materials for incorporation in any articles processed by the defendant.

It was stated in the statement of claim, and not denied, that the defendant was not assessed to income tax on the basis of P.A.Y.E., but under Schedule D, and rates of allowances for expenses were agreed by him with the Inland Revenue authorities without any reference to the company. Further, the defendant was not eligible for unemployment pay under the National Insurance Act, 1946, but was treated for the purposes of that Act as an employer. The defendant was also a self-employed person for the purposes of the said Act and paid for his own stamps and was responsible for the stamping of the cards of those employed by him and he was not an insured person for the purposes of the National Insurance (Industrial Injuries) Act, 1946.

It was further alleged that differences had arisen between the company and the defendant as to whether the company was obliged to pay to the defendant holiday pay in respect of annual holidays under the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952 (S.I. No. 957), Sch., Part III.

The issue raised was whether the defendant and his employees were "in the employment" of the plaintiffs and "workers" within the meaning of the Act and regulations.

Gilbert Paull Q.C., *I. J. Lindner Q.C.* and *Patrick Jenkin* for the plaintiffs.

Melford Stevenson Q.C. and *John Platts-Mills* for the defendant.

Cases referred to in argument: *Templeton* v. *William Parkin & Co. Ld.*[3]; *Lecture League Ld.* v. *London County Council.*[4]

Cur. adv. vult.

May 27. VAISEY J. This action is said to be in the nature of a test case. While I can, of course, decide it as an issue between the plaintiff company and the defendant, I am not sure that what I say will afford any very clear guidance in other cases where the facts are not so similar as to be indistinguishable from the facts

[3] (1929) 22 B.W.C.C. 110.

[4] (1913) 29 T.L.R. 426.

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here. However, though I am doubtful whether I can formulate principles capable of other than limited application, there must be a good many cases very like this, which may well be governed by the judgment which I am now delivering.

The matter is concerned with a custom or practice in the cutlery trade as carried on at Sheffield, and the matter in dispute is as to the effect, if any, on the respective positions of the plaintiff company and the defendant of the provisions of the Wages Councils Act, 1945, to which I will refer as "the Act."

The plaintiff company carries on an extensive cutlery business at Sheffield, with the assistance of some eighty or ninety "in-" workers" and four or five "outworkers," and the defendant is in relation to that business one of that class of persons who are described as "outworkers." That class, however, appears to include persons who carry on their activities not in a uniform manner, but under a variety of conditions. In particular, an outworker may sometimes have a business which, in the strict sense, is a one-man business; that is to say, a business in which he, or sometimes it may be she, works alone as an individual. In other cases, such as the present, the outworker is the head of what I understand is called a "team"; and I think there may be a difference between the outworker who works alone and the outworker who works as leader of such a team. Again, different considerations may apply to the case of an outworker who is, so to speak, a "tied" outworker, equivalent to an inworker working out, acting exclusively for one cutlery firm or company, as contrasted with an outworker who habitually works for more than one such firm or company and might be described as a "jobbing" outworker.

But the facts in the present case are those with which I have to deal, and they are not in dispute. [His Lordship stated the facts and continued:]

The "usual terms" obtaining in the present case are set out somewhat more elaborately in the statement of claim, and there is no dispute about them between the parties. One further term is pleaded by the defendant, which is, that it is a customary and implied term of the bargain between the parties that the defendant was required, or at least expected, personally to execute some work and to use his own manual labour in carrying out some of the processes under his contracts. It is certainly very significant that the defendant is assessed to income tax not on the basis of P.A.Y.E., but under Schedule D to the Income Tax Acts, and rates of allowances for expenses are agreed by him with the tax authorities without any reference to the plaintiff company. Moreover, the defendant is not eligible for unemployment pay under the National Insurance Act, 1946, but is treated for the purposes of that Act as an employer. Similarly, he is regarded for the purposes of that Act as a self-employed person and is not an insured person for the purposes of the National Insurance (Industrial Injuries) Act, 1946. I understand also that he is regarded

as a self-employed person for the purposes of the National Health Act, 1946.

Now the question is whether the plaintiff company is, with regard to the defendant, liable to provide him with holidays and holiday pay under the Act and the Cutlery Wages Council (Great Britain) Wages Regulation (Holidays) Order, 1952, to which I will refer as "the regulation."

I must now turn to the provisions of the Act. It seems to me that the question in this case largely turns, or, it may be, wholly depends, on the definition of "worker" in section 23 (1) of the Act. [His Lordship read the definition, and continued:] If the defendant is a worker within the meaning of that definition, I do not doubt that he is an "outworker" within the meaning of that word as used in the cutlery trade in Sheffield. The definition seems to me to be not very easy to apply to the facts of the present case or, alternatively, it is perhaps not easy to see whether or not it is applicable. Clearly the defendant is a person who has entered into and works under a contract, but is that contract made with an employer? In other words, is this a contract between employer and employee, for I think that "an "employer," in the definition, necessarily presupposes an employee. The case of *Lecture League Ld.* v. *London County Council*,[1] proves, if proof were needed, that the word "employ- "ment" is one of very wide significance. But the words "employer" and "employee" are much more restricted in their meanings. Thus, I may be said to "employ" my time or my talents without being in any proper sense an employer, and I may also be said to be employed in some pursuit or activity without being an employee. Therefore, I ask: is the defendant an employee? If he is not, he must be, I suppose, an independent contractor and not under a contract of service, though working under "a contract personally to execute" some "work or "labour," the last word being, in my judgment, a noun and not a verb, though the language appears to me to be not very elegant on either view.

The problem seems to be this: Is the outworker defendant an employee or is he an independent contractor? It may be, though I do not wish to go beyond what I have to decide for the purposes of the present case, that an outworker working on his own account and without a team and working exclusively for a particular cutler might well be an employee, although equally an outworker as well; but in the present case the defendant is not in that position. He is a member and the head of his team; and on the whole it seems to me that he works not under a contract with an employer, but under a contract or series of contracts with a customer. I can imagine many cases on the borderline where it may be doubtful whether a particular outworker is on the roll of employees of a manufacturer of cutlery,

[1] 29 T.L.R. 426.

1954

Westall Richardson Ld. v. Roulson.

Vaisey J.

or whether he is one who contracts with that firm or company independently and at arm's length. In the case of the defendant, in my judgment, while there may be (and, indeed, I think there is) some element of service or servitude in his position, there is a far greater element of independence and freedom. In the case of other individual outworkers, the balance may incline the other way.

If that is right, there seems to be no point in my referring particularly to the subsections of the Act to which my attention was drawn. As to section 16 (1), I think it is sufficient to say that it only operates where one can find an individual who is both a worker and an immediate employer, and the defendant here is not, in my judgment, such an individual. Section 13 (1) is covered by the same comment that there must be a worker and an employer before it applies.

Similarly, the regulation can apply only to a worker who has an employer and, therefore, only to an outworker who has an employer. I do not doubt that the regulation may apply to cases in which the conditions of the contract between the parties involve the relationship of employer and employee, but it is necessary first to discover the existence of such a relationship before any attempt can be made to apply the regulation. I suppose that there may be cases where it is difficult to say whether a particular individual is an inworker or an outworker, but I find no such difficulty in the present case. The decision in *Templeton* v. *William Parkin & Co. Ld.*[2] is certainly closely analogous to the present case, though it certainly does not, in my judgment, govern it. The "little master" in the cutlery trade has a position similar to but not identical with the outworker, and that decision related to the Workmen's Compensation Act, 1925, which contains a definition of "worker" in terms which are by no means the same as those with which the present case is dealing.

My decision must be for the plaintiff company. It seems to me to be unnecessary to incorporate in the judgment the detailed declarations asked for in the statement of claim, and that it will suffice for me to declare that the relationship between the plaintiff company and the defendant is outside and is not affected by the provisions of the Act.

Judgment for the plaintiffs.

Solicitors: *Bell, Brodrick & Gray for Harold Jackson & Co., Sheffield; Ellis, Bickersteth, Aglionby & Hazel for Elliott & Co., Sheffield.*

J. L. D.

[2] 22 B.W.C.C. 110.

[CHANCERY DIVISION.]

* W. LUSTY & SONS LD. v. MORRIS WILKINSON & CO. (NOTTINGHAM) LD.

1954
Mar. 8.

Lloyd-Jacob J.

[1953 W. 281.]

Practice and Procedure — Trial — Right to open — Registered design— Action to restrain threats—Threats admitted by defendants—Defence of infringement—Counterclaim.

In an action to restrain the defendants from threatening proceedings for infringement of a registered design, the defendants, by their defence, alleged that the plaintiffs had infringed their copyright in that design and counterclaimed for an injunction restraining them from so doing. At the opening of the case by counsel for the plaintiffs counsel for the defendants intervened and conceded that the documents relied on as constituting threats were written by the defendants and amounted to threats. He then applied to the court for a direction that he had the right to open the matter arising on the remaining issues:—

Held, that the duty of the court, in dealing with an application of this kind, was to consider what was the fair mode of trying that which was shown to be the substantial matter, i.e. (having regard to the admissions offered on behalf of the defendants) the question of infringement; that complete freedom should be given to counsel for the plaintiffs to conclude his opening, so far as concerned the claim, and to direct the attention of the court to the appropriate order that should follow from those admissions made on behalf of the defendants; but that, in so far as any question arose about infringement, that was a matter on which counsel for the defendants would be entitled to be called on on their behalf.

Observation of Brett L.J. in *Thomson* v. *South Eastern Railway Co.* (1882) 9 Q.B.D. 320, 328, applied.

ACTION.

In an action to restrain the defendants from threatening, by letters, circulars or otherwise, the plaintiffs, their customers or agents with proceedings for infringement of a registered design, the defendants by their defence, alleged that the plaintiffs had infringed their copyright in that design and counterclaimed for an injunction restraining them from so doing. At the opening of the case by counsel for the plaintiffs counsel for the defendants intervened and conceded that the letters relied on as constituting threats were written by the defendants and amounted to threats within the meaning of section 26 of the Registered Designs Act, 1949. He then applied to the court for a direction that he had the right to open the matter arising on the remaining issues.

James Mould Q.C. and *S. I. Levy* for the plaintiffs.

K. E. Shelley Q.C. and *A. D. Russell-Clarke* for the defendants.

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W. Lusty & Sons Ld. v. Morris Wilkinson & Co. (Nottingham) Ld.

Cases referred to in argument: *Lewis Falk Ld.* v. *Jacobwitz* *; *Pontifex* v. *Jolly* †; *Pearson* v. *Holden*.‡

Lloyd-Jacob J. At quite an early stage in these proceedings it becomes necessary to give a ruling as to the manner in which the future conduct of this case shall be determined. Mr. Mould, for the plaintiffs, was in process of opening his case on the pleadings, as they stand, when Mr. Shelley intervened and conceded on behalf of the defendants that the letters relied on as constituting threats, on which the action is based, were written by the defendants; and he also conceded that they amounted to threats within the meaning of section 26 of the Registered Designs Act, 1949.

In those circumstances, as I understand the matter, the plaintiffs would be entitled to invite me to enter judgment for them on the claim, though that judgment, of course, would not be effective until the matters raised in the remainder of the pleadings had been considered. Accordingly Mr. Shelley invites me to direct that the right to continue to open the remaining matters in dispute—namely, the counterclaim, and what I am told is a further counterclaim to the counterclaim—should rest in him.

Counsel have directed my attention to a number of authorities, and I will review them shortly. Precisely the same point appears to have fallen for decision before Morton J. in *Lewis Falk Ld.* v. *Jacobwitz*,[1] the only difference being, as I understand it, that the admissions as to the responsibility for the letters, and to the fact that they constituted a threat, were conceded in the pleadings and not at the bar; and Mr. Mould invites me to regard that as a sufficient differentiation to justify me in arriving at the contrary conclusion.

Mr. Mould referred to *Pontifex* v. *Jolly*,[2] a decision of Alderson B. That case has not been very fully reported, but it appears to indicate that in that action the defendant had relied on four grounds of defence, two at least of which could properly have formed the subject-matter of a counterclaim. When the action came on for hearing, the defendant made admissions as to the first two grounds (which he had alleged by way of defence) and claimed the right to begin, a right which could only properly vest in him if the court was prepared to treat the remaining paragraphs in the defence as substantial paragraphs in a counterclaim. Alderson B. refused the application, as I apprehend, for the very good reason that the court would not exercise its discretion to permit amendments of pleadings of that character merely for the purpose of assisting a party to procure an advantage such as the right to open the case.

* [1944] Ch. 64; 60 T.L.R. 101; 61 R.P.C. 116.

† (1839) 9 C. & P. 202.

‡ (1948) 65 R.P.C. 424.

[1] [1944] Ch. 64.

[2] (1839) 9 C. & P. 202.

In my view, that is not an authority which really helps me in the present case; and I find far greater guidance from an extract from the judgment of Brett L.J. in *Thomson* v. *South Eastern Railway Co.*,[3] which is quoted in the judgment of Wynn-Parry J. in *Pearson* v. *Holden*.[4] There that renowned Lord Justice puts the matter in a perfectly simple form. He says that the duty falling on the court is to consider "what is the fair mode of trying "that which is shewn to be the substantial matter." Having regard to the admissions offered by counsel for the defendants in the present case, the "substantial matter" before the court is the determination of the issues set out in the counterclaim, as to whether or not the plaintiffs have infringed the registered design of the defendants.

In those circumstances I think that my duty is to indicate that Mr. Mould, for the plaintiffs, has complete freedom to conclude his opening, so far as concerns the claim, and to direct my attention (if he thinks it useful at this stage) to the appropriate order that should follow from these admissions; but that in so far as any question arises about infringement, that is a matter on which Mr. Shelley would be entitled to be called on on behalf of the defendants.

Solicitors: *Gouldens; Sharpe, Pritchard & Co. for J. A. Simpson & Coulby, Nottingham.*

J. L. D.

[3] (1882) 9 Q.B.D. 320, 328. [4] (1948) 65 R.P.C. 424, 426.

[YORK ASSIZES.]

* SELLARS *v.* BEST AND ANOTHER.

1954
Feb. 16, 17.
Pearson J.

[1953 S. No. 3189.]

Electricity — Regulations — Electricity supply — Fault in consumer's installation — Liability of suppliers — Failure to test earthing arrangements before commencing to give supply—Electricity Supply Regulations, 1937, *reg.* 27 (*a*).
Negligence—Dangerous thing.

An electrical contractor installed at the plaintiff's house an electric boiler together with a new circuit, but failed to provide a fully efficient earthing system for the circuit. The electricity board connected up the new circuit to their supply but before so doing, although they carried out certain tests, they did not test to ascertain whether or not the earthing system was adequate. About three months after its installation the insulation of the boiler became defective with the result that electricity escaped into the metal shell and gave the plaintiff's wife an electric shock from which she died. If there had been a proper earthing system no accident would have happened.

[Reported by G. M. SMAILES, Esq., Barrister-at-Law.]

1954

Sellars
v.
Best.

In an action by the plaintiff claiming damages as a result of his wife's death the first defendant was, on the facts, found to have been guilty of want of care in installing the boiler, but as regards the liability of the second defendants:—

Held, that regulation 27 (*a*) of the Electricity Supply Regulations, 1937, imposed no obligation on the second defendants to carry out any inspection or test of the new installation before commencing to give a supply of electrical energy; that, on the facts, they did not assume any obligation to the plaintiff's wife; and that to say that before carrying out the potentially dangerous operation of sending electricity into the new installation they should make sure that the electrical equipment was prepared to receive it would be carrying their tortious liability too far. Therefore, the second defendants were not liable to the plaintiff.

Action.

The plaintiff, Lawrence Sellars, claimed damages as administrator of the estate of his wife, Mary Sellars, deceased, against the first defendant, Lawrence William Best, under the Law Reform (Miscellaneous Provisions) Act, 1934, for the benefit of her estate for her diminished expectation of life, and under the Fatal Accidents Acts for her funeral expenses, and he also claimed for his own benefit damages for the loss of his wife's consortium, including her servitium. He alleged failure of the first defendant to exercise reasonable care and skill in carrying out a contract with the plaintiff to instal an electric boiler. Against the second defendants, the North Eastern Electricity Board, the plaintiff claimed similar damages under the same Acts for their negligence and breach of statutory duty under regulation 27 of the Electricity Supply Regulations, 1937.

The plaintiff's wife died through electrocution on August 11, 1952, when she received a violent electric shock from an electric boiler in the house at Newton-on-Rawcliffe near Pickering where she and the plaintiff lived. The cause of the accident was, first, the deficiency of the earthing system of the boiler and, secondly, defective insulation between the heating element and its metal shell which occurred about three months after its installation.

In May, 1952, the first defendant, who was an electrical contractor, supplied and installed the boiler on the plaintiff's instructions. He also installed a 15 ampere socket outlet with a three-pin plug for the boiler, together with a new circuit, but he did not connect this circuit to the electricity board's mains supply. In addition to two small holes to take the phase wire pins the socket contained a larger hole for the earthing arrangements consisting of an earthing line which, in the event of an escape of electricity, would carry off the electricity, causing the fuse to give way and so isolate the circuit in which the fault had arisen. The earthing line was run to a small stake about 18 inches long placed in the earth outside the front door of the house. Although in some weather conditions, if the earth was very wet, this earthing arrangement would be sufficient, in dry or very frosty weather it would be inadequate. The first defendant, although he made

certain tests, did not make any test to ascertain the capacity of the earthing system. If there had been a proper earthing system no accident would have happened. In due course the board connected up the ends of the new circuit to their supply of electricity.

John McLusky for the plaintiff.

Ernest Ould for the defendant Best.

Geoffrey Veale Q.C. and *G. Norman Black* for the defendant board.

The following case, in addition to those quoted in the judgment, was cited in argument: *Hartley* v. *Mayoh & Co.*[1]

PEARSON J. stated the facts summarized above, considered the liability of the defendant Best and the Regulations for the Electrical Equipment of Buildings issued by the Institution of Electrical Engineers and the evidence of the practice in the district, and held that the defendant Best, in addition to his contractual obligation to the plaintiff to instal the boiler in a reasonable and proper manner so as to make it safe, also had a common law duty to use reasonable care to the plaintiff's wife, who would be a person likely to use the boiler. His Lordship continued: It must be held that the first defendant was liable for breach of contract to the plaintiff and also failed to perform the duty of care which he owed to Mrs. Sellars.

I pass to the more difficult problem as to the situation of the board in these matters. They connected up the loose ends, sometimes called "tails," to their own meter. It has been pointed out that the board is a seller of electricity, and the delivery of the electricity is effected at the terminal or supply points, which are situated approximately at the meter. Up to those supply points everything belongs to and is under the control of the board. Beyond that point, generally speaking, everything belongs to and is under the control of the consumer. The board carried out a test for leakage, but they did not test to ascertain whether the earthing system was adequate or not. It is reasonably plain that if they had done so they would have found that the system was inadequate, steps would have been taken and this accident would not have happened. The whole problem is whether they owed an obligation to Mrs. Sellars to make sure that the earthing system was adequate.

The board's obligation to give a supply of electricity is contained in section 27 of the Schedule to the Electric Lighting (Clauses) Act, 1899, which has been applied to the board by a provision of the Electricity Act, 1947. It is sufficient to say that section 27 imposes an obligation on the undertakers to give a supply upon being required to do so, although that is subject to certain conditions.

[1] [1954] 1 W.L.R. 355; [1954] 1 All E.R. 375.

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Pearson J.

Regulation 25 of the Electricity Supply Regulations, 1937, provides: "(a) The undertakers shall be responsible for all electric "lines and apparatus placed by them on the premises of a "consumer and either belonging to the undertakers or under their "control (whether forming the whole or part of the consumer's "installation or not) being installed and maintained in a safe "condition and suitable for their respective purposes and being "so fixed and protected as to prevent so far as is reasonably prac-"ticable leakage to any adjacent metal." That regulation tends to suggest that there is not the same responsibility for electric lines and apparatus which have been placed on the consumer's premises by someone else or which do not either belong to the undertakers or come under their control. So the ordinary principle that responsibility is based upon ownership or control seems prima facie to apply here.

Regulation 26 provides: "The undertakers shall not per-"manently connect a consumer's installation with their electric "lines unless they are reasonably satisfied that the connection, "if made, would not cause a leakage from the consumer's instal-"lation exceeding [a certain fraction]." The wording there is to impose a definite prohibition. Under that regulation, if the undertakers do make the connection without being reasonably satisfied, they commit an offence, as appears from regulation 39, and they would be liable to a penalty for default. When we come to regulation 27 the wording is changed. That regulation provides: "(a) The undertakers shall not be compelled to "commence or, subject to the provisions of regulation 32, to "continue to give a supply of energy to any consumer unless they "are reasonably satisfied in respect of the consumer's installa-"tion—(i) That all conductors . . . are constructed installed and "protected so as to prevent danger so far as is reasonably "practicable; . . . (ii) That every distinct circuit is protected "against excess energy by means of a suitable fusible cut-out. . ."

Regulation 32 provides for the "Discontinuance of supply in "certain circumstances," and paragraph (a), sub-paragraph (v) provides: "Where in pursuance of this regulation the undertakers "have discontinued the supply of energy to the consumer's instal-"lation or any part thereof, the undertakers shall not recommence "the supply of energy until they are reasonably satisfied [in "certain respects]." It seems clear that regulation 27 (a) has been very carefully drawn and that it would be wrong to assume that the variation in the opening words of that regulation as compared with regulations 25 (a), 26 and 32 (a) (v), is merely per incuriam. The effect of regulation 27 (a) is simply this, that the obligation to supply which was imposed by section 27 of the Act of 1899 is here being made subject to a condition that, although under section 27 they would be normally under obligation to supply, this regulation is saying that they shall not be compelled to commence or continue to give a supply unless they are reasonably satisfied. If they do give a supply without being

satisfied they commit no offence under this regulation. If they commence to give a supply or continue to give a supply having satisfied themselves with a merely cursory inspection they still commit no offence. It seems to me that there is no obligation under this regulation to carry out any inspection or testing at all. Their power is only to refuse to give a supply. Strictly speaking, they have no power to insist on inspecting and testing any apparatus. It is open to the consumer to say: "I do not wish to have "my installation inspected and tested by you. I will not take any "supply. I will provide my own supply." If the consumer says that, then there is no power under regulation 27 to insist upon an inspection to test it. I feel that regulation 27 is drafted with a view not to impose upon the board a responsibility in respect of what the occupier by himself and his contractors and other agents may have done or omitted to do to his own chattels upon his own premises, because that form of wording is very noticeable—"The "undertakers shall not be compelled . . . to give a supply." So that it seems to me that the regulations afford no cause of action to the consumer or to the consumer's wife.

Interesting arguments have been presented by Mr. Ould on behalf of the defendant Best, but in effect supporting the plaintiff against the board, and by Mr. McLusky for the plaintiff, seeking to impose upon the board an obligation towards Mrs. Sellars. It is not at all, in my view, like the cases in which the board have themselves antecedently done something wrong, such as mixing up the two wires, putting the neutral wire where the phase wire should be and vice versa. They have not at any stage done anything wrong as regards the installation. The only omission relied upon is the omission to test for the adequacy of the earthing system. That case could be put in a different way. The plaintiff could say that he relies on the fact of the board having supplied electricity for use in this boiler without having first taken all reasonable steps to satisfy themselves that it was in a fit state to receive an electric current safely. The question is whether it is right to assume that the board undertake any such obligation towards, not merely the consumer, but some other person who is likely to use the electrical equipment in question.

One of the arguments is that the board indicate that they are going to test the equipment, because the contractor, according to the usual system of the board, gave to the board a notice to test the installation. The form was produced addressed to the board and signed by the contractor, giving the board notice that a certain installation was now complete. It states: "Please "inspect and test the same" on a certain date. It may be that the consumer should be deemed to know what his contractor has done and that the board have been asked to and do test the installation. That still leaves unspecified how comprehensive the test is going to be and what it is going to be a test for. There is the obligation on the electricity suppliers, in this case the board, under regulation 28 not to connect the consumer's installation

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with their electric lines until they are satisfied that the connection would not cause an undue leakage from the consumer's installation. But there is nothing in this form to show what kind of test that is. Equally, having regard to the evidence as to the board's practice in the area in which this house was comprised, there is nothing to show that they would carry out a comprehensive test. On the contrary, the evidence is the other way, that they did not carry out what may be a comprehensive test in this district.

There is this further difficulty. If the case is put on the ground of the board having undertaken or assumed to carry out testing, and thereby they misled people into thinking that their test would be comprehensive and adequate to ensure against any unsafe feature of the installation, the question then arises: To whom did they undertake? To whom did they make that assumption? It is founded upon some sort of assumpsit, using the technical phrase. It still remains to inquire to whom it was made. It might have been made to the plaintiff, as the intending consumer and the person asking for the supply, but there is no evidence that Mrs. Sellars knew anything about what the contractual arrangements were as between her husband and the suppliers.

On those two grounds I am unable to see how liability can be possible for the reason that they did in fact carry out some sort of test. The argument was that they must either do it in whole or not at all. If they do not carry out any test then they are not responsible, and if they carry out a test they are bound to carry out a complete and adequate one. That begs the question, "What is the test for; what is it meant to do?" It may be only a test under regulation 26. Without more evidence I do not think that it is possible to say that any obligation was assumed by the defendant board towards Mrs. Sellars.

The other way of putting the argument is that the board, as it is said, unleash this dangerous substance, electricity, by sending it along their wires and through the connection which they have made in this house into the installation which is there. Before they carry out that potentially dangerous operation they should make sure that in fact it will be safe, because the electrical equipment in the house is fully prepared to receive it. That is a possible argument, but I think that it is too difficult to define the obligation, where it begins and where it ends, because the supply of electricity is a continuing operation. It may go on for years, and it is difficult to see any reason why it can be confined to the moment of first giving the supply. Is it sufficient for the electricity board to be satisfied at the moment when they commence to supply electricity, and then do they cease to have any responsibility for the subsequent maintenance? It is difficult to define it in a different respect. How far does it go? Must they re-do all the work which the electrical contractor has done—dig up the wires to see that they are sound, test the steelwork of the

boiler and test the insulation and test everything? Is it possible to confine the so-called comprehensive test within any reasonable bounds at all? I think that there is too much uncertainty there, and the more reasonable principle is that the board are responsible for what they themselves do and what they themselves have control over.

The board are responsible for bringing the electricity along their own lines, and for making and continuing to have, it may be, a proper connection at the terminal supply points. Then, if they have installed and they still have control of some electrical equipment on what is called the consumer's side by virtue of that installation and continuing control they would be responsible for that also. It seems to me too much to say that the board are responsible for what the occupier by himself and his contractors and agents may have done or omitted to do to his own chattels on his own premises. That is carrying the kind of tortious liability which is envisaged in *Donoghue* v. *Stevenson* [1] too far, and it cannot be held to apply here. For those reasons I hold that the board are not liable to the plaintiff, but I hold in favour of the plaintiff against the first defendant.

As to the measure of damages under the first head under the Law Reform (Miscellaneous Provisions) Act, I award the sum of £400. Under Lord Campbell's Act the agreed sum is £30 6s. With regard to the claim for breach of contract by the plaintiff against the first defendant in respect of the loss of consortium of the wife there was no evidence here to show any actual pecuniary loss or expense arising to the husband by reason of his wife's death. I have had regard to what was said in *Best* v. *Samuel Fox & Co. Ld.* [2] in the House of Lords. I am not sure whether in those circumstances the proper result is that there should be merely nominal damages in the sense of a sum of 40s., or whether it is permissible and right to award something more than that by way of mere general damages for loss of consortium. I think that the second is the true view; but although no large sum should be awarded in the absence of proof of financial damage I think that the proper view is that it can be more than a nominal sum, and I award £100.

Judgment for the plaintiff against the first defendant for £530 6s.
Judgment for the second defendants against the plaintiff.

Solicitors: *J. D. Whitehead & Son, Pickering; Barnet Ellis, Pickering; Jacksons, Monk & Rowe, Middlesbrough.*

[1] [1932] A.C. 562; 48 T.L.R. 494.

[2] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.

[SOUTHWARK CONSISTORY COURT.]

1954
May 26.

Garth Moore Ch.

* *In re* ST. PAUL'S CHURCH, BATTERSEA.

Ecclesiastical Law — Faculty — Armorial bearings — Royal arms — Introduction into church—Whether consent of bearer necessary.

On the hearing of unopposed petitions for the grant of a faculty for the introduction into the church of various forms of decoration including a number of heraldic devices:—

Held, (i) that the introduction of the royal arms, signifying the royal supremacy, was a matter within the discretion of the consistory court, and that so long as the Crown claimed supremacy in the established church, it was unreasonable that the Crown should object to the badge of that supremacy being displayed: *In re the Parish Church of West Tarring* (post, p. 923) followed;

(ii) that the use for decorative purposes of the first quarter of the royal arms as a device signifying the kingdom of England involved different considerations, and that the consent of their bearer, the Sovereign, should be sought;

(iii) that the arms of the borough of Battersea and of the London County Council could be introduced, both bodies having consented to such use;

(iv) that no consent was necessary for the use of either the arms of the diocese or the arms of the province, or St. George's Cross, signifying the Church of England.

Unopposed petition for a faculty.

The churchwardens and secretary of the parochial church council sought a faculty to cover a number of items connected with the decoration of the church, the proposals having the support of the whole of the parochial church council and of the diocesan advisory committee. The only matters which came to be considered in open court were the proposals to introduce certain heraldic devices, namely, the royal arms signifying the royal supremacy, to be displayed on the organ loft, and six decorative shields to be displayed in the chancel, three on either side of the altar.

The petitioners appeared in person.

Garth Moore Ch. stated the facts, and continued: One of the proposals is to place the royal arms on the organ loft in a place associated by tradition with the display of such arms, signifying the royal supremacy. It is also proposed to place in the chancel six decorative shields displaying the following arms:—The arms of the kingdom of England, by which is meant what is now the first and fourth quarter of the royal arms, but was once borne alone by the Sovereign; the arms of the Church of England, by which is meant St. George's Cross; the arms of the borough of Battersea wherein the church is situated; the arms

[Reported by G. H. Woolveridge, Esq., Barrister-at-Law.]

of the county of London, of which Battersea forms part; the arms of this diocese of Southwark, and the arms of this province of Canterbury. With this variety of subjects the case presents a convenient opportunity to consider the principles on which faculties should be granted for the introduction of heraldic emblems into a church.

So far as royal arms are concerned, I should have granted a faculty without more ado had it not been for the attitude adopted by the Home Office towards such applications. On April 2, 1953, that department circularized all diocesan registries claiming that the royal arms, the royal crown and the royal cypher are the personal emblems of the Sovereign and may not be reproduced without the Queen's consent, and that application for that consent should be made to the Secretary of State for Home Affairs. That circular began a considerable correspondence between the Home Office and various persons, including myself and Chancellor Macmorran; but, since the Crown is not represented here today, I intend to say no more about it, save that at no time has the Home Office produced any authority in support of its claim.

As I am aware, however, of the attitude of the Home Office, I have made it a practice of this court that notice of every petition to introduce the royal arms should be given to that department, so that the Crown may have an opportunity of entering an appearance and arguing both its right to appear and, if that is granted, the substance of its claim. That course has been taken in this case, but neither in this case nor in any other has advantage been taken of this opportunity, and no argument in support of the contentions of the Home Office has been presented to the court. These are judicial proceedings and the petitioners are entitled to have their case heard on its merits in open court, and as that case is unopposed I must decide it as best I can. Although unassisted by argument I have considered carefully the principles on which applications for armorial bearings should be treated.

There is in England—though not, I believe, in Scotland—so far as I know no legally recognized proprietary right in heraldic emblems. I carefully refrain from stating the matter more dogmatically than that, for it may still be a matter for argument before the Court of Chivalry. But, on that assumption, no one has an absolute right to prohibit the use of his arms, and it is a matter of discretion for the consistory court whether or not to grant applications for the introduction of heraldic emblems.

In general, I should be slow to grant such an application where a reasonable objection could be made by or on behalf of the bearer of those arms, and I shall in future normally require notice of any petition for the introduction of heraldic emblems to be given to the bearers of those emblems, at any rate where it appears to me that an objection could be reasonably entertained. In the present case, I have a number of emblems to

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Garth Moore Ch.

consider and I do not think that any single principle covers them all.

First, there are the royal arms, not as pure decoration, but to be so placed as to signify the royal supremacy. The royal arms have been so displayed in churches now for about four centuries. There is ground for thinking that their introduction has sometimes been enforced at the instigation of the Crown. The matter has always been within the faculty jurisdiction of the consistory court and has never till 1953, so far as I know, been treated as the concern of the Home Office. But, in any event, their presence in a church, in the manner desired in this case, seems to me to be on a par with their presence in a court of law. In both cases it signifies the highest temporal authority. So long as the Crown claims supremacy in the established church, it seems to me to be unreasonable that it should object to the badge of that supremacy being displayed. It is as though a principal were to seek to disavow his agent while actively taking all the advantages which that agency confers. For this reason, though for a time at least I shall continue the practice of requiring notice of these applications to be served on the Home Office so that the Crown may continue to have an opportunity of appearing and arguing its case, until some valid argument is presented which will persuade me that these applications should not be granted, I shall in the absence of special circumstances grant them as I grant this one.

This is what I have done in the past and I am fortified in my view by the recent judgment of Macmorran Ch., delivered in the consistory court of Chichester, in *In re the Parish Church of West Tarring*,[1] where identical considerations arose. I adopt the reasoning of that judgment, with which I respectfully agree.

With regard to the so-called arms of the kingdom of England, however, different considerations arise. It is true that they are the arms of the Sovereign and part of the royal arms commonly borne by the Sovereign today. But the petitioners do not seek their introduction in order to signify the royal supremacy, nor are they in this form commonly associated with that signification. They are in this case sought as part of a general decorative scheme. Their use in the circumstances strikes me as harmless and appropriate, but the consent of their bearer, that is, the Sovereign, has not been given or, indeed, sought, and on the principle which I have enunciated, I think that this should be a condition precedent to their introduction. I shall, therefore, adjourn this part of the application so as to enable the petitioners to seek the permission of the Sovereign through the proper constitutional channels. They will have liberty to apply again to this court and, if the Sovereign's permission is given, I shall include these arms in the faculty which will issue. If permission is refused, I shall sympathetically consider any application,

[1] Post, p. 923.

whether for consequential variation or otherwise, which the petitioners may make.

With regard to the arms of the borough of Battersea and of the London County Council, both those bodies have sensibly and reasonably signified their consent to the use of their arms and I give leave for their introduction.

With regard to the arms of the diocese and the arms of the province, no permission for their introduction has been sought; but the church is part of the diocese and of the province, and I cannot conceive the refusal of consent or any reasonable grounds on which such refusal could be based. I, therefore, grant permission for their introduction.

With regard to St. George's Cross these arms, so far as I am aware, do not in any sense belong to anybody. Among other uses to which they are put is that of signifying the Church of England. I see no reason, therefore, why they should not be introduced and I give permission for their introduction.

I hope that what I have said may be of assistance to others in the diocese as an indication of the principles upon which, as at present advised, similar applications will be considered by this court; but it should be remembered that this petition concerns only the introduction of armorial bearings into a church. I am expressing no view about what might happen in different circumstances. The flying of flags or the display of banners, for example, may well call for a different treatment, and what that treatment should be still falls to be decided.

Faculties decreed accordingly.

NOTE.

[CHICHESTER CONSISTORY COURT.]

* *In re* WEST TARRING (Rector and Churchwardens).

1954
Mar. 30.

Kenneth Macmorran Ch.

Ecclesiastical Law—Faculty—Armorial bearings—Royal arms—Introduction into church—Whether permission of Her Majesty necessary before issue of faculty.

Petition for a faculty.

On March 30, 1953, the rector and churchwardens of the parish of West Tarring in the diocese of Chichester issued a petition asking for a faculty to authorize the display of the royal arms over the vestry door in the parish church. The petition was supported by the unanimous resolution, dated March 5, 1953, of the parochial church council, and on April 10, 1953, was approved by the diocesan advisory committee. A citation in the usual form was issued from the registry on May 5, and duly returned on May 11. No appearance in opposition was entered.

The petitioners appeared in person.

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WEST TARRING (RECTOR AND CHURCHWARDENS), *In re.*

KENNETH MACMORRAN Ch. stated the facts, and continued: The present petition is for the display of the royal arms on the wall of the church. It is not a proposal to use the arms or any other royal emblem for mere artistic embellishment, as for example, in a stained glass window. It is simply to implement the desire to display the royal arms as such, and it is stated that the petition is the outcome of a loyal desire on the part of the petitioners to commemorate Her Majesty's coronation.

The petition is dated March 30, and the registrar received a circular letter from the Home Office, dated April 2, 1953, in the following terms: "Dear Sir, An instance has recently come to our notice of the reproduction of the royal arms in a new stained glass window in a church, and we have reason to believe that the position regarding the reproduction of the arms and other royal emblems may not be fully appreciated. The position is that the royal arms, the royal crown and the royal cypher are the personal emblems of the Sovereign and may not be reproduced, in whole or in part, without the Queen's consent; such consent is also necessary in the case of emblems of past sovereigns. The Home Secretary is the Minister who advises Her Majesty on such matters, and application for permission should be made to him. Permission is, in fact, granted only in very exceptional circumstances, but where, for example, it is desired to instal a stained glass window in a church in commemoration of a particular Sovereign or of a State occasion such as a coronation, it may be possible for the Home Secretary to recommend the grant of permission to reproduce the personal cypher of the Sovereign. . . . We would mention also that the rules governing the reproduction of royal emblems apply equally to the special versions drawn by Mr. Milner Gray for the Council of Industrial Design for use on coronation souvenirs."

I wrote a letter to the Home Secretary on April 20, to which I had a reply dated May 29, expressing the Home Office view as follows: "The Home Secretary appreciates that the arms of previous Sovereigns are displayed in many parish churches, and he would not wish to raise any objection to the renewal or restoration of existing coats of arms. It appears, however, that the practice has very largely fallen into desuetude during the past hundred years, and the Home Secretary does not feel that the existence of this practice should be regarded as overriding the general consideration that since the royal arms and other emblems are personal to Her Majesty, it is only proper that her consent should be obtained for their reproduction in any form. It is observed that the applications to which you refer in your letter of May 4 both relate to proposals to place the royal arms in churches in commemoration of the coronation, and the Home Secretary feels that in these circumstances the application ought to be dealt with as applications for a new use of the royal arms rather than as a revival of the practice of exhibiting royal arms in churches." It seems to me that the view expressed in the earlier circular letter has been modified, as the point is taken for the first time that the long-established custom to which I had referred "has very largely fallen into desuetude during the past hundred years."

I am therefore confronted with the claim by a government department that the royal arms may not be displayed in a parish church without the Home Secretary's consent, in spite of the fact that, as I read the law, the authority to decide whether any furniture or ornament is to be admitted to consecrated buildings is the ecclesiastical court. In my view, therefore, the opinion of the circular letter I have quoted above is an unwarranted interference by a department of State with a court of competent jurisdiction.

Nevertheless, I have been anxious throughout these proceedings that the view expressed by the Home Office on the merits of the case should be fully investigated and, accordingly, I caused to be served on the Home Secretary on March 12, 1954, a copy of the original citation in this case,

with an intimation that if he wished to oppose the petition and would enter an appearance, I was prepared to hear him on the question whether he had such an interest as entitled him to appear, and, if that question was decided in his favour, on the merits of the case. On March 19 a letter in reply was addressed to the registrar in the following terms: "With reference to your letter of March 12, regarding the proposal to "display the royal arms in West Tarring Parish Church, I am writing "to say, that as you will appreciate, the question of the issue of a "faculty is not one which concerns the Home Secretary, who is, however, "responsible for advising the Queen on applications for permission to "use Her Majesty's personal arms." The petition in this case, therefore, remains what it has always been, an unopposed petition; and I must decide it as best I can.

The textbooks are not particularly helpful, but I may quote as an example Cripps, Law Relating to Church and Clergy (7th ed., p. 406), where the following passage occurs: "Thus there can be no doubt as to "the legality of the following: Galleries erected in the church, bells "other than that necessary to ring to church and to toll at funerals as "before mentioned, organs, clock chimes; the king's arms which are "very commonly set up in churches, pulpit cloths, houseling cloths, "cushions or mats, furniture for the vestry, prayer and hymn books." This statement, which has the authority of the late Chancellor Lawrence and the late Sir Stafford Cripps, is reproduced in the eighth edition edited by myself, and there are similar statements in other of the earlier textbooks. I am informed by the Chancellor of the Diocese of Southwark that in a case in his court, the Home Secretary was given the opportunity to appear but did not avail himself of it, and that in that case the faculty was granted.

I now come to consider the merits of the case. The royal arms may, it is said by the Home Office, be lawfully displayed to mark the presence of the Sovereign. That may be a confusion with the use of the royal standard with which at present I am not concerned, but the arms are certainly displayed to mark her authority, witness the use of them in the courts of secular justice, and, indeed, on the letter paper of the Home Secretary himself; but the display in churches, which certainly goes back to the time of Henry VIII, marks the royal supremacy "over all "causes and persons as well as ecclesiastical and civil within the realm."

It is stated by Mr. Marcus Whiffen in his book Stuart and Georgian Churches (1947), p. 6: "Royal arms either painted or carved constituted "another standard ornament of churches during our period. Sometimes "they were set up over the Commandments; Professor Sykes (Church "and State in England) quotes an early eighteenth century writer who "explains that this position was chosen 'to satisfy all those who trod "'the courts of the Lord's House and are diligent in the performance of "'their duty, agreeable to the contents of those grand rules of the "'Christian religion, (viz. the ten commandments, the Lord's Prayer "'and the creed) that they shall meet encouragement and protection from "'the State.'" The placing of the royal arms in churches did not become compulsory until 1660, but the practice dated back to the reign of Henry VIII. The illustrations in this book show the arms displayed in the following churches: on the chancel screen, Abbey Dore, Herefordshire, 1634; Ingestre, Staffordshire, 1673; Derby All Saints, 1725; Staunton Harold, 1720; and on the communion rail, Weston, Staffordshire, 1710; and Castle Bromwich (undated).

In "The Old Church Gallery Minstrels," by Canon K. H. MacDermott (1948), there is a reproduction of a painting in Ifield Church in this diocese about the year 1840, showing the arms displayed on the west wall, and a photograph of the western gallery in Hampton Gay Church showing them on the face of the gallery itself.

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In "The Architectural Setting of Anglican Worship" by Addleshaw and Etchells (1948), it is stated at p. 101, that the best known form of decoration of the nave was the royal arms. The practice grew up during the Reformation. "It is a practice not peculiar to the Church of "England or reformed Christianity. Royal arms used to adorn the "churches of France and Spain. In the reign of Mary Tudor the royal "arms which had been set up over the rood screen were only placed "elsewhere so as to make room for the restored rood and not turned out "of the church. It is a matter for regret that the Anglican reformer "should not have found some place for them other than that once "occupied by the rood, thereby exposing themselves to the taunts from "malicious latinists that they should set up a lion and dog in place of "Our Lady and St. John, the lion and the greyhound argent being "supporters of the royal arms of Elizabeth. They (the arms) expressed "a fervid loyalty, which at times swept the country, like the royal arms "set up at the Restoration with the inscription 'God Bless Charles the "'Second and send him long to Reign.'" They represented a royal "supremacy, but the royal supremacy did not mean an authority "external to the church. The arms were not those of a purely secular "person, because the Sovereign is the centre of a society which is both "the church and State. He is himself what seventeenth century lawyers "call, 'a spiritual person capable of jurisdiction in spiritual things, "'though not, of course, of exercising pastoral and priestly powers.'"

The churchwardens' accounts at Yatton, in Somerset, record the payment of a guilder for guilding the royal arms, 1541–1542, and in this same book there are illustrations showing the church of Deptford St. Nicholas built in 1697, and now destroyed by enemy action, with the reredos crowned with the royal arms of William III, and of Ackerman's aquatint, 1825, of St. Martin-in-the-Fields showing the royal arms in the ceiling over the chancel arch, and similarly in the church at High Wycombe, Buckinghamshire.

A remarkable instance occurs in three Acts of Parliament during the time of George III, under which five churches were built by trustees between the years 1819–1831. All these five churches are furnished with a royal coat of arms with supporters of exactly the same pattern, cast in iron, and with the shield of Hanover in the midst.

Recent cases where the royal arms have been introduced are very numerous, but the following may be taken as representative: Eversley, Hants; Chatton, Newcastle; Willingdon, Sussex; Stanton, Glos.; Bledlow, Bucks; Littlehampton, Sussex, and St. Mark's, Marylebone, and St. Paul, Stratford, London.

It seems to me, from what I have stated above, that the practice with which I am dealing has a continuous existence from the reign of Henry VIII to the present time, always excepting the short reign of Queen Mary Tudor, and the suggestion that the custom has fallen in desuetude cannot be sustained for a moment. I am satisfied that the present proposal is a lawful proposal and, accordingly, I decree that a faculty shall pass the seal as prayed.

Faculty granted.

H. G.

[COURT OF APPEAL.]

* MOOR v. MOOR.

C. A.

1954
May 25.

Evershed M.R., Denning and Hodson L.JJ.

Husband and Wife—Divorce—Discretion—Exercise—Review by appellate tribunal — Sanctity of marriage — Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 4.
Divorce—Practice—Undefended petition—Leading questions.

The parties were married in 1929, and in 1936 the wife left the husband and shortly afterwards contracted an association with another man with whom she had lived ever since and by whom she had had two children. Subsequently, the husband began an association with a single woman and had by her four children. The wife petitioned for divorce on the ground of the husband's adulterous association and at the same time she asked the court to exercise its discretion in her favour. The wife gave no evidence of the reason why she left her husband. The commissioner refused to exercise his discretion in the wife's favour and dismissed her petition, primarily on the ground that she was the party who had broken up the marriage. On appeal:—

Held that, the Court of Appeal could not substitute its discretion for that of the judge, unless he had failed to exercise his discretion judicially, as by misdirecting himself in some material particular; that the commissioner had not misdirected himself in taking into consideration the circumstances in which the marriage had broken down in the first instance; and that the manner in which he had exercised his discretion should not be interfered with.

Observations of Lord Simon L.C. in *Blunt* v. *Blunt* [1943] A.C. 517, 525; 59 T.L.R. 315; [1953] 2 All E.R. 76 applied.

APPEAL from Judge Kingsley Griffith sitting as special commissioner at Kingston-upon-Hull.

The wife, Mrs. Jessie Moor, petitioned for the dissolution of her marriage with Harry Moor on the ground of his adultery, and asked the court to exercise its discretion in her favour in respect of her own adultery. The commissioner dismissed the petition, refusing to exercise his discretion in the wife's favour since, on the evidence before him, she was the party responsible for the break up of the marriage. The facts are more fully stated in the judgment of Evershed M.R.

The wife appealed against the commissioner's refusal to exercise his discretion in her favour. The husband was not represented on the appeal, but he wrote to the court stating that he did not wish to oppose the appeal.

F. S. Laskey for the wife. Neither counsel nor solicitors who represented her in the present appeal were in any way concerned in the court below.

The following cases were cited in argument: *Blunt* v. *Blunt* [1]; *Hinkins* v. *Hinkins* [2]; *Redman* v. *Redman* [3]; *Sanders* v. *Sanders*.[4]

[1] [1943] A.C. 517; 59 T.L.R. 315; [1953] 2 All E.R. 76.
[2] (1953) Times, February 19.
[3] [1948] W.N. 94; [1948] 1 All E.R. 333.
[4] Unreported (1954) C.A.

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Evershed M.R. This was a petition presented by a wife in 1953 for the dissolution of her marriage, celebrated in December, 1929. At the date of the marriage the wife was about 18 years old and the husband a little over 20. Seven years later, in 1936 (according to the only evidence which is before the court), as a result of protracted quarrelling, the wife left the matrimonial home. No explanation of her decision and conduct was given by her, except that there had been a series of quarrels. By a question, with the rather ominous number of 13, which was in a form so leading as to be quite inadmissible, she was asked, "Did you suspect that your husband was having relations with "someone else?" to which she gave the expected answer, "Yes." But having regard to the form of the question, the answer carried no weight and was of no value, the more so because it was not thought proper to make any inquiry whether she had any basis for those suspicions, and, if so, what it was. Having left her husband, so far as the evidence goes, she made no attempt to return, to effect a reconciliation, or to make any application to him to support her.

The subsequent history briefly is as follows: The wife, after a short interval of time, being young, contracted an association with a single man of the name of Ford, and they have lived as man and wife together ever since, and she has had by him two children. It appears that, so far as she is concerned, she has remained faithful to Ford, though she has, of course, been unable to marry him.

In like manner, the husband, after a certain interval, began an association with one Miss Mary White, and they likewise have lived together as husband and wife ever since. From that association there have been no less than four children. It is also the fact that the association of the husband with Miss White started rather later than the association of the wife with Ford.

The petition of the wife, which was based on the adulterous association of the husband with Miss White, was accompanied by a discretion statement in the course of which the wife said: "As "the result of many quarrels between my husband and myself . . . "I left him . . . some time in 1936." She then referred briefly to her association with Ford.

From time to time, this court, and I think the President also, has drawn attention to the way in which, in cases of this character, evidence is given by a series of leading questions, which every experienced advocate knows to be quite irregular, and which have the effect of making the answers either not at all impressive or far less impressive than they otherwise would be. In spite of the attention which has been drawn to this matter, nobody, so far as I can see, has paid the slightest regard to what has been said, and I do not forget that the judges who try these cases might, I should have thought in all conscience, be expected to have stopped this irregularity.

The impression left upon my mind by the present case is one of a most casual presentation of the case: a few leading questions are asked and then the matter is put before the judge with the suggestion that there was really nothing in it, and that he would be bound to exercise his discretion in the petitioner's favour. But the judge refused so to exercise his discretion. The material passage in the transcript reads: "The question is whether this "woman can come to this court and ask me to exercise my "discretion in her favour, she being the party who began it"—meaning thereby, she being the party who first left and broke up the marriage, or alternatively, who first started an adulterous association, or perhaps both. "She left her husband and formed "another association. It seems to me that, if I exercise a "discretion in a case like this, discretion becomes a rubber stamp "and it ceases to have any meaning whatever because it follows "in an undefended case, or almost follows, that since the husband "has not troubled to defend he is also anxious that the marriage "should be dissolved, and, therefore, in any undefended case "there is no discretion if I apply the principles you ask me to. "No, I am refusing to exercise discretion."

It is not in doubt that this court cannot substitute its discretion for the discretion exercised by the judge, unless it is made plain that in some way the judge has not exercised his discretion judicially, as by misdirecting himself in some material particular. By section 4 of the Matrimonial Causes Act, 1950, the discretion is committed to the judge at the trial.

I cannot help feeling that if rather more care had been taken in presenting her case, the wife might have been able to give evidence which would have supplied the commissioner with a firm basis upon which he might have exercised his discretion in her favour. As it was, I think the commissioner spoke truly when he said that all he had got was the fact that this wife had first broken up the marriage, had gone off, had left her husband, and started shortly afterwards an adulterous association without any explanation whatsoever of the circumstances which led up to it.

Counsel for the wife drew attention to the fact that there had been no children of the marriage, and that she, the wife, had had two children and had lived as man and wife with Ford. She omitted to prove that Ford was willing to marry her, though I assume from what Mr. Laskey has told us that that could have been established. But no emphasis was laid on the circumstances of the husband, though the commissioner pointed out, with some justice, that possibly the husband (who had been deserted) might, if he was really anxious to regularize his own liaison with Miss White, himself present a petition.

Sympathy for the wife and an extreme distaste for the way in which this case was presented and conducted seem to me to be an insufficient basis for substituting for the commissioner's discretion this court's discretion.

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I felt inclined, during the course of Mr. Laskey's argument, to say that there was sufficient unsatisfactory conduct of the case to justify us in ordering a new trial, but, on the whole—and in this matter I have been guided by my two brethren, whose experience is much greater in these cases than mine—it seems to me that that would be merely a disguised way of indicating to some other commissioner that we thought that the discretion might be exercised in another way. Indeed, I am not at all convinced on this evidence that there is enough to induce me to say that I should have so exercised it. It may be that this wife could satisfactorily explain why she left her husband, but, on the other hand, it may be that she could not—I do not know. At any rate, the commissioner had, I think, no information before him which would entitle him to take the view that the conduct of the wife, which alone was proved, was not a most serious obstacle in her path.

It is clear that the commissioner had *Blunt* v. *Blunt* [1] in mind. In effect, he referred to it because he said: "I think I "remember a case in the House of Lords which said that the "maintenance of marriage as an estate is just as strong a ground "of public policy as the happiness of the individuals concerned." That is a reasonably accurate reference to the well-known passage in the speech of Lord Simon L.C., where he said [2]: "To these four "considerations I would add a fifth of a more general character, "which must, indeed, be regarded as of primary importance, "namely, the interest of the community at large, to be judged "by maintaining a true balance between respect for the binding "sanctity of marriage and the social considerations which make it "contrary to public policy to insist on the maintenance of a "union which has utterly broken down." It is sometimes assumed that the utter breakdown of the union is so strong an element in the matter that the discretion ought always to be exercised in the petitioner's favour whenever that has occurred; but I cannot accept that view. Indeed, it seems to be in conflict with what Lord Simon says, that that consideration must be "balanced" against the public policy which upholds the sanctity of marriage.

I ask the question which I think the commissioner asked: If the wife says, "We had a lot of quarrels, the marriage was a "failure, so I walked out and started association with somebody "else," is this court then to say, "It is a long time ago, the "marriage has broken down, I will exercise my discretion"? I cannot say that the commissioner was wrong when he said: "No, I will not. If I do, I am just putting a rubber stamp on "this discretion."

I repeat that I feel sorry for the parties and for the six children who are the issue of these two associations; but the commissioner drew attention to the fact that the husband (who

[1] [1943] A.C. 517; 59 T.L.R. 315; [1953] 2 All E.R. 76.

[2] [1943] A.C. 517, 525.

apparently has tried to support this appeal, though not being a party to it) may himself present a petition, and, as the commissioner indicated, in the circumstances, he might well succeed in getting a decree. The costs, if he starts proceedings, would be no greater than if the court ordered a retrial of this petition. But, on the appeal, though I confess with no little hesitation and with a feeling of uneasiness which has been mainly caused by the way in which the case was conducted, I have come to the conclusion that it would not be right or in accordance with well-established principles for the Court of Appeal to substitute its discretion for that of the commissioner on no ground other than that we might think that, if we had tried this case and heard this evidence and no more, we might have granted a decree. In my judgment, the appeal fails.

Denning L.J. I agree. The decision of the House of Lords in *Blunt* v. *Blunt* [2] marked a turning-point in the way the court exercised its discretion in divorce cases. Whereas previously discretion was exercised in comparatively few cases, since that decision it has been exercised in most of the cases in which it has been sought. But it is important to remember that Lord Simon L.C., in delivering the unanimous judgment of the House of Lords, required the courts to maintain "a true balance" between the sanctity of marriage on the one hand and the other social considerations on the other hand.

In applying that ruling in recent years, I am afraid that the fact that the marriage "has utterly broken down" has weighed heavily in the balance, whereas the sanctity of marriage has weighed light in the scale. That is not the correct method of approach. A true balance must be kept. It is most important that the court should emphasize the sanctity of marriage.

In the present case, the commissioner found that it was the wife who was the one at fault in the first instance—she left her husband and formed another association. If the commissioner thought, as he did, that he could not in her case exercise his discretion because of his feeling that the sanctity of marriage must be maintained, I do not think that this court should interfere. For these reasons, I agree that this appeal must be dismissed.

Hodson L.J. I also agree. If this court were to interfere with the discretion of the commissioner, it would be substituting its discretion for that of the court to which the discretion has been entrusted.

The commissioner in one paragraph of the transcript sums up the case in this way: "The question is whether this woman can "come to this court and ask me to exercise my discretion in her "favour she being the party who began it. She left her husband "and formed another association. It seems to me that, if I

[2] [1943] A.C. 517.

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"exercise a discretion in a case like this, discretion becomes a "rubber stamp and it ceases to have any meaning whatever "because it follows in an undefended case, or almost follows, that "since the husband has not troubled to defend he is also anxious "that the marriage should be dissolved, and, therefore, in any "undefended case there is no discretion if I apply the principles "you ask me to." He previously had directed himself by reference, although not by name, to the decision of the House of Lords in *Blunt* v. *Blunt*.[3] He clearly had in mind the observations of Lord Simon L.C. with regard to the maintenance of marriage as an estate.

Lord Simon L.C., in his speech, confirmed the considerations which had been recognised by the court from the time at least of the presidency of Sir Henry Duke, but he added a fifth consideration, which has lately given rise to debate, by these words: "To these four considerations I would add a fifth of a more "general character, which must, indeed, be regarded as of "primary importance, namely, the interest of the community at "large, to be judged by maintaining a true balance between "respect for the binding sanctity of marriage and the social "considerations which make it contrary to public policy to insist "on the maintenance of a union which has utterly broken down." Nowhere did Lord Simon L.C. say that it is irrelevant to consider the circumstances in which the marriage breaks down in the first place, or which of the parties was the original wrongdoer, and I think it cannot be fairly urged against the commissioner's judgment that in mentioning that matter, as a matter which impressed him, he had misdirected himself.

The court will not lay down rules of an exhaustive character as to the exercise of discretion. Nor am I seeking to say that in no case can a party, who is the original wrongdoer, rightly appeal to the court for the exercise of discretion.

The circumstances of the original parting in the present case are circumstances which have given me (and I think all of us) anxious consideration, because this case was not properly presented to the court. The circumstances of the original parting were not dealt with by examination of the wife in such a way as to give any assistance to the court. These are the questions which were asked relating to the period in 1936 immediately before the separation: "(Q.) Did you suspect that your husband "was having relations with someone else? (A.) Yes. (Q.) As a "result of those suspicions did you leave your house in October, "1936? (A.) Yes, Sir." The matter was left there and no ground for suspicion was sought to be established. The commissioner was left with the fact that on the wife's own evidence she had left her husband without any just cause, and had not made any claim for maintenance against him, coupled with the statement of the husband which had been put in as a confession of his

[3] [1943] A.C. 517, 525.

adultery: "My wife left me in October, 1936." The case having been presented in that way, the commissioner, having had those facts put before him, exercised his discretion without, I think, showing that he acted on any wrong principle, or misappreciated the facts as disclosed to him in evidence. Therefore, I think, this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Smith & Hudson for Payne & Payne, Hull.*

B. A. B.

[COURT OF CRIMINAL APPEAL.]

*REGINA *v.* McNALLY.

C. C. A.
1954
May 24.
Lord Goddard C.J., Hilbery and Havers JJ.

Criminal Law—Plea—Guilty—Application to withdraw plea before sentence—Matter within discretion of trial judge.

The question whether a prisoner may withdraw his plea is one entirely within the discretion of the trial judge, but the court has no power to allow a plea to be withdrawn after judgment.

Rex v. *Blakemore* (1948) 33 Cr.App.R. 49 disapproved.

Rex v. *Plummer* [1902] 2 K.B. 339; 18 T.L.R. 659 followed.

APPEAL against conviction.

The appellant, Thomas McNally, was indicted with a number of other men, only one of whom, called Stubbs, pleaded not guilty, on a charge of warehousebreaking and housebreaking. The pleas were taken on the first day of the Manchester Winter Assizes before Jones J., but sentences were not pronounced until after the trial of Stubbs, when the appellant and the other accused were brought up one by one to be sentenced. When brought up the appellant told the judge that he wished to change his plea from guilty to not guilty. The appellant, who had several previous convictions, had been caught red-handed by the police, and had pleaded guilty without any qualification, and he had also pleaded guilty before the magistrates. The judge did not ask him why he wished to change his plea but told him that he only wanted to give trouble, and refused to allow him to change his plea. He was sentenced to seven years' imprisonment.

His ground of appeal was that the judge should have asked him the reason for wishing to change his plea, and that in failing to ask this question the judge had not properly exercised the discretion vested in him whether or not to accede to the appellant's request, and that, accordingly, the court should grant a venire de novo.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

C. C. A.

1954

Regina
v.
McNally.

T. R. Fitzwalter Butler for the appellant.

Sir Noel Goldie Q.C. and *Sidney Smith* for the Crown.

The following cases, not referred to in the judgment, were cited in argument: *Regina* v. *Clouter and Heath**; *Rex* v. *Grondkowski*.†

Lord Goddard C.J. We only put this case into the list as an appeal—Hilbery J. gave leave—in order that this court might have an opportunity of stating what is the position with regard to a prisoner who desires to change his plea after arraignment. The question whether a plea may be withdrawn or not is entirely a matter for the trial judge. If the court came to the conclusion that there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the prisoner should be allowed to join issue, no doubt the court would allow him to do it. For example, it has been known for a prisoner charged with receiving stolen goods to acknowledge that he received them, and to plead guilty, adding "but I did not know that they were "stolen." In such a case the trial judge might well allow the prisoner to change his plea, but it is entirely within the discretion of the judge.

In our judgment, *Rex* v. *Blakemore* [1] ought not to be followed. In that case Byrne J. allowed, in exceptional circumstances, a plea of guilty to be withdrawn after judgment; but once sentence has been pronounced there is no power in the court to allow the plea to be withdrawn: see *Regina* v. *Sell*,[2] where the Common Serjeant referred the question to several of the judges.

In *Rex* v. *Plummer*,[3] Wright J., who delivered the principal judgment of the Court of Crown Cases Reserved, stated categorically that a plea cannot be changed after judgment. In the present case, it is true, the appellant asked for permission to withdraw his plea before judgment was given, but we cannot say that the judge did not properly exercise the discretion vested in him. The most that can be said in the appellant's favour—and the court is indebted to Mr. Fitzwalter Butler, whom we asked to represent the appellant so that we might have the relevant authorities brought to our notice—is that the judge did not ask the prisoner on what grounds he wished to withdraw his plea. It is perfectly obvious that he had no grounds. In his notice of appeal he did not suggest that he had any grounds, nor has his counsel been able to put before this court the grounds on which the appellant wished to withdraw his plea. He had, in fact, admitted his guilt before the committing justices.

* (1859) 8 Cox C.C. 237.

† [1946] K.B. 369; 62 T.L.R. 329; [1946] 1 All E.R. 559; 31 Cr. App.R. 116.

[1] (1948) 33 Cr.App.R. 49.

[2] (1840) 9 C. & P. 346.

[3] [1902] 2 K.B. 339, 347; 18 T.L.R. 659.

We are quite satisfied that the judge did exercise his discretion. He had all the relevant facts before him. He knew all about the prisoner, and he could see that there was no ground for allowing the prisoner to withdraw his plea. Accordingly, this appeal fails and is dismissed.

Appeal dismissed.

Solicitors: *Registrar, Court of Criminal Appeal; P. B. Dingle, Town Clerk, Manchester.*

[QUEEN'S BENCH DIVISION.]

* SINASON-TEICHER INTER-AMERICAN GRAIN CORPORATION *v.* OILCAKES AND OILSEEDS TRADING CO. LD.

1954
May 26.
Devlin J.

Sale of Goods—C.I.F.—Bank guarantee—Provision for bank guarantee by buyers to sellers on first presentation of documents—Repudiation by sellers before receipt of guarantee—Event guaranteed—Time when guarantee to be provided.

Arbitration—Case stated—Findings of fact—Duty of parties to arbitration.

A contract made on August 11, 1952, for the sale of Canadian barley c.i.f. Antwerp-Hamburg range provided for shipment during October/November, 1952, payment to be net cash in London upon first presentation of documents, the buyers to give the sellers through their London bank a guarantee that the documents would be taken up on first presentation. No time was stipulated in the contract as to the date of the guarantee. On September 10 the sellers purported to cancel the contract alleging that they were entitled so to do as the guarantee had not been received. On September 10 the buyers' London bank informed the sellers that an irrevocable letter of credit had been opened by the buyers in favour of the sellers, but the sellers maintained their refusal to carry out their obligations under the contract and on September 16 the buyers referred the matter to arbitration.

It was found that the buyers' obligation was to provide the guarantee within a reasonable time before the first shipment date, namely, October 1, 1952; that such reasonable time had not arrived by September 10; that the sellers had wrongfully repudiated the contract; and that the buyers accepted that repudiation on September 16 and were entitled to damages accordingly:—

Held, that the same principles applied in this respect to a bank guarantee as to a confirmed irrevocable letter of credit to which it was analogous; that it must be provided within a reasonable time measured in relation to the event guaranteed; that, as its purpose in the present case was limited to guaranteeing the first presentation of documents, the buyers were under an obligation to provide the guarantee within a reasonable time only of the first shipping date, October 1, 1952; and that the award must be upheld.

Pavia & Co. v. *Thurmann-Nielsen* [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492 considered.

[Reported by MRS. E. M. WELLWOOD, Barrister-at-Law.]

1954

Sinason-Teicher Inter-American Grain Corporation v. Oilcakes and Oilseeds Trading Co. Ld.

It is the duty of parties to an arbitration who desire to raise questions of law for the decision of the court to make plain to the arbitrators all the points on which they wish the facts to be found for the purpose of arguing the question of law.

Special case stated by appeal committee of London Corn Trades Association Ld.

On August 8, 1952, an English company, Oilcakes and Oilseeds Trading Co. Ld., obtained approval from the Bank of England Foreign Exchange Control under the terms of a notice "Merchanting Trade-Resale of Dollar Raw Materials to E.P.U. countries" (F.E.C. 461) to purchase in America for resale in Western Germany a quantity of Canadian Barley c.i.f. for a sterling return of £580,000. On August 11, 1952, Oilcakes and Oilseeds Trading Co. Ld., entered into a contract with an American corporation, Sinason-Teicher Inter-American Grain Corporation, whereby they agreed to buy and the American corporation to sell 9,500 tons, 1,016 kilos. each No. 2 Canadian barley for shipment during October–November at a price of U.S.$75.15 per 1,000 kilos. net, in bulk, delivered weight, c.i.f. Antwerp–Hamburg range, buyers' option, discharging expenses for sellers' account. Payment was to be net cash in London on first presentation of documents, the buyers to give the sellers through their London bank the guarantee that the documents would be taken up on first presentation. The contract incorporated the conditions of the London Corn Trades Association Ld. The contract was part of a switch transaction and the German firms to which the goods were ultimately to be sold guaranteed "the ordered liquidation of the above contract." A number of organizations were concerned in the switch transaction which was organized by the Commission Internationale Futtermittel G.m.b.H. of Frankfurt-Main, who also acted as agents for the American sellers. The English buyers' agents were a German firm, Lichtenstein and Mannheimer, Hamburg. The terms of the guarantee required by the sellers were communicated to the buyers on August 12. On August 19 the sellers sent their contract of sale dated August 11 through their agents to the buyers, having previously been informed that the buyers' guaranteeing bank in London was Hambros Bank, but that the bank guarantee called for by the contract could only be established after the German bank guarantee had been obtained. The sellers did not mention to the buyers at that stage, nor was any insertion made in the contract, of a date by which the bank guarantee was to be supplied. On August 31 the sellers informed their agents that they expected the guarantee to be supplied by September 2, and on September 4 they informed the German buyer that they would extend this date to September 9. This information was passed on to the buyers' agents.

Meanwhile, the buyers concluded the formalities required by the Bank of England by submitting, on September 8, 1952, the

required sterling transfer forms and the firm contracts for the bank's approval. On September 9 Hambros Bank cabled the sellers stating that they had been instructed by the buyers to issue a guarantee in the sellers' favour subject to Bank of England approval. On September 10 the sellers communicated with their agents, referring to the cable from Hambros Bank and stating that they were compelled to cancel the sale by reason of the failure of the buyers to furnish the guarantee in time, and requesting them to inform the buyers accordingly. This message was duly communicated to the buyers' agents. Also, on September 10, Bank of England approval having been received, Hambros Bank cabled to the sellers the terms of an irrevocable letter of credit opened by the buyers in favour of the sellers, the terms of which were substantially the same as those required by the guarantee provided for by the sellers. On the same day the sellers informed the buyers by cable that as the cable received from Hambros Bank on September 9 had not contained the payment guarantee the "deadline" for supplying the "performance "guarantee" had expired without performance and they had "cancelled the deal" that night. Thereupon, the buyers informed the sellers that no deadline had been received or accepted, and that as the guarantee had already been sent in the form of a letter of credit they insisted upon the execution of the contract. The sellers repeated that they considered the sale cancelled, and did not reply to further communications made to them by the buyers. On September 15 the buyers asked the sellers for a declaration that delivery would be executed within twenty-four hours, and no reply being received, referred the matter to arbitration.

At the hearing by the appeal committee of the London Corn Trades Association Ld. of an appeal by the sellers from the umpire's decision awarding damages to the buyers for the wrongful repudiation of the contract, it was contended for the sellers inter alia (1) that the buyers through their agents had agreed that the date for the opening of the guarantee should be September 1, and also to the extended date of September 9; (2) that if there was no agreed express date then the buyers' obligation under the contract was to secure that the guarantee was given as soon as reasonably possible, that they did not do this, and that, therefore, they were in default, and the sellers were entitled to treat the contract as at an end; and that it had been properly determined. on September 10, 1952; (3) that the letter of credit dispatched by the bank was too late and its terms immaterial in law, but that if it were material the document did not comply with the contract because it was not a bank guarantee.

It was contended for the buyers (1) that it was not a term of the contract that the buyers should cause the bank guarantee to be opened at any date prior to September 10; (2) that the buyers' obligation in relation to the bank guarantee was to cause it to be available to the sellers by the first shipment date under

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the contract, namely, October 1, 1952; or, alternatively (3) within a reasonable time before the first shipment date, and that such reasonable time had not arrived by September 10; (4) that the sellers having repudiated the contract before the arrival of the letter of credit opened by the buyers were not entitled to rely on the matters complained of in relation thereto as justifying repudiation; (5) that the opening of a letter of credit was a proper and customary compliance with the buyers' obligation under the contract; and (6) alternatively, that if it were not so, that non-compliance did not evince an intention on the part of the buyers to repudiate the contract.

The committee found, inter alia, that, although the sellers purported to require the guarantee by September 9, the buyers had never agreed to any fixed date nor had they authorised their agents so to do. In so far as it was a question of fact they found, and in so far as it was a question of law, they held (1) that the buyers' obligation was to provide a bank guarantee within a reasonable time before October 1, 1952, being the first shipment date, and that such reasonable time had not arrived by September 10, 1952; (2) that as Bank of England approval was not obtained until September 9, the buyers were entitled to a reasonable period of time after that date to obtain such guarantee, and that such reasonable time had not elapsed by September 10. They found further that the letter of credit opened by the buyers was a sufficient compliance with the contract, and that the sellers did not object to its form, but repudiated the contract before its receipt and maintained that repudiation thereafter. They therefore awarded that the sellers had wrongfully repudiated the contract on September 10, 1952, which was accepted as a final breach by the buyers on September 16, 1952, and awarded damages to the buyers.

The question of law for the court was whether, on the true construction of the documents and the facts as found, the sellers were entitled to treat the contract as determined.

[There was also a dispute before the appeal committee as to the actual date of the contract, which the committee found was August 11, 1952, and asked for the opinion of the court as to the correctness of this finding, but it was conceded at the trial that August 11 was the actual date of the contract.]

T. G. Roche for the sellers.

E. W. Roskill Q.C. and *R. A. MacCrindle* for the buyers.

The cases cited in argument are referred to in the judgment.

Devlin J. stated the facts, and continued: The question of law which is submitted in the case is whether the sellers were entitled to treat the contract as terminated. That raises a short point which can be put in this way: There is no time expressed in the contract as to the date upon which the guarantee was to be

furnished. Therefore, it follows (and both sides are agreed on this) that the guarantee must be furnished within a reasonable time. The question is how a reasonable time is to be measured. It is upon that point that the parties differ.

The sellers' contention as stated before the committee and repeated here is as follows: The buyers' obligation was to secure that the guarantee was given as soon as reasonably possible. The buyers' contention was put in the alternative. First, they submitted that "the buyers' obligation in relation to the said "bank guarantee was to cause it to be opened so that it should "be available to the sellers by the first shipment date under "the contract, namely, October 1, 1952," and they relied as support for that submission on the decision of the Court of Appeal in *Pavia & Co.* v. *Thurmann-Nielsen.*[1] Alternatively, they said: "The buyers' obligation in relation to the said bank guarantee "was to cause it to be opened so that it should be available to "the sellers within a reasonable time before the first shipment "date, namely, October 1, 1952, and that such reasonable time "had not arrived by September 10, 1952." Those two contentions are based on the submission that a bank guarantee is to be treated for this purpose as being in the same position as a letter of credit, and that the obligation upon a buyer to provide a London guarantee is to be measured, so far as time is concerned, by the same principles as those which would apply to a letter of credit.

In *Pavia & Co.* v. *Thurmann-Nielsen*[1] the question was whether a buyer was entitled to wait until he had some reasonable notice or some reasonable ground for thinking that the seller was about to ship, or whether he was obliged to open the letter of credit by the first date of the shipment period provided for in the contract. The Court of Appeal held that the latter was the true view, and that a buyer was not entitled to say, once the shipping period had begun, that he was not going to open his letter of credit until there was a reasonable possibility or some notification by the seller that he was going to ship. Accordingly, upon that basis, the buyers in the present case framed their first contention that the bank guarantee need not be opened before October 1, 1952, that is, the first date of the period of shipment.

I do not think that the *Pavia* case[1] really determines the question of whether the first date of the shipment period is the last date by which the credit has to be opened. It may very well be argued, for example, that if the first available date for shipment is October 1, the sellers are entitled to tender any bill of lading which bears the date October 1. That means that it may well be actually loaded on the ship before that date. It means certainly that it will have to be brought down to the docks before October 1, and it might be said that a seller was entitled to know before he embarked upon those operations which led directly

[1] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.

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to the performance of his obligations under the contract that his payment was secured by the credit for which he stipulated. I do not think the *Pavia* case [2] decided that point one way or the other. No doubt it was with that in mind that the buyers framed their contention in the alternative and said that, at any rate, they were not obliged to give a guarantee until within a reasonable time before the first shipment date.

In view of the findings of the committee that September 10 was a reasonable time, it is unnecessary for me to determine which of the two views is correct. The alternative contention in this case is quite sufficient for the buyers.

I shall proceed upon the alternative contention of the buyers that makes clear the difference between the two parties as to the method which they propose should be adopted for settling a reasonable time. The sellers want to count forward from the date of the contract. They say that the obligation upon the buyers in a contract of this sort is to arrange the bank guarantee as soon as possible: the buyers must have a reasonable time within which to do it, but the reasonable time should be counted from the date of the contract when the obligation to obtain the guarantee arose. The buyers, on the other hand, say that one should count back from the date of the event which the guarantee is intended to cover; that the guarantee is one for payment upon presentation of documents and a buyer would not be obliged to furnish the guarantee until that date draws reasonably near.

It is to be assumed that the guarantee is not going to be of service to the seller until he really begins to need it, and he does not begin to need it until a reasonable time before the first date of shipment. The buyers rely on the decision in the *Pavia* case,[2] and submit that the bank guarantee in this contract is exactly the same as a letter of credit, that the best sort of bank guarantee which could have been obtained would have been an irrevocably confirmed letter of credit, and that, if that had been given, the principle on which the beginning of the period is to be determined has been settled by the *Pavia* case.[2] I think that the buyers' view is the correct one.

Mr. Roche has argued that a bank guarantee is essentially different from a letter of credit, and that the sellers wanted the guarantee to give them security. They wanted to know at the earliest possible moment that, when they tendered documents, payment would be secured or that they would have the protection of a bank guarantee in respect of it. It is not merely a question of arranging to put the goods on board. They might want to make arrangements to buy the goods or they might have opportunities to sell them more profitably to someone else and, therefore, they would want to know at the earliest possible moment that they were secured against any possible default by the buyer. That is tantamount to saying that the guarantee which was to be

[2] [1952] 2 Q.B. 84.

supplied by the bank was what might be described as a performance guarantee. I think that the answer to the question lies upon a consideration of the terms of the contract. One must consider whether the bank is intended to supply a performance guarantee. I do not think it is.

Mr. Roskill has pointed out the different language used in the contract in relation to the guarantee to be given by the bank and that used in relation to the guarantee given by the German guarantors which was plainly a performance guarantee. It was described as a guarantee for the orderly liquidation of the contract. The guarantee to be furnished by the bank was a much more limited thing. It was a guarantee which did not go to the whole performance of the contract but only to one part of it, namely, that the documents would be taken up on presentation.

Mr. Roche submits, and I have no doubt that he is right, that as a matter of law a bank guarantee is not the same as a letter of credit. Under a letter of credit the bank itself undertakes to pay against documents which are to be presented to it. If it is an irrevocably confirmed letter of credit it creates a direct relationship between the bank and the seller, and the bank becomes directly liable to the seller for the fulfilment of the obligations it has undertaken in the letter of credit. Under a bank guarantee, looked at legally, the bank becomes liable only indirectly or secondarily as a guarantor if the buyer fails to fulfil his obligation. The contract does not provide for the documents to be presented to the bank, it provides for the bank's guarantee that the documents will be taken up on the first presentation. Those distinctions are perfectly true, but commercially speaking, it seems to me that the two documents should be treated in the same way, and what is a reasonable time for tendering the documents is a question of fact to be measured in the light of commercial considerations and the commercial purpose of the contract. A confirmed irrevocable letter of credit fulfils all the purposes of a bank guarantee, and far more, but I think that a bank guarantee is sufficiently analogous to a letter of credit for it to be said that the same principles ought to be applied in measuring its effect.

One might look at it in another way. Having taken the view which I have, that the bank guarantee is not a general performance guarantee, but only a guarantee of a limited performance, one asks oneself what the event is which is being guaranteed. That event is that the documents will be taken up on first presentation. Plainly, the guarantee must be there before the documents are presented. Equally it can be argued that it is not enough to tender, say, the day before. It still must be, in measuring time, a time which gives effect to the event guaranteed, that is, the first presentation of the documents. One may take it a few steps back and say that the guarantee must not be there immediately before the documents are presented; it must be before some event, such as the shipment, which obviously leads up to the presentation of the documents. One may go

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back along the chain as far as it is commercially proper to go, but the relation between the time of tendering the guarantee and the event which is guaranteed must still be measured in that way.

It is not, therefore, in my judgment, a guarantee which is measured by the fact that the contract is to be entered into. It is to be measured in relation to the event which is guaranteed, and that is the measure for which the buyers have contended, and I think rightly. Accordingly, their construction of the contract is the right one and the committee were right when they accepted it, and, prima facie, their finding of fact and their conclusion of law disposes of the matter. They said: "In so far "as it is a question of fact we find, and in so far as it is a matter "of law we hold, that the buyers' obligation was to provide a "bank guarantee within a reasonable time before October 1, "1952, and that such reasonable time had not arrived by Sep-"tember 10, 1952." That, I think, was a correct conclusion, and I would therefore answer the question addressed to me by saying that the sellers were not entitled to treat the contract as determined on September 10, and, accordingly, the award should be upheld.

But Mr. Roche, in the course of his final address, produced a second point. He said that, in fact, and it is indeed a fact found by the case, although upon this view the sellers wrongfully repudiated the contract on September 10, the buyers did not accept the repudiation until September 16. Accordingly, the true question is not whether working backwards from the first date of shipment one should go as far back as September 10, because September 10 becomes irrelevant. He said that the true question was whether a reasonable time had elapsed if the time were calculated from September 16. He submitted that there is no finding of fact on that point, and it might very well be that the committee would have held, if, for example, a guarantee had been tendered on September 15, that that was too late, as it had run the shipment date too close.

I think there are two answers to that point. First, it is plain that the point was not taken below in the sense that the committee's attention was never directed to the question whether they should apply their minds to consider what was a reasonable date on the basis of September 16. They applied their minds entirely on the basis of September 10. It is important that people who are going to argue points of law before the court should get the facts found which they want found for the purpose of arguing the point of law which they want to submit to the court. Arbitration has great advantages and it also has some disadvantages. Splitting up questions of fact and of law may be one of the disadvantages, but nothing can be more unfortunate than for cases constantly to go back from the court to the arbitrator because there is found to be some fact which the arbitrator has not found in the case stated which he might have found. Lay arbitrators cannot be expected to realize for themselves all the facts to which

a point of law might conceivably give rise. It would be very unfortunate if applications to send cases back on those grounds were likely to be entertained.

Mr. Roche has plainly argued that on September 10 he was entitled to rescind the contract. If he wanted to put forward the alternative case, namely, that if he was not entitled to rescind on September 10, then he was entitled to rescind on September 16 as no guarantee had been tendered by that date, it was his duty to tell the committee that alternatively he argued that he was entitled to repudiate on September 16. It is then for him to satisfy the committee that by September 16 the document had not been tendered and that, therefore, he was entitled to repudiate as at that date. It is plain that the committee thought that the only material date was September 10.

The buyers made their contention, saying that on September 10 they still would be in time to tender the documents, and it is plain that the tribunal was never asked to say whether on September 16 they would also be in time. It is plain also, from their finding, that had they been asked they would at any rate have said that the time had not expired by September 10, and that it plainly lasted some days after that. That is implicit from what they say, but whether it would have lasted so long as September 16 is not plain. The whole contention put forward by the sellers was that they were entitled to treat the contract as determined on September 10. If they wanted the matter raised, it was their duty to raise the question clearly and to say that they were entitled to treat the contract as determined on September 10, or, alternatively, on September 16. If that had been done, the attention of the arbitrators might have been directed to the importance of making another finding of fact. I do not, therefore, think that upon any view I could go into this point, nor would I be prepared, for the reasons which I have given, to send the case back to the arbitrators.

I am slightly fortified in that conclusion by the fact that it would be a bad point anyway, because if the sellers had contended before the arbitrators that, alternatively, they were entitled to rescind on September 16, and that the buyers ought to have tendered the guarantee before that date, the buyers' answer would have been that up to September 10 they were not obliged to tender a guarantee because it was too early, and that between September 10 and 16 they were not obliged to tender a guarantee because the sellers intimated quite plainly that they would not accept one if tendered. That is shown to be the true position by the facts annexed to the case.

It is no doubt true that if one party repudiates a contract, as the sellers did on September 10, the other party, the buyers in the present case, is not obliged to accept it. One party can keep the contract alive, and if they do so they keep it alive for the benefit of both parties. If, therefore, the sellers on September 15 had changed their minds and said, "We think we were

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"quite wrong about time, it ought to be worked backwards and "not forwards: now tender," it would have been no answer for the buyers to say, "You have already repudiated." The buyers had kept the contract alive, but it does not mean that if the buyer chooses to keep the contract alive he is obliged to behave in precisely the same way as if the seller had not repudiated. That is to confuse two things. It is plainly established by *Braithwaite* v. *Foreign Hardwood Co.*[3] that that is not the case. If the seller's repudiation is such that he displayed an attitude which showed that he was, in effect, saying to the buyer, "Although you are keeping the contract alive you can take up or "perform your next obligation whatever it may be, tender your "documents as much as you like, I cannot accept them," the buyer is relieved from the obligation of making an empty and formal tender. He may, if he wishes for his own purposes, keep the contract alive and still claim that he is relieved from the obligation of making an empty and formal tender. The attitude of the sellers as shown in their cables was plain. They were not saying to the buyers in the period that elapsed between September 10 and 16: "If you tender your document now we "will look at it and see if it is all right." What they were saying was: "We have cancelled on September 10 and we stand on the "fact that we cancelled on that date." That made it plain that they were waiving any obligation on the buyers' part to trade during that period. The result is that I answer the question in the negative and uphold the award.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.; Richards, Butler & Co.*

[3] [1905] 2 K.B. 543; 21 T.L.R. 413.

[PROBATE, ETC., DIVISION.]

* ARDING v. ARDING.

1954
May 27.

Karminski J.

Practice Note.

Husband and Wife—Divorce—Practice—Trial—Right to begin—Desertion alleged—Just cause as defence.

A husband by his petition prayed for a decree of divorce on the ground of desertion, alleging that his wife had left him; the wife by her answer admitted leaving the husband but alleged that she had just cause for doing so. It was submitted on her behalf that her counsel had the right to begin:—

Held, that the burden of proof remained upon the petitioner, who sought a decree, and the husband's case should therefore be heard first in the usual way.

Petition by husband for divorce.

The husband prayed for a decree of divorce on the ground of desertion; the wife did not dispute that she had left him, but she alleged that she had had just cause for doing so by reason of the husband's conduct. When the case was called,

H. B. Grant, for the wife, said that it was admitted that the wife had left, and intended to leave, the husband, and that there was, accordingly, only one issue: had she just cause for doing so? The burden was upon him (her counsel) to prove this, and he submitted that he therefore had the right to begin.

KARMINSKI J. referred to section 4 of the Matrimonial Causes Act, 1950 (which concerns the duty of the court in the presentation of a petition), and said that it was for the petitioner to prove his case.

Grant. But the whole burden does not rest upon the petitioner: although that part of the case upon which a decree, if granted, must be founded, must be proved to the satisfaction of the court, it does not follow that the burden of establishing all issues is upon the petitioner. In the present case, the real issue upon the pleading is whether the wife had just cause for leaving.

H. S. Law (*D. R. Ellison* with him) submitted that since the burden of proving the allegation of desertion to the satisfaction of the court was on him, if relief were to be granted, he should begin. *Hewitt* v. *Hewitt*,[1] a restitution case, was to be distinguished. The burden upon a petitioner for divorce was of a different nature.

KARMINSKI J. I think that the ordinary course should be followed. I have no doubt that the burden of proof is on the husband in view of section 4 of the Act of 1950, and he should therefore begin.

Solicitors: *Bulcraig & Davis; Blyth, Dutton, Wright & Bennett for Johnson, Mileham & Scatliff, Brighton.*

J. B. G.

[1] [1948] P. 150; 64 T.L.R. 120; [1948] 1 All E.R. 242.

[BIRMINGHAM ASSIZES.]

* SEMTEX LD. *v.* GLADSTONE.

1954
Apr. 5, 9.

Finnemore J.

Master and Servant—Contract of service—Implied term—Servant required to drive motor-vehicle on highway—Motor insurance—Policy to indemnify servant—No implied term—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35 (1).

Vicarious Liability—Indemnity from servant. Joint Tortfeasor—Contribution. Road Traffic—Third party insurance.

[Reported by NIUL HOGG, ESQ., Barrister-at-Law.]

1954

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Where a master employs a servant to drive a motor-vehicle on the highway on his, the master's, business, while it is an implied term in the contract of service that in relation to each such excursion there shall be in force an insurance policy sufficient to comply with section 35 (1) of the Road Traffic Act, 1930, no term can be implied that the master must go further and keep up a policy to indemnify the servant against any damages awarded against him at the suit of a party injured by his negligent driving.

The defendant, who was the plaintiffs' servant, was employed, inter alia, to drive some of his fellow-employees to and from their work in a shooting brake belonging to the plaintiffs. The shooting brake was at all material times insured by the plaintiffs in compliance with the Road Traffic Act, 1930. Due solely to the defendant's negligence the shooting brake was involved in an accident in which one of the passengers was killed and others were injured. Those injured and the representatives of the deceased sued and were awarded damages against both the plaintiffs and the defendant. In an action by the plaintiffs for an indemnity or for a 100 per cent. contribution from the defendant:—

Held, (1) that, whether the claim was for an indemnity at common law, based on an implied term in the contract of service that the defendant would perform his duties with reasonable care and skill, or whether it was for a contribution, brought under section 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the plaintiffs, being themselves in no way to blame for the accident, were entitled to recover from the defendant the full amount of the damages awarded against them; and (2) that no term could be implied in the contract of service that the plaintiffs would keep up a policy of insurance to indemnify the defendant against the consequences of his negligent driving.

Jones v. *Manchester Corporation* [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125 applied.

Action.

The plaintiffs, being flooring and decking contractors, employed the defendant as a supervisor for the laying of rubber floors. The defendant was required to oversee work which was being done away from the premises of the plaintiffs, and among his duties he was expected to drive a shooting brake, the property of the plaintiffs. In March, 1951, the defendant was supervising the laying of floors at premises in Nottingham. The work was being done by workmen from 7 o'clock at night until 7 o'clock in the morning. The lodgings provided for the workmen proved unsatisfactory and it was arranged that the defendant should carry the men in the shooting brake to and from Nottingham and Birmingham each day.

On March 7, 1951, as the defendant was driving back a number of workmen, he was involved, due solely to his own negligence, in a serious accident, in which one of the workmen was killed and several others injured. These workmen and the representatives of the one who was killed brought an action against the plaintiffs and the defendant and recovered damages and costs totalling some £9,360.

The plaintiffs now sued the defendant for an indemnity or for a contribution of 100 per cent. under section 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, alleging that the accident was caused solely by the negligence of the defendant. The defendant pleaded in reply that "it was an implied "term of the contract of employment between the plaintiffs and "the defendant that the plaintiffs would effect and/or keep in "force a policy of insurance which would indemnify the plaintiffs "and the defendant against liability which may be incurred by "him in respect of the death of, or bodily injury to, any person "caused by, or arising out of, the use by him in the course of "his employment of the shooting brake on the road"; and that the claim of the plaintiffs was contrary to, and in breach of, this implied term.

It appeared that the plaintiffs carried two insurance policies, each with different insurers: one an employer's liability policy, under which the plaintiffs were the only insured, and the other a motor policy complying with section 35 (1) of the Road Traffic Act, 1930,[1] under which the plaintiffs were the primary insured and the actual driver was the secondary insured subject to certain conditions. The motor insurers had stated that they did not regard these conditions as fulfilled in this case, though they did not specify which conditions had not been complied with, and that they did not consider themselves bound to indemnify the defendant if he should be required to pay all or any part of the damages awarded in the above-mentioned action.

R. Marven Everett Q.C. and *E. G. H. Beresford* for the plaintiffs.

E. Ryder Richardson Q.C. and *A. E. James* for the defendant.

The following cases were cited: *Harmer* v. *Cornelius*[2]; *Weld-Blundell* v. *Stephens*[3]; *Monk* v. *Warbey*[4]; *Tattersall* v. *Drysdale*[5]; *Ryan* v. *Fildes*[6]; *Digby* v. *General Accident Fire & Life Assurance Corporation Ld.*[7]; *Richards* v. *Cox*[8]; *Gregory* v. *Ford*[9]; and *Jones* v. *Manchester Corporation.*[10]

Cur. adv. vult.

[1] Road Traffic Act, 1930, s. 35: "(1) Subject to the provisions of this "Part of this Act, it shall not be law-"ful for any person to use, or to cause "or permit any other person to use, a "motor vehicle on a road unless there "is in force in relation to the user of "the vehicle by that person or that "other person, as the case may be, "such a policy of insurance or such "a security in respect of third-"party risks as complies with the "requirements of this Part of this "Act."

[2] (1858) 5 C.B.(N.S.) 236.

[3] [1919] 1 K.B. 520; 35 T.L.R. 245; affd. H.L. [1920] A.C. 956.

[4] [1935] 1 K.B. 75; 51 T.L.R. 77.

[5] [1935] 2 K.B. 174; 51 T.L.R. 405.

[6] [1938] 3 All E.R. 517.

[7] [1940] 1 K.B. 643; 56 T.L.R. 394; [1940] 1 All E.R. 514; varied C.A. [1940] 2 K.B. 226; 56 T.L.R. 839; [1940] 3 All E.R. 190; revd. H.L. [1943] A.C. 121; 58 T.L.R. 375; [1942] 2 All E.R. 538.

[8] [1943] 1 K.B. 139; 59 T.L.R. 123; [1942] 2 All E.R. 624.

[9] [1951] 1 All E.R. 121.

[10] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

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April 9. Finnemore J. stated the facts and continued: I take it to be clear that in our law a master can sue his servant for negligence. There is no special law which allows a servant to be negligent about his master's business and then to claim that he was exempt from an action by his master. There is authority for that, although it hardly needs authority.

The next question is whether the master can sue the servant if the servant has not directly injured the master, or his property, but having injured other people in such a way that his master is called upon as being responsible for the torts of his servant to pay large sums of money. The principle which I believe to be the true principle, is summarized in Salmond on the Law of Torts, 11th ed., p. 92: "It would seem clear on principle that in all "cases of true vicarious liability the person held vicariously liable "for the tort of another should have a right of indemnity as "against that other. Thus, a master who has paid for the negli-"gence of his servant should be able to sue that servant for "indemnity. That this is generally so cannot be doubted, pro-"vided that the negligence of the employer himself or one of his "other servants has not contributed to the damage." This paragraph is a little different from the one which appeared in the 10th edition, which was referred to in *Jones* v. *Manchester Corporation.*[1] If that is a proved expression of the law on this matter then, so far, the plaintiffs would be clearly entitled to recover. The master here, the plaintiffs, has paid for the negligence of the servant, the present defendant, and no one suggests, or could suggest, that any negligence of the employer, or any other of his servants, has in any way contributed to this damage.

This matter was considered recently in *Jones* v. *Manchester Corporation.*[1] In that case the action was brought against the hospital board of the Ancoats Hospital in Manchester and the doctor who administered the anaesthetic which unfortunately resulted in the death of the person whose administratrix was bringing the action. That case shows quite plainly that in a case where a master and his servant are jointly concerned in a tort they can, under the Law Reform (Married Women and Tortfeasors) Act, 1935, bring an action for contribution. Hodson L.J., in a dissenting judgment in which he held that neither the hospital board nor any other of their servants had been negligent, put the matter on a rather different basis. He said that in his view the negligent servant is under an implied term in his contract of employment to exercise reasonable skill according to his calling. He cited a passage of Willes J. in *Harmer* v. *Cornelius*,[2] and then he cited a passage from *Weld-Blundell* v. *Stephens*,[3] in which Warrington L.J. said[4]: ". . . it may well be "that if a servant by his negligent act inflicts an injury on a third "person who recovers damages therefor from the master, the

[1] [1952] 2 Q.B. 852.
[2] (1858) 5 C.B. (N.S.) 236.
[3] [1919] 1 K.B. 520.
[4] Ibid. 536.

"latter may recover the amount from the servant in an action "against him for breach of his duty. But in such a case the "right of action against the master and his legal liability them-"selves result from the servant's negligent act, and but for that "act would not have existed."

I confess, if I were free and if it really mattered, I would prefer the way in which Hodson L.J. puts this kind of case—that is as a breach of the contract of service between the master and his servant—to some other ways in which it has been put. For some reason that I have never been quite able to understand, the master who is vicariously responsible for his servant is referred to as, and apparently treated as, a joint tortfeasor. This point was elaborated by Denning L.J. in *Jones* v. *Manchester Corporation*.[5] I could never see why an employer, whose only liability is the vicarious liability of being responsible for what his servant does, should be called a joint tortfeasor, which should mean a person who took some part in the tort which is the subject of the action. However, I do not think that in the present case it really matters, because it is clear that, if one has to regard the employer as a joint tortfeasor with his servant, who alone committed the tort, then by reason of the Act of 1935 he can claim contribution and that contribution can be as much as 100 per cent. This was illustrated by *Ryan* v. *Fildes*.[6] In that case Tucker J. made an order for a 100 per cent. contribution although he did draw attention to the fact that under that Act of Parliament, there being joint tortfeasors, contribution is a matter in the discretion of the court in the circumstances of each case, and the court might order no contribution, or might order a contribution up to 100 per cent.

It seems to me that where the negligence concerned is entirely the negligence of the one party—in the present case the servant—it would follow really, if one applies the ordinary principles of justice, that the contribution should be 100 per cent. Certainly, in my opinion, in this case, whether I treat it as a matter of breach of contract of service, as Hodson L.J. put it in *Jones* v. *Manchester Corporation*,[7] or whether I treat it as a case of contribution, as it was put by Denning L.J., and probably by Singleton L.J., I think the result would be the same. In my view, the plaintiffs would be entitled to recover the whole of the damages which they have had to pay in this case owing to the negligence—and owing only to the negligence—of the defendant.

What is the answer to that? If I understand the defence, putting it shortly, it is this: owing to the Road Traffic Act, 1930, which introduced what we called "compulsory insurance" for vehicles on the road against damage being done to third parties, the whole system has been changed. Indeed, Mr. Ryder Richardson put it in these actual words: "The whole matter is now

[5] [1952] 2 Q.B. 852.
[6] [1938] 3 All E.R. 517.
[7] [1952] 2 Q.B. 852.

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"changed because of motor insurance." I propose to deal with that in a little more detail in a moment, but I want to say that I have come to the conclusion that it does not in any way change the law of this country. All that the Act of 1930 did in regard to this matter was to say that it was an offence to drive a vehicle on the road, or cause it to be driven or permit it to be driven, without having in force a contract of insurance according to the requirements of that Act. I do not think that it in any way interferes with what I might describe as the general law existing between master and servant with regard to the control of a motor-car.

I notice that in the original defence which was served in this case, all that was raised was a denial of negligence by the defendant and, secondly, a general denial, without any reason given, that the plaintiffs were entitled to indemnity or contribution, costs or expenses. After that the matter was further considered and an amended defence was served, drawn, if I may say so, obviously by a pleader of considerable skill and ingenuity. It is with that amended defence that I now have to deal.

Paragraph 1 has been amended to add: "The wages of the "defendant were at all material times £365 per annum." That is interesting but, it seems to me, a quite irrelevant piece of information, but obviously some weight is attached to it because more than once Mr. Ryder Richardson pressed on me the consideration that this was an action by a subsidiary company of a very great commercial concern against one of their employees earning £9 per week, and he drew what was intended to be a very harrowing picture of this unfortunate man having his house—if he has one—sold over his head, he being driven with his wife and children into the gutter and forced into bankruptcy. Of course, it is obvious to anyone who uses his eyes in this court, apart from the evidence that was given, that in the result this is a contest between much more seasoned warriors than even Semtex Ld. or the defendant. Behind the scenes are two very well-known insurance companies, and I think that both the facts that the defendant is a man of small means and that, ex hypothesi, the insurance companies are people of very large means, are quite irrelevant. The rights of the plaintiff do not depend on the ability or inability of the defendant to satisfy any lawful judgment that is given, nor does a judgment given depend in any way on the fact that one party, or both parties or no party, has or have in the background an insurance company on which they can rely. The fact that people are insured in respect of this or that risk does not in the least alter the principles which the court has to apply in deciding, first of all, what the law is.

The second paragraph in the defence reads: "It was an implied "term of the contract of employment between the plaintiffs and "the defendant that the plaintiffs would effect and/or keep in "force a policy of insurance which would indemnify the plaintiffs "and the defendant against liability which may be incurred by

"him in respect of the death of or bodily injury to, any person "caused by or arising out of the use by him in the course of his "employment of the shooting brake on the road." I am not sure whether, if that be true, it would really make any difference, because I think that this case still has to be decided apart from the question of insurance except to the extent which I will deal with later on. As pleaded I think that paragraph is wrong. I do not think that it can be any implied term of the contract of his employment that a particular policy of insurance to indemnify the driver must be in force. There may be of course—I think there is—implied in a contract a term that the law will be observed and that the driver will not be called upon to do an unlawful act: in other words, that the employer will have taken the steps which he is bound to take under the Road Traffic Act, 1930. This is made plain in *Gregory* v. *Ford*,[8] where Byrne J. held that section 35 of the Act of 1930 did not cast on the employers any duty in relation to their servant to insure against third-party risks a vehicle driven by the servant, but he did hold, secondly, that there was an implied term in the contract of service that the servant should not be required to do an unlawful act, and, accordingly, there was an implied term that the employers were to comply with the provisions of section 35 (1) of the Road Traffic Act, 1930.

Byrne J. pointed out that it was necessary to consider the object of the statute and he quoted Goddard J. in *Tattersall* v. *Drysdale*,[9] as having said: "[The Road Traffic Act, 1930,] was "aimed at the protection of the public by providing that there "should be a body of insurers behind every driver of a car." Byrne J. said[10]: "With that observation I respectfully agree. "*Monk* v. *Warbey*[11] is authority for the proposition that a person "who is injured by the negligent driving of a motor car which is "not the subject of insurance against third-party risks can sue "the owner of the motor car for breach of statutory duty, but, so "far as I am aware, there is no authority for the proposition that "section 35 (1) casts on the employer a statutory duty in relation "to his servant, and, having regard to the object of the statute, "I do not think that it does." He then held that there was an implied term that the employer would observe the conditions of the Road Traffic Act and that the driver in that case—where there was, in fact, no policy in existence—was entitled to succeed on that implied term.

Byrne J. added[12]: "A servant is, of course, liable at the suit "of his master for damage which is the result of the servant's "negligence, but in this case, although the third defendant was "negligent, it is owing to the breach of statutory duty by the "first and second defendants that the damages in respect of "which they claim indemnity fall on them. For that reason, in

[8] [1951] 1 All E.R. 121.
[9] [1935] 2 K.B. 174, 181.
[10] [1951] 1 All E.R. 121, 123.
[11] [1935] 1 K.B. 75.
[12] [1951] 1 All E.R. 121, 124.

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"my view, their claim fails." It is wrong, therefore, to say that one can imply in the defendant's contract of employment here a term that he is to be indemnified against liability, but there is to be implied a term that the owners would carry out the obligations laid on them by the Act of 1930. I have to couple up with paragraph 2, paragraph 8 of the amended defence where it says that the claim of the plaintiffs was contrary to and in breach of the said implied term of contract of employment between the plaintiffs and the defendant. If the contract was that the defendant was not to be put under any liability and was to be protected in that sense, that might be so, but if the implied term is only the one with which Byrne J. deals, that is to say, to carry out the terms of the Act of 1930, it seems to me to be not so.

Paragraph 9 reads: "Further, or alternatively, the plaintiffs "in breach of the said implied term failed to effect, or keep in "force, a policy of insurance which indemnified the defendant "against liability in respect of people in this case who brought "their actions." The answer to that is that, prima facie, they seem to have done that very thing. Two contracts of insurance were put in, both called for by the defendant. It appears, first, that the plaintiffs had an employers' liability policy of the Midland Employers' Assurance Ld., which covered everybody under a contract of service or apprenticeship who might be injured, or fall ill, arising out of and in the course of their employment, so that, if that happened, the plaintiffs and nobody else would be insured against liability. Secondly, there was a contract for insurance with the Cornhill Insurance Co. Ld. which was a motor-car policy. Under that policy the shooting brake which was concerned in this matter was covered. It contains the term that the company will indemnify any person driving the insured car on the orders of the insured or with the insured's permission, provided such person is not entitled to indemnity under any other policy and that the terms, expense and conditions apply to him as far as possible. It is issued in the names, I notice, of Semtex Ld. and/or representatives. It is one of those contracts designed, I think, to cover the requirements of the Act of 1930. There is a primary insured, a company, and there is a secondary insured, that is the actual driver, and they undertake to indemnify him provided he was driving on the order, or with the permission, of the insured, as, of course, the defendant was. What I fail to see is how that makes any difference to the legal position between master and servant. It may be a very comforting thing for the defendant if, indeed, that insurance policy indemnifies him when he makes a claim against the insurers. Whether it does that or not, all I need say at the moment is that, prima facie, it is such a contract as would satisfy the requirements of the Act of 1930, and it was in force on March 7, 1951.

A letter was also put in by the defendant dated July 13, 1953, written to him by a firm of solicitors acting for the Cornhill Insurance Co. Ld. in which the opinion was given that the

insurers were not liable to indemnify him. No hint is given in that letter on what ground the Cornhill Insurance Co. Ld. would disclaim liability to the driver. I have not in fact been told what it is. It may be—I do not know—that if, in due course, when the proper steps have been taken, it should turn out that that policy is a bad one, or ineffective for some reason, there might then be questions to be decided between the plaintiffs and the defendant, but at the moment all I have is that policy put before me, and it seems to me a complete contradiction of the defence put forward here that they failed, in effect, to keep in force a policy of insurance which indemnifies the defendant against liability in respect of the death of this one man and the injuries of the others. But again I say that the duty of the employers is, in my view, limited to their duty under the Road Traffic Act. One cannot imply in the contract of employment any other term because, if the servant wants any term further than the one which is part of the public law of the land, it must be the subject of an express agreement.

I will come to the other points of the defence. Paragraph 10 is that he is under no duty at common law to indemnify or to make contribution to the plaintiffs. I have already indicated my view. Whether the master must be treated as a joint tortfeasor and it comes under the Law Reform (Married Women and Tortfeasors) Act, 1935, or not, the defendant is, in my view, quite plainly liable at common law to his masters. If he is negligent and causes damage to them by his negligence, they are entitled to recover. It is said that the plaintiffs are in breach of " the said " implied term " contrary to law and natural justice. I do not think it is in breach of the said implied term, whatever that term was. The defendant has his rights, whatever they are, under this contract because there is an express provision for indemnifying him and, indeed, the policy goes further than the requirements of the Road Traffic Act, 1930, because it appears to preclude the death of or injury to people who were in the vehicle in the course of employment.

The final plea is that, in any event, acting under section 6 (2) of the Law Reform (Married Women and Tortfeasors) Act, 1935, the court should, as it has power to do if that is the right way to put this case, exempt the defendant from liability to make any contribution. I cannot see any possible ground for exercising that power and I see every possible ground for doing the exact opposite. That an employee who is negligent and causes grave damage to his employers, should be heard successfully to say that he should not make any contribution to the resulting damage, is a proposition which does not in the least commend itself to me and I do not see why it should be so. I find that justice, as we conceive justice in these courts, says that the person who caused the damage is the person who must in law be called upon to pay damages arising therefrom.

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I want finally to refer to a case which, it seems to me, is extremely near the present case, not only in law but even, if one may be so bold as to say so, in the idea of natural justice that the defence has been rather pressing on the court. That is *Digby* v. *General Accident Fire and Life Assurance Corporation Ld.*,[13] which caused a great deal of litigation. The short facts were that Miss Merle Oberon, the well-known actress, was injured in her car while being driven by her chauffeur. The car collided with another car. She brought an action against her own chauffeur and the driver of the other car. The court held that both vehicles were to blame and that meant, in the blank statement of the law, that Miss Oberon was able to gain her judgment only against her own chauffeur and that she did to the amount of £5,000. I have no reports of that original trial, but it is plainly an authority for this: that an employer and owner of a car can sue the driver employed by him for injuries caused to the owner by the negligent driving of that car. The matter then went to arbitration because the driver claimed indemnity on a policy which, as far as I can see, appears to be indistinguishable from the Cornhill policy in the present case. The umpire, Mr. Maxwell-Fyffe K.C., decided that the driver was entitled to be indemnified. The matter then went to Atkinson J., who agreed. It went to the Court of Appeal which, by a majority, disagreed. Finally, the matter went to the House of Lords which, again by a majority, agreed with the original decision, and held that the driver was able under the policy taken out by his employer, the owner of the car, to claim indemnity from the insurance company for the damages which he was liable to pay to the owner.

It is true that the dispute in that case was on the question whether the policy-holder should be considered as a third party for this purpose, and that question is irrelevant in the present case because I am not dealing with that proposition. That case illustrates strikingly, however, that the owner was able to sue her own chauffeur and driver and to recover damages, although there was in force a policy which she had taken out covering what is required to be covered by the Road Traffic Act, 1930, and which, as the House of Lords subsequently held, in fact gave protection to the driver himself. The only difference I can see between that case and the present is that there the employer was suing the servant for injuries which his negligence had caused to her physically. In the present case the plaintiffs are claiming against the servant for damages they have had to pay to people injured by the driver's negligent driving, and as I think in our law a master is entitled to sue his servant for damages he has been called upon to pay to others, as well as for injuries directly caused to him, I think the principle is the same. With the other part of the case I am not concerned, except that it does serve to

[13] [1940] 1 K.B. 643; varied C.A. [1940] 2 K.B. 226; revd. H.L. [1943] A.C. 121.

show that in the absence of something which has yet to be disclosed and argued, the defendant may be able to take considerable comfort in that the Cornhill policy may well cover him even against his own employers. This principle was illustrated again in *Richards* v. *Cox*,[14] but I do not think that more need be said about that with regard to the present case. For these reasons I think that the plaintiffs are entitled to recover in the present action and, accordingly, they will be entitled to the relief for which they ask.

Judgment for the plaintiffs.

Solicitors: *Buller, Jeffries & Kenshole, Birmingham; Blewitt & Co., Birmingham.*

[14] [1943] 1 K.B. 139.

[CHANCERY DIVISION.]

* *In re* BRACE, DECD.
GURTON *v.* CLEMENTS AND OTHERS.

1954
May 5, 6.
Vaisey J.

[1953 B. 5355.]

Will—Construction—Uncertainty—Condition subsequent—Gift of freehold house and contents and "any possessions I may have" to one daughter "on condition that she will always provide a home for" another daughter—Condition subsequent—No gift over—"Possessions"—"Provide a home"—Whether condition valid—Precatory trust.

Trust and Trustee—Precatory trust. "Possessions"—Cash at bank—Proceeds of policy—Arrears of pension.

A testator by his will provided: "I give and bequeath unto my "daughter Irene my house at 25 Apton Road, Bishop's Stortford, "together with the contents of same and any possessions I may "have, on condition that she will always provide a home for my "daughter Doris at the above address." There was no gift over. The testator's estate consisted of the house, furniture and effects, cash at a bank, proceeds of an insurance policy and arrears of a pension:—

Held, (1) that "any possessions I may have" included the furniture and effects, cash at the bank, proceeds of the policy and arrears of the pension.

Fleming v. *Burrows* (1826) 1 Russ. 276 followed.

(2) That, in the absence of a gift over, the condition should be construed as precatory only; and further that the words to "provide "a home for . . ." were so vague as to be unintelligible, so that regarded as a condition of defeasance they were void for uncertainty.

In re Richardson [1904] 2 Ch. 777 considered.

In re Talbot-Ponsonby's Estate (1937) 54 T.L.R. 33; [1937] 4 All E.R. 309 questioned.

Clayton v. *Ramsden* [1943] A.C. 320; 59 T.L.R. 75; [1943] 1 All E.R. 16 applied.

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ADJOURNED SUMMONS.

The following statement of the facts is taken in substance from the judgment of Vaisey J.

The testator, Thomas Sampson Brace, described in his will as "of 25 Apton Road, Bishop's Stortford, Hertfordshire," made that will on March 19, 1950, and, after appointing the plaintiff, Walter George Bobs Gurton, his executor, declared: "I give and "bequeath unto my daughter, Mrs. Irene Clements, of 25 Apton "Road, Bishop's Stortford, Herts, my house at 25 Apton Road, "Bishop's Stortford, together with the contents of the same "and any possessions I may have, on condition that she will "always provide a home for my daughter, Doris Mary Brace, at "the above address."

On August 8, 1953, the testator died. He was a widower with five children, all defendants to this summons, namely, Irene, Doris Mary, Eva, Netta and Nellie. Irene, Eva, Netta and Nellie were all married. Doris Mary was a spinster of about 38 years of age, who was and had since early childhood been mentally afflicted, and appeared in these proceedings by the Official Solicitor as her guardian ad litem. She had no means or possessions of any kind. Irene, both before and after her marriage in 1940, resided with the testator at 25 Apton Road, which was also the home of Doris Mary. For many years Irene had looked after and cared for her father, the testator, and her sister, Doris Mary, and fully intended and wished to continue to act towards her sister with the same kindness and consideration as formerly, whatever might be the legal effect of the will.

The testator's estate consisted of 25 Apton Road, which was freehold, and of an estimated value of £1,500, some furniture and personal effects worth about £50, cash on deposit at a bank £210 1s. 1d., the proceeds of an insurance policy £20 3s. 2d., and arrears of a pension, £1 15s. 3d.

By this summons the executor asked, inter alia, (1) whether the contents of the house and any possessions that the testator might have included the whole of his residuary personal estate, and (2) whether the condition that Irene should always provide a home for Doris at the house was valid, or was void for uncertainty, or for any other reason.

D. H. McMullen for the executor.
Raymond Walton for Irene.
W. F. Waite for Doris.
A. J. Balcombe for the remaining daughters of the testator.

All cases cited in argument are referred to in the judgment.

VAISEY J. stated the facts, and continued: The first question which arises is, What is meant by the words "any possessions "I may have"? In my judgment, they include all the items which I have enumerated, so that Irene is entitled to the whole

of the testator's estate, and for this *Fleming* v. *Burrows* [1] is sufficient authority. I will make a declaration accordingly.

The more difficult question is as to the validity and meaning of the condition that Irene is to provide a home for her afflicted sister. The condition is, of course, a condition subsequent, applicable not only to the house, but to the whole and every part of the estate. The question is whether on the true construction of the will Irene has no more than a conditional property not only in the house but in the various moneys which go to her with it, or whether she takes all absolutely, treating the conditional words as merely hortatory and precatory and expressive of the testator's expectation and belief that she will carry out his plainly declared wishes.

The latter alternative is not easily justified by the words, and the real difficulty to my mind is whether the condition is phrased with sufficient clarity and certainty to enable the court to give effect to it as a valid and binding condition subsequent.

I confess to feeling a very grave doubt whether the conception of one person A providing a home for another B is susceptible of any such clear and definite significance as to enable anybody to say what it means or what obligations it entails. Obviously, the provision of a home would involve giving shelter from the elements; but, if board and lodging, clothing, food, and so forth, have to be provided, on what scale or by what standard is the obligation to be imposed? Another way of stating the difficulty is to ask whether providing B with a home includes or implies maintaining him. I cannot read "provide a home for" as equivalent to "maintain and provide a home for"; had those been the words, I might not have felt any difficulty.

In re Richardson [2] is, at first sight, very like the present case, and was cited to me as almost, if not quite, conclusive of the present case. Unfortunately, however, the question of the certainty or uncertainty of the condition was never argued in that case, and there are two very substantial differences between that case and the present. The headnote reads: "A testatrix gave her "residuary estate, in the events which happened, (1) to her niece "C. on condition that she resided in the testatrix's house during "the life of the testatrix's sister M., and provided there a home "for M. so long as she wished; (2) in the event of C. not "complying with the condition, to another niece upon the like "condition; (3) in the event of neither niece complying with "the condition, upon trust for M. for life with other trusts over "on her death. At the date of the testatrix's death M. was a "lunatic not so found, confined in an asylum, and was not "expected to recover her faculties. Upon a summons by C. under "the Settled Lands Acts: *Held*, that C. was a person having "the powers of a tenant for life under the Settled Land Act, "1882; that the condition as to providing a home was void so far

[1] (1826) 1 Russ. 276.

[2] [1904] 2 Ch. 777.

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"as it prevented C. from exercising her power of sale; and that "she was entitled to sell the house and keep the proceeds "absolutely."

First, it is obvious that it did not matter in that case whether the condition was good or bad, because the sale was about to be effected; but the second point to which I wish to call attention is that the words which I have read from the headnote are incomplete, and what was said in the will was that the niece was to provide "there," that is in the house in question, "a home free "of cost or charge of any kind." Those words certainly give much more guidance on the meaning of "providing a home" than do the perfectly colourless words in the present will. The other most important difference between the cases is this, that in *In re Richardson*,[3] there was a definite, positive and plainly expressed gift over. Here there is no such gift over, and that seems to me to point very strongly to the conclusion that the testator never contemplated anything in the nature of a forfeiture of estate or interest; because, if the condition in this will is treated as binding, Irene would not be able to spend one penny of the money in the bank, or to deal with one stick of the testator's furniture as her own. That seems to me a very unlikely intention to attribute to the testator. The absence of a gift over seems to me to point quite strongly to the conclusion that these words were not intended to be anything more than precatory.

What is meant by "providing a home," without any reference, as in *In re Richardson*,[4] to costs and expenses? It seems to me to be an expression with a certain general significance applicable in various contexts and having in each case a very different meaning. Of a negligent mother, for example, it might be said that none of the children were at school, and that she did not really "provide a home" for them, in the sense that she allowed them to run loose, with that sort of idea of "providing a "home." That is not like "providing shelter" and "allowing "them to reside" or anything of that sort, but it is "providing a "home"; and "home" is a word, in my judgment, of an extremely wide and varied significance.

I have been referred to many cases dealing in recent years with this difficult question of conditions subsequent. The first in order of date is *In re Talbot-Ponsonby's Estate*,[5] before Crossman J. There the condition was that the devisee of the estate was to make the same his home. I should have thought that an extremely vague expression, but, at any rate, it seems to me an expression of far greater certitude than saying that someone is to provide a home for someone else. If the owner of an estate makes that estate his home, he is clearly to reside there in the ordinary way and treat the place as his ordinary place of residence.

[3] [1904] 2 Ch. 777.
[4] Ibid.
[5] (1937) 54 T.L.R. 33; [1937] 4 All E.R. 309.

I may observe that *In re Talbot-Ponsonby's Estate*[6] has been cited in cases before higher authority, and I very gravely doubt whether, having regard to those cases, it could now stand.

I was next referred at length to *Sifton* v. *Sifton.*[7] The crux of the whole matter is summed up in the quotations from earlier cases which appear in the judgment, and the case reminds the profession and reminds us all of the necessity for extreme caution in framing conditions subsequent, and I wish to refer to some wise words of Lord Wright in *Clayton* v. *Ramsden.*[8]

Lord Wright, who agreed with most, but not all, of the statements of the other learned Lords, began his speech with these words: "My Lords, a testator who wishes to leave an estate or "interest subject to a defeasance clause must be very careful, or "his lawyers must be very careful, how the clause is expressed. "Lord Eldon L.C., in 1823, in *Fillingham* v. *Bramley,*[9] said: "'There is great difficulty in saying that a forfeiture was incurred, "'when the court cannot see clearly what it was the testator "'meant.' Later, Lord Cranworth more precisely, in *Clavering* "v. *Ellison,*[10] said that 'where a vested estate is to be defeated "'by a condition on a contingency that is to happen afterwards, "'that condition must be such that the court can see from the "'beginning, precisely and distinctly, upon the happening of "'what event it was that the preceding vested estate was to "'determine.'"

Then Lord Wright continued: "Lord Cranworth treats the "matter as one to be decided as it were in vacuo, simply on the "construction of the clause. 'The question,' he said,[11] 'is . . . "'whether you can predicate on reading the will, what it was "'that was to defeat the vested estate?'"

In this case the testator has tried to leave an estate or interest subject to a defeasance clause, and I ask myself: has he been very careful how the clause is expressed? Is the court able to see clearly—those are the words of Lord Eldon—what it was the testator meant? For the reasons which I have already given in part, I do not think that this testator has indicated that.

I should like to read next *In re Gape,*[12] where the reference was to "permanent residence in England," and it was held by the Court of Appeal "that it is not essential for the validity of a "condition subsequent that the words of the condition shall be "of such a character that the question whether a forfeiture has "or has not occurred, or would or would not be incurred, can be "ascertained not only with certainty but with perfect ease." The clause in that will was, according to the Court of Appeal, "sufficiently precise and definite to give it validity." The words

[6] 54 T.L.R. 33.

[7] [1938] A.C. 656; 54 T.L.R. 969; [1938] 3 All E.R. 435.

[8] [1943] A.C. 320, 329; 59 T.L.R. 75; [1943] 1 All E.R. 16.

[9] (1823) Turn. & R. 530, 536.

[10] (1859) 7 H.L.Cas. 707, 725.

[11] Ibid. 726.

[12] [1952] Ch. 743; [1952] 2 T.L.R. 477; [1952] 2 All E.R. 579.

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in the will there, putting them quite shortly, were that the beneficiaries should take up permanent residence in England, and again there was a gift over. I quote these words from the judgment of Evershed M.R.[13]: "It is quite clear to me," he said, "that Lord Romer, in his phrase[14] 'can see from the beginning "'precisely and distinctly upon the happening of what events,' "etc., was but restating in his own language the same principle "which Parker J. and Fry J. had stated; in other words, it is not "necessary that the words of the condition should be of such a "character that the question whether forfeiture has or has not "occurred or would or would not be incurred can be ascertained "not only with certainty but with perfect ease. Sometimes, no "doubt, it is a matter of some difficulty to say whether, having "regard to the particular events which have happened (and, as "all the world knows, sometimes the actual events are of a most "unusual and unforeseen character) the forfeiture has, according "to the true construction of the document, been incurred. But "that aspect of the matter is not essential to the validity of the "condition, as is illustrated by *Bromley* v. *Tryon*,[15] a decision "of the House of Lords. That was a case of a shifting clause "under a will whereby certain settled estates became divested "upon the happening of certain rather complex events," and then there is a quotation from the speech of Lord Simonds L.C. in that case, which is the last to which I shall refer.

Reading with care those words of Evershed M.R., I of course agree, with great respect, that it may often be a matter of some difficulty to ascertain whether a forfeiture has occurred; but my trouble in this case is that I do not know what the original condition means. It is not a question of endeavouring to find out whether the forfeiture has occurred; I must first decide what the devisee Irene must do to protect her estate. As I have said, I think the expression "provide a home" not only extremely vague but quite devoid of any intelligible signification. It is not a difficult expression; but, I think, an unintelligible one. I agree that in many cases a man may be said to be "providing a "home" for someone, if, for example, he feeds him, gives him board and lodging, entertains him and gives him pocket-money and so forth. That, of course, would be a case in which a home would be provided for the person in question to the fullest extent; but what if the pocket-money be stopped, the food reduced, if he be compelled to wear shabby clothes whilst the other man is handsomely dressed? All such questions seem to me to introduce an element of uncertainty into this conception of "providing a home," so that no real attention can be paid to that expression in so far as it is alleged to create legal obligations.

Bromley v. *Tryon*,[16] in the House of Lords, was, as Evershed

[13] [1952] Ch. 743, 748.
[14] [1938] A.C. 656, 675.
[15] [1952] A.C. 265; [1951] 2 T.L.R. 1119; [1951] 2 All E.R. 1058.
[16] [1952] A.C. 265.

M.R. pointed out in *In re Gape*,[17] a complicated case. Really, however, the only difficulty was what was meant by the "bulk" of a settled estate where the estate was subject to alterations in size, character, value and so forth, and might be partly land and partly capital moneys. As the House of Lords concluded that the expression meant anything over half, and that, accordingly, the clause was not void for uncertainty, I should have thought that that was a case in which the doubtful word "bulk" could be construed by the court. The court would say that "bulk" meant the greater part, 51 per cent., just over half. After that conclusion, there would not, in my view, be any uncertainty at all about the matter and, although Lord Simonds L.C. reminded us that the principles of *Sifton* v. *Sifton*[18] and *Clayton* v. *Ramsden*[19] must be applied with caution, I do not think that there is anything in his speech or his decision which really helps those who are trying now to clarify a wholly unintelligible condition subsequent.

At the conclusion of his speech Lord Simonds said[20]: "In "deference to the argument of learned counsel who sought to "illustrate the alleged obscurity of the relevant words by refer-"ence to the facts of the present case, I will only add this. "It does not follow because the words of a defeasance clause "are sufficiently clear to give the clause validity that there may "not be cases in which its application is difficult, and I appre-"hend that, if there is a real doubt, the court will show the same "favour to a vested estate in applying the clause as it does in "construing it. But in the present case I do not find in the facts "as proved, whether as illustrative of the difficulty of construc-"tion or of application, anything which would lead me to a "conclusion favourable to the appellants." Then he said that he saw no sort of ambiguity in those words, though the result of them might be capricious.

For myself, I think that nobody can say that the expression "providing a home" for a person as a condition subsequent is free from ambiguity. I should have thought that it is not merely ambiguous, but of no ascertainable significance at all.

In *Clayton* v. *Ramsden*,[21] in the course of the argument, one of their Lordships, I think Lord Romer, said that a condition subsequent must never be a condition in which a standard has to be applied. Any attempt to introduce standards into the condition subsequent will create difficulty, and I have often thought of those words; if one has to apply a standard and is not told what standard to apply, the condition is not one which can be properly imported into the conditions. In the present case, what sort of "home" do the words "provide a home" mean? How comfortable is it to be? Is it to be a mere shelter from the elements or a place where, so to speak, one feeds with the family

[17] [1952] Ch. 743.
[18] [1938] A.C. 656.
[19] [1943] A.C. 320.
[20] [1952] A.C. 265, 276.
[21] [1943] A.C. 320.

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or eats one's meals below stairs or what? Nobody can tell; it is all entirely unqualified. Joyce J., in *In re Richardson*,[22] had at any rate this guidance, that the person for whom the home was to be provided was to have it free of all costs or charges of any kind whatsoever. I agree that, even then, that left a good deal to be worked out. Was he to have his clothes provided? I should have thought that it was a case of board and lodging. There are not, however, any such words in this case, and I feel bound to hold that the condition is void for uncertainty.

There are other points, on which I shall not enlarge at any length. Nowadays some allowances are made for assisting the maintenance of persons afflicted, as this unfortunate woman is; and it may be a matter of some importance to know whether she has or has not a legal right to maintenance under the terms of the will. In any case, I think that I should make it perfectly clear that I cannot in this case do anything save hold the condition void. I am not quite certain how the condition could be defeated. It is, I suppose, admitted that, even if it were valid, Irene's legal rights would become indefeasible if she chose to grant a lease of the property to her husband. There, again, however, I cannot believe that the testator contemplated that Irene, the eldest daughter, would not be able to handle any of his money or treat as her own one stick of his furniture, but would have to live in constant anticipation of some elaborate inquiry being instituted whether or not she was complying with the legal condition.

In my view, in the absence of an express gift over, the proper way of construing these words is to regard them as precatory, merely a guide to what the testator's aim and object was in choosing this one daughter as the recipient of his bounty, although the words themselves, I agree, are not expressed in the form of a request but are drafted as a condition. For the reasons which I have tried to explain, I think that they must be construed not as a condition, although in form that would appear to be their result.

I shall accordingly declare that the condition is void for uncertainty, and that Irene takes the whole of the estate beneficially.

Declarations accordingly.

Solicitors: *Barlow, Lyde & Gilbert for H. Stanley Tee, Bishop's Stortford, Herts; Official Solicitor.*

K. R. A. H.

[22] [1904] 2 Ch. 777.

[QUEEN'S BENCH DIVISION.]

*MINSTER TRUST LD. *v.* TRAPS TRACTORS LD. AND OTHERS.

[1953 M. No. 1528.]

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Feb. 22, 23, 24, 25, 26; *Mar.* 1, 2, 3, 4, 5, 8, 9, 10, 11, 12; *May* 19.

Devlin J.

Certificate — Sale of goods — Engineer — Secondhand machines to be supplied with "Hunt Engineering Certificate that they have been "fully reconditioned to their satisfaction"—Inspection by Hunt Engineering Company on seller's instructions—Hunt reports to seller tendered as certificates—Breach of contract—Certificates in rem—Certificates in personam—Position of certifier—Whether duty not to influence certifier — Implied standard of quality — Meaning of "fully reconditioned."

A seller had let out earth-moving plant and machinery on hire to contractors by a contract which provided that "on the completion of the hire each machine will be . . . reconditioned by "you" [the contractors] " . . . under the supervision and to the "satisfaction of the Hunt Engineering Company and the hire will "cease on . . . the issuance of their certificate that the machines "have been satisfactorily overhauled on a fully reconditioned "basis." The Hunt Engineering Company, whom the seller instructed to act on his behalf under that contract, was a company which inspected and reported on machinery and whose "certificate" was universally recognized as the mark of a good machine. While the work of reconditioning was being carried out under the supervision of Hunts and before their final reports had been made the seller sold the machinery by a contract of sale which provided that "All these machines are to be supplied with the Hunt Engineering "Certificate that they have been fully reconditioned to their satisfaction." Both parties thought that Hunts had an "A" standard which was the equivalent of 85 per cent. new, but in fact their notion of 85 per cent. was incorrect and Hunt's standard, though high, varied for different parts of the machine and was subject to instructions received from their client, and the company did not regard themselves as certifying but as reporting to their customer for whom alone their report was intended. The final reports on each machine forwarded by Hunts to the seller, and tendered by the seller to the buyers as certificates under the contract of sale, were headed "Inspection report" and stated, inter alia, that the unit "was accepted as reconditioned to the "required standards." The reconditioning of the machines was subsequently found to be unsatisfactory and the buyers claimed damages against the seller for breach of contract:—

Held, (1) that on the construction of the contract of sale the parties contemplated that the certificate to be issued by Hunts would be a certificate in rem, that was, a certificate certifying a standard of quality extraneous to the contract, either the certifier's own standard or one taken from some public or independent source, as opposed to a certificate in personam dealing only with a particular contract and addressed only to particular parties and which, although it might be a certificate of quality, did not carry the same meaning to all the world but might have to be interpreted in the light of particular contractual requirements or of information known only to the addressees; that there were, accordingly, implied provisions in the contract (a) that the

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machinery would be fully reconditioned up to Hunt standards; (b) that a valid certificate by Hunts in the terms prescribed was conclusive that the machinery had been fully reconditioned up to that standard; and (c) an undertaking by the seller to supply such a certificate.

(2) That since Hunts did not certify in rem for the benefit of all who might be concerned but in personam for the benefit of a particular contract (in this case the contract of hire) and a particular customer who knew what his contract was, the words "accepted as reconditioned to the required standards" in the documents put forward as certificates must, on the construction of the documents, be interpreted as "the standards you" [the seller] "required us to adopt"; that a certificate to satisfy the contract of sale must contain a binding decision upon the quality of the machines and be unambiguous and readily understandable and in the terms of the contract; and that it followed, therefore, that the "inspection reports" were not a compliance with the contract of sale and were not conclusive as to the standard of reconditioning, and the seller, accordingly, was in breach of contract.

Held, further, that as the parties had contracted in relation to a standard of quality set up by Hunts that was the standard to be applied by the court in assessing damages.

Equitable Trust Co. of New York v. *Dawson Partners* (1927) 27 Ll.L.Rep. 49 applied.

Observations on the implication from a contract of a duty not to influence a certifier.

ACTION.

The first defendants, Traps Tractors Ld., owned earth-moving machinery, tractors and plant, which it let out on hire to contractors. The second defendants, Plant Sales and Exchange Ld., bought and sold such plant. In April, 1952, the third defendant, one Francis Gaster, who owned substantially all the shares in and was the only active director of both companies, put the first defendants into voluntary liquidation, intending to sell all the company's plant. On June 4, 1952, the plant in question, six D.8 caterpillar tractors advertised as new 1950 complete with P.C.U. and Le Tourneau scrapers, and four T.D.14 tractors, also with Le Tourneau scrapers, was advertised for sale in "The Contract Journal." The advertisement was put in by the second defendants who owned a 43 R.B. [Ruston Bucyrus] excavator (not relevant to this report) which was also advertised for sale. The advertisement stated that all the plant was "in the finest "condition" and the tractors were advertised as being sold with "Hunt A certificate."

In February, 1950, Gaster had entrusted the management of the six D.8 tractors to Joe Beaton Ld. of Hatfield, and in March, 1951, he contracted with Richard Costain Ld. for the hire of all six for a minimum period of 54 weeks. The contract required Costains to maintain the machines in first-class condition, and further provided: "On the completion of the hire "each machine will be overhauled and reconditioned by you "[Costains] at your cost under the supervision and to the "satisfaction of the Hunt Engineering Company and the hire will

" cease on the date of the issuance of their certificate that the " machines have been satisfactorily overhauled on a fully " reconditioned basis." The contract also provided that if, during the hire, for the convenience of the operators, fractures or breakages had been welded before delivery, the welded parts would be replaced with new parts, or with secondhand parts if such were acceptable to Hunts; that, in relation to new parts generally, only standard parts would be fitted if they were available, but if not available, British made parts could be substituted if acceptable to Hunts, and that the tyres fitted to the scrapers should, on redelivery be " passed by the Hunt Engineering Company as not " less than 90 per cent. new and free from gashes, which would " lessen this percentage."

The Hunt Engineering Co., referred to in the contract, was the Robert W. Hunt Co., an American corporation carrying on business as consulting engineers, with its head office in Chicago. It had a branch office in London under the management of one Lockwood with a staff of about a dozen inspectors. Its main business was the inspection and certification of new machinery, which it did in all parts of the world, and its certificates were said to be universally recognized as the hallmark of a good machine. In 1952 part of its business was the inspection of and making reports on secondhand machinery. The "Hunt " 'A' certificate" mentioned in the advertisement of June 4 referred to the Robert W. Hunt Co. Gaster had had many dealings previously with Hunts. He had consulted Lockwood about the wording of the clause in the Costain contract and his formal instructions to them to act on his behalf under the contract were given on April 13, 1951.

The Costain contract came to an end in March, 1952, and Costains then began the work of fully reconditioning the tractors under the supervision of Hunts. Towards the end of 1951 the four T.D.14 tractors were sent to Joe Beaton Ld. for reconditioning, and on February 18, 1952, Gaster wrote to Lockwood in relation to these tractors: " We should like them to be recon- " ditioned to your standard so that your fully reconditioned " certificate can be issued on completion of the work." Hunts issued two reports in respect of the T.D.14 tractors, one dated April 21, and the other April 28, 1952. The report on one tractor stated " the completed unit is accepted as reconditioned to the " required standard " and the report on the other described it as " fully overhauled and reconditioned."

In March, 1952, Lockwood wrote to Gaster: " In order to " conserve spare parts it is proposed by the contractor to build " these parts up and re-machine to the caterpillar standard." [Welding.] " The resultant repair will, in our opinion, be satis- " factory and acceptable to us." Gaster at first instructed Hunts that the contract must be rigidly adhered to and that replacement by new parts must be undertaken; but after it had been pointed out to him that the special provision in the contract related only

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to fractures and breakages and not to worn parts he withdrew his instructions, informing Lockwood that his contract did not "prohibit the building up of worn parts by welding to your satis-"faction. . . ."

At the end of April Gaster received from Hunts several reports concerning two of the D.8 tractors with their accompanying scrapers. The reports were based on "final inspection," and stated that the machinery had been "reconditioned to the "required standards and to our satisfaction," but they also stated that it had not been repainted and did not state that the tyres were 90 per cent. Gaster spoke to Lockwood about these points and Lockwood said they had not yet issued final reports, and they would see that the machines were painted and the scraper tyres made 90 per cent. Further progress reports were made during May, but nothing final.

On June 9, 1952, the plaintiffs, who were investment brokers with experience in the commercial handling of earth-moving machinery, and who had seen the advertisement in "The Contract "Journal," arranged a meeting with Gaster. They met him again on June 11 when a deal was made for the sale to them of two D.14 tractors with scrapers and equipment for £4,000 each, and three D.8 tractors with their scrapers and other equipment for £12,000 each.

Both parties agreed that Hunts had an "A" standard which was the equivalent of 85 per cent. new, or virtually new, and on June 12 a letter confirming the sales was written by the liquidator of the first defendants, in which the machines were said to be sold "as and where lying," and which expressly stated: "All "these machines are to be supplied with the Hunt Engineering "certificate that they have been fully reconditioned to their satisfaction." In the final paragraph of the letter, the liquidator stated that the final certificates had not yet been received from Hunts. He enclosed such reports as Gaster then had and said: "The balance of the reports have been promised shortly and you "may take this as my assurance that you will receive them within "the next week or so."

On the following day, June 13, and also on June 19 and 23, Gaster received further reports relating to the three D.8 tractors and scrapers which had been sold on June 12, and also to one other D.8 tractor. The reports described them as "used "reconditioned," specified, as Gaster had required, that painting had been carried out, and stated in conclusion that the tractor "is considered to be satisfactorily reconditioned for normal "service with the usual care and maintenance required by this "class of equipment." The scrapers were described as being "reconditioned under our inspector's supervision." It was noted that they had been painted, it was stated that tyres had been removed and examined for interior defects and refitted, and the conclusion in each case was as follows: "The scope of the

"inspection made, limited owing to it not having been possible "to give any load working trials, has proved to our satisfaction "that this Le Tourneau scraper unit has been reconditioned to a "satisfactory standard and it is accepted as a unit suitable for "immediate service."

Shortly after the sale Gaster asked Lockwood to send up their inspector so that he could have the final certificates. He was told that an inspector was not available and that the only thing that he was needed for was the tyres. Gaster was aware that no tyres had been removed for inspection, and as a result of conversations Hunt's inspector noted in his report on June 19: "The contractors are taking responsibility for inside of tyres to "be examined by them . . . the tyres are considered acceptable "for a good period of life but are not 90 per cent. new. . . ." In fact, the true condition of a tyre, whether 90 per cent. or 70 per cent. (Hunt's standard) cannot properly be ascertained without internal examination.

On about June 23 Gaster received word that the blade of one of the scrapers attached to a D.8 tractor sold on June 12 required a new cutting edge, and he wrote to Lockwood on June 24 asking that particular attention be paid to all blades and cutting edges. By the following day he had read through the reports on the scrapers and he wrote to Lockwood as follows: "I "notice that there is an apparent discrepancy in the description "of the condition as compared with some of your other reports. "I think I have mentioned this before, but as you know, the "arrangements were that these tractors and scrapers were to be "'. . . reconditioned under the supervision and to the satisfaction "'of the Hunt Engineering Company to enable them to issue "'their certificate that the machines have been satisfactorily "'overhauled on a fully reconditioned basis' and I do feel that "all your certificates should bear that phraseology, and not that "they have been reconditioned to a satisfactory standard, as "that may cover anything."

Later in the day, he receive some more details about the new cutting edge which gave him a very severe shock. He wrote again on June 25: "You will remember that the whole basis of "the reconditioning of these machines was that they would be "'. . . reconditioned under the supervision and to the satisfaction "'of the Hunt Engineering Company to enable them to issue "'their certificate that the machines have been satisfactorily "'overhauled on a fully reconditioned basis,' and I mentioned "when I saw you last that I was a little afraid that the super-"vision of the scrapers was not being undertaken on this basis, "as the reports on these valuable pieces of equipment which cost "nearly £4,000 each today showed what appeared to be the result "of only a cursory examination. This means that the machines "would be handed back to us with your certificate with Costains "free from any further liability, but with the machines not

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"overhauled on a fully reconditioned basis and we would then, "most probably, have to bear the cost of the further repairs "required. Two or three days ago—on June 23—your report was "issued that this scraper has been reconditioned to a satisfactory "standard and was acceptable for immediate service. Already "this morning I have written you a note drawing your attention "to what I consider to be the inadequacy of this standard of "certificate, as it did not include the wording '. . . satisfactorily "'overhauled, on a fully reconditioned basis,' and I have now "ascertained that this machine was booked, with a tractor, for "hire with Wimpeys, but when their inspector went up a day or "so ago, he immediately pointed out that it required a new "cutting edge. . . .

"The result of this is that the machines cannot go out on "hire, which involves considerable loss, but worst of all that this "very obvious defect has been passed by your inspector even "after we have asked you to be specially careful to see that "nothing was missed in the reconditioning. I have asked "Costains to proceed with the necessary work which they are "doing, but I do feel that some explanation is necessary, "especially as there are still three more scrapers and three more "tractors to pass. If I may, I would again emphasize that every "final certificate of yours bears the stipulated wording '. . . satis-"'factorily overhauled on a fully reconditioned basis,' and if you "are unable for any reason to give this certificate, then the "supervision cannot have been carried out adequately as was "agreed by you when accepting our instructions."

On June 26 Lockwood replied about the cutting edge, suggesting the possibility of an error in the number of the scraper. On the same day he replied also to Gaster's longer letter of complaint. He wrote: "Your remarks have been carefully noted "and we feel it incumbent to point out that the reports on these "particular units had perforce to be moderated from a fully "reconditioned basis owing to the agreement with your good selves "that the contractor was to be given full permission to remove, "examine and refit all tyres without our inspector being given "the opportunity of examining them internally. This point was "expressly emphasized in our progress report No. 25185 of "June 19 in relation to these three units. In view of this we so "framed our final reports on these units so as to omit covering "the inspection of any parts not actually examined by our "inspector and for which we, of course, can accept no respon-"sibility. We trust that this explanation makes clear to you "the reason for the variation in phraseology mentioned in your "letter."

On June 27, 1952, Gaster offered the three remaining D.8 tractors and scrapers to the plaintiffs at the price of £10,000 each. At a meeting with the chairman of the plaintiff company the plaintiffs finally bought the three tractors for £8,000 each, on the same terms as the sale of June 12, the sale being confirmed by

letter on June 30; but nothing was said by Gaster about the difficulties which had arisen over the wording of the Hunt certificates. Only one of the tractors sold on June 27 had by then been reported upon by Hunts, and Gaster had not as yet supplied under either of the contracts any documents which he tendered as certificates. On July 4, he wrote to Lockwood: "I have been reading through many of the reports which have "been sent, and to put it frankly I am a little perturbed . . ." and he asked for an interview. A meeting took place on July 8 when Gaster said that he wanted the wording "fully recon-"ditioned" to be on the certificates, as that was the wording in the Costain contract. Lockwood, seeing no material difference between that term and any other term used in the reports such as "reconditioned to a satisfactory standard" offered no objection to the words "fully reconditioned" and on July 10, he wrote to Gaster enclosing twelve reports, "duly revised," a separate one for each D.8 tractor and scraper. They were all clearly described as "revised" and as "inspection reports," not as certificates, and all in the form of the one set out below.

"ROBERT W. HUNT COMPANY, Engineers.

London, June 19, 1952.

"L.O. 41882.

INSPECTION REPORT No. R. 25186 (REVISED).

"Clients.	Messrs. Traps Tractors Ld., 93 Lancaster Gate, London, W.2.
"Place of "Inspection.	Widdrington, Northumberland.
"Date of "Final "Inspection.	June 15, 1952.
"Equipment "Inspected.	One—Used and fully reconditioned caterpillar tractor, model 2 U. No. 7965, complete with Le Tourneau winch No. P.34966 R.6.F.US.7 and hydraulically operated angledozer equipment.
"Tests.	The above tractor and equipment have been subjected to operational tests carried out under 'No Load' conditions and the engine, gears, transmissions, brakes, clutches and hydraulic gear found to operate satisfactorily for normal use.
"Inspection.	Supervision of the reconditioning of the caterpillar tractor and equipment has been carried out to ensure the adequacy of the work and that the workmanship is to the required standard.

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After completion of the operational tests a thorough and careful visual examination was made of the whole unit and power control together with the angledozer equipment to verify the general condition of the unit which was found to be satisfactory for service under normal conditions.

" Conclusions. The inspections made during the course of the reconditioning of the caterpillar tractor No. 7965 and the trials run after reconditioning have proved that this unit has been overhauled in a workmanlike and satisfactory manner and the completed unit is accepted as reconditioned to the required standards.

" Remarks. In view of the fact that this is a second-hand vehicle the obligation assumed by us in furnishing inspection reports on this class of material extends only to the client for whom the report is made, which report represents our opinion on the day of inspection only, based entirely upon the reports of our inspectors, all of whom we endeavour to select with due care. We believe their reports are accurate, but the conclusions reached by them are matters of opinion, the accuracy of which we do not guarantee, and we shall not be responsible for damage or loss of any kind which may be connected in any way with our inspection or reports.

" DB:OMC.

Respectfully submitted,
ROBERT W. HUNT COMPANY
(Sgn.) Lockwood."

The six reports for the scrapers were done in the same way as for the tractors, each scraper being described as used and fully reconditioned. Each of the six contained only one operative paragraph headed " Inspection," which was in these terms: " The Le " Tourneau scraper, subject of this report, has been reconditioned " under our inspector's supervision to ensure that the work " carried out was adequate and the workmanship is to the required " standard. All working parts have been examined and accepted " as being in good condition for further service. New pulley pins " and link pins have been fitted where necessary. The hopper " plates have been reconditioned and are free from buckling and " dents. New rubbing plates as required have been welded " into position. The main frames are sound. Tyres have been " removed and examined by the contractor for interior defects, " and refitted. The whole unit has been painted in the standard " yellow colour. The inspections made during the course of the " reconditioning of the Le Tourneau scraper No. s.28788-LP-F-SP " proved that this unit has been reconditioned in a workmanlike

"and satisfactory manner, and the completed unit is accepted as "reconditioned to the required standards."

The liquidator forwarded those reports to the plaintiffs on July 16, 1952, and those reports with the exception of the April reports on two tractors sent to them following the first sale, were all that the plaintiffs saw in relation to the D.8 tractors.

Some of the D.8 units were sent out to work by the plaintiffs; tyres had to be replaced and the operators were dissatisfied with the condition of the machines. In the result, Gaster suggested that the machines be examined by an independent engineer. The examination was duly carried out and the engineer reported that the standard of reconditioning was not such as they would expect if the machines had been fully reconditioned to 85 per cent. of new.

The plaintiffs claimed damages against all three defendants for breach of contract and/or warranty and/or duty in and about the sales to them of the machinery, alleging, inter alia, breach of oral warranties as to quality given by Gaster personally and on behalf of the first defendants. They contended that there had been a breach of a term, or of an implied term, of the contracts, in that none of the tractors had Hunt "A" certificates, nor, alternatively, had they been fully reconditioned to the satisfaction of Hunts. They further contended that the first defendants, acting by Gaster, had influenced or affected Hunts in relation to the standard of reconditioning required, and in relation to the wording of their certificates.

The first defendants denied liability. They contended that they had fully performed the terms of the contracts by supplying Hunt certificates and/or reports such as were intended between the parties.

The plaintiffs' action against the second defendants related solely to the R.B.43 excavator and is not material to this report.

Sir Hartley Shawcross Q.C., *Eustace Roskill Q.C.*, *Michael Kerr* and *R. A. MacCrindle* for the plaintiffs.

Kenneth Diplock Q.C., *C. G. Armstrong Cowan* and *Gordon Hodgson* for the defendants.

The following cases not cited in the judgment were referred to in argument on the issues relevant to this report: *Lord Forres* v. *Scottish Flax Co. Ld.*[1]; *Johnston* v. *Chestergate Hat Manufacturing Co. Ld.*,[2] and *Dean* v. *Prince*.[3]

Cur. adv. vult.

May 19. DEVLIN J. read the following judgment in which he referred to the facts, found that no oral warranties were given by the defendants in respect of any of the machinery, held that

[1] [1943] 2 All E.R. 366.
[2] [1915] 2 Ch. 338.
[3] [1953] Ch. 590; [1953] 3 W.L.R. 271; [1953] 2 All E.R. 636.

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Gaster did not enter into any personal liability in respect of any of the contracts and that the action against him personally failed, and continued: The action against the first defendants, Traps Tractors Ld., depends upon the allegations relating to the Hunt certificates.

Before considering these certificates, I shall seek to determine what is meant by "fully reconditioned." The term is said by the plaintiffs to have a meaning that is well understood in the trade, as distinct from "reconditioned" simpliciter, which some witnesses thought was meaningless. I do not think there is strong enough evidence to establish for "fully reconditioned" a trade meaning in the strict sense; but also I do not think that its meaning as understood in the trade is really any different from its natural and popular meaning. "Recondition" is not a word to be found in the dictionary, but it obviously means "to put "back into condition"; not, of course, into brand-new condition, but to renew the machine in the sense of giving it a new lease of life. It means more than overhauling or repairing. In any machine there are some parts which are intended to last as long as the machine itself lasts, and the other parts which have a shorter life and need to be renewed from time to time. Reconditioning requires, I think, that the machine should be thoroughly examined—usually that means "stripping down"—to see what renewable parts are worn, and all such parts which are substantially worn should be renewed. To insist that every slightly used part should be scrapped would be absurd. But any part that is left must, I think, have most of its life still in front of it, so that the machine, as a whole, is given, as I say, a new lease of life. When the parties talked of the plant, as they did in this case, as being made 85 per cent. new, their idea was, I think, that it would be as good as if only 15 per cent. of its working life had gone. Inevitably, the decision whether a worn part should be retained or renewed must vary according to the standard exacted by the person responsible, some standards being stricter than others. Hunts had a reputation in the trade for exacting a high standard.

I do not think that "fully" adds much to "reconditioned," but it does add something. The reason why "reconditioned" by itself is distrusted in the trade is, I think, because the word has been seized upon by people who smarten up a machine with a new coat of paint and sell it as reconditioned. "Fully" is thought necessary to exclude that practice. In truth, I think that if a machine was sold as "reconditioned" without qualification, it would not be enough to prove that part of it was reconditioned. But I can see that qualifications might be implied. If, for example, a car was sold as "reconditioned," it might be suggested that the term was intended to apply only to the engine, or something of that sort. The advantage of "fully" is that it expresssly excludes qualifications of this sort. I am satisfied,

therefore, that there is a difference which is thought in the trade to be important, and that a certificate of reconditioning simpliciter is not accepable in a contract which calls for full reconditioning.

I can now consider the effect of the certificate clause and the points that are taken on it. It is undisputed that if each of these machines is covered by a valid certificate testifying to Hunts' satisfaction that it is fully reconditioned, the plaintiffs' case must fail, inquiry into the real condition of the machine being then irrelevant. The plaintiffs contend that the inspection reports tendered by the defendants are not certificates within the meaning of the contract, and that, if they are, they are invalid because Lockwood (Hunts' London manager) was improperly influenced by Gaster. The defendants deny any improper influence, and say that in any event nothing short of fraud (which is, of course, not alleged) will invalidate the certificates.

It is convenient to consider first the issue raised by the last contention, for I think that that consideration opens the way to the true interpretation of the certificate clause. There is no general rule of law prohibiting the influencing of certifiers. Apart from fraud, a duty not to influence can only be imposed by an implication arising from contract. Such an implication must, in accordance with settled principles, be both reasonable and necessary, and the contract must be examined to see what it yields in this respect. There is, after all, nothing to prevent a party from requiring that work shall be done to his own satisfaction. He might then choose to act upon the recommendation of an agent. If an agent is named in the contract, it may be plain that he is to function only as the alter ego of his master, and then his master can tell him what to do: see *Ranger* v. *Great Western Railway Co.*[1] *per* Cranworth L.C.,[2] and Lord Brougham.[3] Whether it be the act of the master or the servant, there may be a question (again depending upon the implication to be drawn from the contract) whether the dissatisfaction must be reasonable, or whether it can be capricious or unreasonable so long as it is conceived in good faith. A number of cases on this point are cited in Benjamin on Sale, 8th ed., p. 582. The tendency in modern cases seems to be to require the dissatisfaction to be reasonable.

What has to be ascertined in each case is whether the agent is or is not intended to function independently of the principal. The mere use of the word "certificate" is not decisive. Satisfaction does not necessarily alter its character because it is expressed in the form of a certificate. The main test appears to be whether the certificate is intended to embody a decision that is final and binding on the parties. If it is, then it is in effect an award, and it has the attributes of its arbitral character. It cannot be attacked on the ground that it is unreasonable, as the

[1] (1854) 5 H.L.Cas. 72.
[2] Ibid. 89.
[3] Ibid. 115.

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opinion of a party or the certificate of one who is merely an agent probably can. On the other hand, it must be made independently, for independence is the essence of the arbitral function. If two parties agree to appoint an arbitrator between them, it would be, I think, implied in the contract in order to give it business efficacy (it is not now in practice necessary to consider the point because of the control over the arbitrator which the Arbitration Acts give to the court) that neither side would seek to interfere with his independence. If a party to a contract is permitted to appoint his agent to act as arbitrator in respect of certain matters under the contract, a similar term must be implied; but it is modified by the fact that a man who has to act as arbitrator in respect of some matters, and as servant or agent in respect of others, cannot remain as detached as a pure arbitrator should be.

There is another distinction between certifiers. If work under a contract has to be completed to the satisfaction of a certifier, it may mean that his duty is merely to see that the requirements of the contract are met, or it may mean that he is entitled to impose a standard of his own. It may be that his standard is that to which the parties submit and that it constitutes the only provision in the contract about quality; or it may be that his standard is an added protection, so that performance under the contract must satisfy both the contract requirements and the certifier. Examples of the latter are to be found in *Newton Abbot Development Ld.* v. *Stockman Bros.*[4] and *Petrofina S. A. of Brussels* v. *Compania Italiana Transporto Olii Minerali of Genoa.*[5] So far as I am aware, there is no case in which a certifier who has to certify only according to his own standards has been held to be an arbitrator. It is not, however, possible under this head to draw a hard and fast line between the two categories. There must always be some room for the discretion of the certifier, however tightly the contract may be drawn. Even if he has to certify only whether an express term has been complied with, there must be room for the exercise of his judgment. *Cammell Laird & Co. Ld.* v. *Manganese Bronze and Brass Co. Ld.*[6] is a case in which it was held that the satisfaction of a third party operated only within the requirements of the contract; that is to say, it was not permissible for the third party to put upon the seller obligations as to quality outside the contract. Lord Wright said[7]: "It is true that the clause cannot be intended to deal with "matters outside the scope of the respondents' obligations under "the contract, or to enlarge these obligations except in so far as "these are enlarged because there is super-added the judgment "of a third party."

Allied to this, there is a distinction between a certificate that is given only for the purposes of a particular contract and one

[4] (1931) 47 T.L.R. 616.

[5] (1937) 53 T.L.R. 650; 42 Com. Cas. 286.

[6] [1934] A.C. 402; 50 T.L.R. 350.

[7] [1934] A.C. 433.

that, although it may be called for by a particular contract, is not particularly related to that contract. The certifier may not then be an agent of either party. That is so in the case of a Lloyd's certificate or of a certificate by a public analyst, or others that may be obtainable on a fee. It has now become quite common to include among documents which have to be tendered against payment a certificate of inspection or of quality. Certificates of this sort are addressed to all the world or to all who may be concerned. If the phrase is not used as more than a label, they might be called certificates in rem, as compared with certificates in personam, which concern only particular contracts and are addresssed only to particular parties. The former carry the same meaning to all who read them. The latter may have to be interpreted in the light of particular contractual requirements or of information known only to the addressees. A certificate in rem certifies a standard of quality extraneous to the contract. It may be the certifier's own standard or it may be taken from some public or independent source. A certificate in personam may be based on the certifier's own standards or on standards prescribed by the contract. It may be a certificate of quality or a certificate that a contract has been carried out.

Finally, there is a distinction between a certifier whose function has been completed before the contract is entered into and one who has a function to perform under the contract. In the latter case there is room for an implied undertaking that he will not be improperly influenced. In the former case there can be no room for an undertaking that relates to the future. If anything is to be implied, it must be a warranty about the past. There may be grounds for implying a warranty that the certifier has not been improperly influenced, but, so far as I know, the point has never been decided. All the leading cases on the topic, such as *Hickman & Co.* v. *Roberts* [8] and *Compania Panamena Europa Navegacion* v. *Leyland (Frederick) & Co. Ld.*,[9] concern certifiers whose duties arose out of the contract. It seems clear that there cannot be the same necessity for implying a warranty in respect of the past as there is for implying an undertaking for the future. If a building owner makes the obligation of payment conditional on his architect's certificate of quality, he must not, for example, instruct his architect not to be content with less than three coats of paint, for he has impliedly undertaken that he will leave his architect free to judge independently, either by reference to the contract requirements or to his own standards of quality, whichever the case may be, how many coats of paint are required. But if he sells a completed house and agrees to supply with it his architect's certificate of quality, does he thereby warrant that he has not told his architect to be content with two coats of paint? It may be argued that there is no necessity for an implied warranty of that sort, and that the buyer is

[8] [1913] A.C. 229. [9] [1947] A.C. 428.

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sufficiently protected by the fact that the seller would, in his own interests, have been concerned to get the best quality he could.

These are the sort of points that have to be answered, and the answers depend upon the construction of the clause, which is common to all the contracts: "All these machines are to be "supplied with the Hunt Engineering certificate that they have "been fully reconditioned to their satisfaction." In form, the clause does no more than require a certain document to be supplied. Apart from what is inherent in it, there is not in the contract any express term about quality. It is, of course, to be assumed that the seller will not be able to obtain Hunts' engineering certificate unless the goods are in fact of a certain quality, but the contract does not directly provide that they should be so. It is, however, manifest that such a provision is implicit. The defendants do not argue that, if the certificate is invalidated, the contract is one for machinery "as and where "lying" with no terms about quality in it. Both sides are agreed that the contract is for machinery of a quality that is described as fully reconditioned. They differ in this detail, that the plaintiffs argue that, in the absence of a certificate, it is for the court to fix, in the light of the evidence, what is a reasonable standard of fully reconditioned quality, while the defendants contend that it is fixed by the contract itself as the Hunt standard. For reasons which it is more convenient to give later, I prefer the defendants' contention. The plaintiffs do not argue that the clause is severable into two independent parts, the first being a term as to quality, and the second a term that Hunts are to be satisfied, so that the seller must comply with both. I think that is right; that is to say, the clause must be construed as a whole, and it was not intended that quality could be questioned if a valid certificate was supplied; the certificate is not merely an "added "protection." The result is that, if the defendants supply a certificate in accordance with the contract, it is conclusive that the goods are of the contract quality. If they do not, that question is left open for determination in the ordinary way. On the other hand, the defendants do not (and I think could not) argue that they have an option either to supply a certificate or to tender goods that are in fact of the contract quality. They have undertaken to supply a certificate, and the consequences of their failure to do so will not be merely that the question of contract quality is left open, but also that they have broken a term of the contract which might, of itself, and irrespective of actual quality, sound in substantial damages, for uncertified goods are not as saleable as certified goods, even if both are of the same quality. I say "might" sound in substantial damages, but in fact it is not alleged in this case that the mere lack of a certificate has resulted in anything more than nominal damages. The claim for substantial damages is based on the defective quality of the machinery.

I conclude, therefore, that there is expressed or implied in the clause three provisions as follows: (1) as to quality, the machinery is to be fully reconditioned up to the Hunt standard; (2) a valid certificate by Hunts in the terms prescribed is conclusive that the machinery has in fact been fully reconditioned up to this standard; (3) an undertaking by the seller to supply such a certificate.

It may be objected that there is nothing in the written part of the contract, at any rate, about the Hunt standard, and that the first of the three provisions that I have set out above introduces an unwarranted interpolation. I do not think so. I think it can be justified even on the written term, if it is construed in the light of the surrounding circumstances. Under that term, Hunts have to express their satisfaction. They cannot do so without applying either a standard of their own or some other standard. In other words, the distinction is between the certificate of standard quality and the certificate of contract requirements. I think it is quite plain from the evidence by the parties of what was understood in the trade and discussed between them that the former was intended. It was commonly understood in the trade that Hunts had a standard of full reconditioning. If the parties, when they contracted, had been asked: "What is it that "Hunts have got to be satisfied about? Have they got to be satis-"fied that the machinery has been fully reconditioned according "to their own standards, or that it has been fully reconditioned "according to the requirements of a contract made by Gaster, "or that it has been fully reconditioned according to Hunts' own "standards as modified in agreement with Gaster?" the parties would all have agreed that Hunts were intended to certify in relation to their own standards. The other two alternatives would render the certificates valueless, unless one knew what Gaster's requirements were, or what modifications to Hunts' standard had been agreed. No doubt the plaintiffs were aware, if they thought about it, that the work of reconditioning had been done under a contract. But they were not concerned to know, and were not told, who had done the work of reconditioning. Nor were they concerned with the relationship between Hunts and Gaster. It was obvious that Hunts must have supervised the work of reconditioning, but whether they had done so as agents of Gaster or of the reconditioners was irrelevant to the contract between the plaintiffs and the defendants. All that Gaster had to do was to supply a Hunt certificate. If his contract with the reconditioners had been that they were to supply him with a Hunt certificate, he could have fulfilled his contract of sale by passing the certificate on.

This was not, therefore, a case in which Hunts were being put forward as the agents of the seller and being endowed by common consent with certain arbitral functions to perform under the contract of sale. They were certifiers, and nothing else. So

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far as the contract of sale is concerned, there is no need to suppose that they were the agents of Gaster. All he had undertaken to do under the contract was to procure and deliver their certificates. In short, the type of certificate the parties were contracting about is what I have called a certificate in rem. This was not disputed in argument, so I shall merely summarize the evidence that illustrates the point.

The plant was advertised by Gaster as being sold with Hunt A certificate, it being thought by Gaster, and some others, that Hunts had an "A" standard; Ferguson [chairman of the plaintiff company] thought something similar to A.1 at Lloyds. This standard, the parties agreed, was the equivalent of 85 per cent. new or virtually new. The evidence on this point was common ground, and, so far as the plaintiffs were concerned, most of it was obtained from them in cross-examination in order that the defendants might establish (as, in my judgment, they did) that the plaintiffs were really relying throughout upon the Hunt certificate. Thus, Ferguson said that it was a common thing to buy plant on Hunt certificates, and, for example, that people hiring plant often rang up and said: "Has it got an A "certificate?" Hill [a director of the plaintiff company] said that he knew of the Hunt standard as being a hallmark, that everyone in the trade knew of it, and anyone buying or selling equipment would attach great importance as to whether or not it had a Hunt certificate showing that it was up to the Hunt standard. Garrett accepted the term "hallmark," said that the certificates were well known in the trade, and that no one would hesitate to buy on a Hunt certificate. Billingham [an official of the plaintiff company] said that it was a well-known standard, and that the greatest reliance had been placed upon it in the trade of buying and selling. Gaster also said that Hunts' standard was well known in the trade. When, in cross-examination, he was asked whether he knew the distinction between reconditioned and fully reconditioned, he answered: "I only know all my life, "that is Hunts' certificate, that is Hunts' standard." Asked again about the Hunt certificate, he said: "It is done to their "own standards in their own way. They do not have a variety of "standards." Davis said that the Hunt standard or the Hunt certificate was well known in the trade and highly thought of.

All this evidence seems to me to make it abundantly plain that what these parties were contracting about, and what the contract called for, was a certificate of quality supplied by persons who were thought by the trade to fulfil the same sort of function as the Classification Societies fulfil in shipbuilding and surveying. The root of the trouble in the present case is that Hunts do not in fact fulfil any such function. Their main function, as I have said, is to issue certificates recording their examination of new plant. A specimen form of certificate in use for this purpose was put in. This does not certify any quality, but only that the material "has been accepted under the instructions provided."

It is clear that Hunts' reputation must be based upon the fact that they receive or accept instructions to inspect only high quality material, coupled with the fact that no doubt they usually exercise a high degree of care in carrying out their inspections. Except upon this assumption, the certificate is worthless to anyone who does not know what are "the instructions provided." It is, therefore, plain that, even in relation to new material, Hunts do not certify "in rem" for the benefit of all who may be concerned. They certify "in personam" in relation to a particular contract, and for the benefit of a particular customer who knows what his contract is.

In respect of second-hand material, they not only refuse to act, except for a particular customer, but they do not certify at all. In these circumstances, I cannot refrain from observing that it is unfortunate that they have done nothing to stop the impression getting about in the trade in this country in second-hand plant that there *is* a Hunt certificate; and, indeed, that they have regularly accepted, as in this case, instructions to issue certificates. The expression "Hunt A certificate," Mr. Lockwood blandly observed at the beginning of his evidence, "is quite "unknown to us, except by hearsay: we have heard it; but, of "course, we disregard it." He said that Hunts did not issue certificates, but reports. When he was taxed with the fact that, in respect of the T.D.14s, he had accepted instructions to issue a fully reconditioned certificate, he said: "It is a word that has "been very, very loosely used."

If Lockwood's denials involved only a question of terminology, it would not matter. But it is plain that they go much deeper than that. It would be going too far to say that there is no such thing as a Hunt standard. In one sense, there is. Hunts do not usually undertake any work of inspection unless the machinery is stripped down. That must mean that they do not usually concern themselves with anything except full reconditioning. In deciding what parts are sufficiently worn to require replacement, Hunts have a set of standard rules which they apply to different parts of the machine and which are common to all their inspectors. The notion of 85 per cent., which the parties to this contract thought was their standard, is in fact incorrect, and, as Lockwood said, meaningless. You cannot have a universal standard for all parts. There have to be different standards for different parts. Thus, as I have already mentioned, Hunts take a standard of 70 per cent. for tyres. Another example given by Lockwood is that they allow a crankshaft up to two regrinds. These are examples of individual parts where there are fixed requirements. In other cases, the inspector must often have to fix his own requirements according to his experience, which is, of course, in the Hunt organization, a pooled experience. This body of requirements constitutes what may be called a Hunt standard. No doubt it is a high one, and Hunts have acquired a reputation for care in seeing that it is complied with. But, if it

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were really a standard of quality, in the sense of being a hallmark, it would be necessary for Hunts never to depart from it. In fact, it is no more than the standard which Hunts apply, subject to any instructions which they get from their client. If the client prescribes a modified standard, Hunts will apply it, for they do not regard themselves as certifying anything, but merely as reporting to their customer, who is nearly always the buyer, upon the quality of the goods he is getting, or of the work that is being carried out under contract with him. Lockwood put it: "We establish our own standard, but if our customer requires us "to exceed it or diminish it we do so in accordance with his "instructions and report accordingly." In the particular case of the Costain contract, he regarded himself as modifying the Hunt usual standard in respect of tyres. In relation to welding, he thought the decision to accept it or not was a matter of principle and was taken in agreement with Gaster. In relation to painting, he spoke of being "instructed to defer final release "until such time as they had been painted."

The reports are intended only for his own customers. The final report is not intended as a complete embodiment of any conclusion. All the reports are to be read cumulatively. If there has been a modification from Hunts' usual standards, the report may contain a reference to it; or, on the other hand, if it is a matter that is well known to the customer, it may not be referred to. Thus, one D.8, tractor 65, was noted by Costains on delivery to them as having a cracked and welded frame for which they would not be responsible when reconditioning. This was known to Gaster and therefore not mentioned in the Hunt report; but it could not, of course, be known to a purchaser from Gaster. It is thus quite plain from this account of Hunts' practice that Lockwood was not quibbling or playing with words when he was insistent that he provided reports and not certificates.

The evidence of what Hunts were actually thinking and doing does not, of course, throw any light on the true effect of the contract. I have set it out here, perhaps a little prematurely, so as to bring out into the open the nature of the misunderstanding that has, I think, prevented the contract between the plaintiffs and the defendants from working in the way in which it was intended to work. But I must now return to the contract and consider whether the documents which have been tendered under it are certificates within the meaning of the clause. The clause, as I have said, calls for a certificate from Hunts that the machines have been fully reconditioned up to their standard. Whether it has been broken depends upon the character of the documents supplied by Hunts and not upon what Hunts thought they were supplying or intended to supply.

Mr. Diplock has pointed out that until a very late stage of the case the plaintiffs never appeared to doubt that what they got were certificates which apparently conformed to the contract; their case has been that the certificates were improperly procured.

The documents were sent on July 17 and were acknowledged by Billingham without comment on July 23. They appear to have been filed away without study or discussion with Ferguson or Hill. It seems to have been thought that any bit of paper with Hunts' name on was good enough for the contract. Billingham said that he had never seen a Hunt certificate or report before, that he had no idea what it was, that they purported to be a Hunt certificate and he accepted them as such and nobody studied them very carefully.

The point that is now taken is that these documents are not certificates at all. In the course of the trial I ruled, though not without hesitation, that the point was open on the pleadings. I gave leave to amend the defence so that the defendants could set up an estoppel. They contend that the plaintiffs represented that they were satisfied with the certificates and that the defendants were thereby induced to refrain from seeking to obtain further certificates. I think that this plea fails. There is no material from which I can imply any representation; and, if the defendants had sought to obtain from Lockwood further certificates, I do not think that they would have got them. I summarize later the evidence from Lockwood, which shows that he would never have given an unqualified certificate. The plaintiffs' conduct, of course, precludes them from rejecting either the certificates or the machines, but I cannot see how it can affect their right to damages.

As I have said, the certificate under this contract has a double function. It is a hallmark which (a) the seller has undertaken shall be put upon the goods, and which (b) is conclusive that the goods are of the contract quality. The fact that the seller has accepted the goods without the hallmark does not preclude him from contending that the goods are not in fact of the contract quality and from claiming damages accordingly. Such a contention has to be determined by the court on its merits unless the seller produces a document which contains a binding decision upon it. If, in truth, the document relied upon does not contain such a decision, I see no evidence that the plaintiffs represented to the defendants that it did. I must therefore examine these documents to see what they amount to, and I shall take first the reports relating to the D.8s.

The first point which the plaintiffs take is that they are not in form certificates; they are not so described and do not in terms certify anything. This is not a point to be brushed aside. I doubt if, for example, a bank paying out money under a letter of credit requiring presentation of a certificate could be expected to accept a document in this form. A document which has to be handled in commerce must be in a form which leaves no reasonable doubt about its nature. But on the facts of this case the plaintiffs' conduct makes it at least difficult for them to rely upon objections of form, at any rate if they stood by themselves. The plaintiffs may not have studied the documents, but they saw what

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they were and can now hardly contend that they expected something which was labelled as a certificate. I think also that the evidence that Hunts' " certificates " were well known in the trade, combined with Hunts' own evidence that they only issued reports, leads to the inference that the documents that were current in the trade were documents in the form of reports.

I proceed, therefore, to consider the substance and effect of the documents. Their language does not follow the wording of the contract; there is no statement in terms that the machinery had been fully reconditioned to Hunts' satisfaction. I think that the only words that can be regarded as words of certification are in the conclusion that " the completed unit is accepted as " reconditioned to the required standards." What is meant by " the required standards " ? Are the standards those required by the certifier or by the client to whom the report is addressed and for whom presumably the work of reconditioning has been done? Of course, to the plaintiffs themselves and to Gaster, who assumed, though wrongly, that Hunts certified only according to standards of their own, from which they never departed, the words might very well mean " the standards required by us." On the other hand, to one who knew the true facts and the conception that Hunts themselves entertained of their function, the words would mean " to our standards as modified where necessary to meet your instructions." Construed simply from what appears on the face of the document, and without recourse either to the assumed or to true facts, I should interpret the words as meaning " the standards you required us to apply." " Require " is not the natural word to use if all that is meant is " our standards." Upon this construction, I hold that the certificates are not a compliance with the contracts.

On any view, I think that the language used is ambiguous. On the face of it, there are the two possible meanings I have noted. A reasonable man in the position of the plaintiffs (and that is the test I must apply) might well, if he were looking for greater certainty, turn back to the April reports which the defendants had sent on June 12 but expressly not as final certificates. He would find that they contained the phrase " reconditioned " to the required standards and to our satisfaction." He might ask himself whether the later omission of " to our satisfaction " was accidental or deliberate. He might note that the " required " standards " seem to have been satisfied although it was expressly noted that the machines had not been painted, and that there was a defective tyre to be replaced and the replacement had not been examined.

I think that a certificate of this sort must, to satisfy the contract, be unambiguous and readily understandable. When a document is tendered under a contract, the recipient has often to make up his mind whether he is going to pay out money upon it or to accept or reject goods; he has no right and may not have time to cross-examine the certifier or to ask him to clear up

doubts. In *Equitable Trust Co. of New York* v. *Dawson Partners*,[10] the contract called for "a certificate of quality to be "issued by experts who are sworn brokers." The plaintiffs tendered a certificate issued by only one expert. Viscount Sumner said[11]: "There is no room for documents which are almost the "same, or which will do just as well. Business could not proceed "securely on any other lines." This was a case of documents tendered under a bankers' credit and there is no doubt upon the authorities that such tenders have to be strictly scrutinized. But I do not think that the principle is peculiar to bankers' credits; I think it applies to any sort of commercial dealings where documents of this sort pass under a contract of sale.

Similarly, if the document is looked upon in its character of a final determination upon the quality of the goods, it is equally important that it should be unambiguous. The seller has the advantage of being allowed to supply a document which, if effective, shuts out all further inquiry into the condition of the goods. It is not unreasonable to demand that such a document should be clear and substantially in the terms for which the contract calls. Even if it were established that all Hunts' reports which hitherto have circulated in the trade were in as vague language as this one, it would still not, in my judgment, avail the defendants. What is commonly accepted in the trade can be a guide to the form of document which the parties must be supposed to contemplate, but whether in substance it complies with the contract must depend upon the terms of each particular contract and the terms of each particular certificate. If the contract calls for a document which contains a specified statement, no amount of evidence that other parties to other contracts have been content with looser statements can modify the obligation.

As I have said, the intent of the certifier cannot affect the construction of the certificate except in so far as it is expressed therein. But it may have another bearing on the position. If the defendants could show that the ambiguity was unintentional and could easily be resolved by the grant of another certificate in a proper form, they might be able to contend that the damages were nominal; or the point might help them in their plea of estoppel. I think the evidence shows clearly not only that Lockwood did not intend to issue a certificate in any form, but also that he did not intend to express in his reports his unqualified satisfaction with the reconditioning. I have already summarized the evidence in which he agrees that he departed from Hunts' standards in respect of the tyres certainly and, perhaps, also the welding. He wrote the letter which I have already quoted, in which he says that he does not take responsibility for any unexamined part. His evidence put the matter beyond doubt. He said: "It has never been the policy of "our company, nor is it accepted in any inspection organization,

[10] (1927) 27 Ll.L.Rep. 49. [11] Ibid. 52.

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"to certify the quality of second-hand machinery. It is only "being reported upon, factual reports. It was never our intention "to accept or to issue a certificate." Again he was asked: "You do not accept the responsibility of certifying between two "different parties, a vendor and purchaser, as to what the con-"dition of second-hand material may be?" and he answered, "No." He said that if he had been told that the reports were required for the purposes of a contract of sale with a third party, he would not have issued them, still less have altered them. Later he was asked about the reports generally, and it was put to him: "If you were asked now, on the basis of these documents, "to make a report that it was fully reconditioned to your "standards, you would not be able to do so, would you?" He answered, "No."

I conclude, therefore, that these documents are not certificates in form, in substance or in intent, and, accordingly, that there has been a breach of contract in respect of the D.8s. I have reached my conclusion by holding that the sort of certificate which must be supplied is what I have called the certificate of quality given in rem, and that nothing else will do. It may be said that one can reach the same conclusion without trying to classify or define too closely the nature of the certificate for which the contract calls, but by simply implying a warranty that, whatever sort of certificate is supplied, it must be the result of the uninfluenced and independent judgment of the certifier applying his own standards.

It may be so; but there are difficulties about this which I have not been able to resolve to my own satisfaction. I prefer to obtain the result by the construction, in the light of all the circumstances, of the clause which the parties have used, rather than by the implication of a warranty. I have already indicated my doubts about the implication of a warranty relating to the past. I think there would be a difficulty also about defining the limits of such a warranty. Does the seller warrant absolutely that the certifier will apply his own standards? If so, is he liable for error or for negligence on the part of the certifier, although he (the seller) in no way contributes to it? Or is it merely a warranty that he has not himself effectively interfered in the process of certification? If the implied duty not to interfere only comes into existence upon the creation of the contract, how should it be applied in a case such as this, where the contract contemplates that the question of certification is already settled and in fact it is not? Must it be proved that the seller intended to influence? Is it enough to show that he did an act which was reasonably calculated to influence the certifier, or must there be something in the nature of fraud or unfairness? I shall not attempt to answer any of these questions. On the view I have taken, they do not arise; and I have, I hope, found such facts as will enable them to be answered if they should arise hereafter.

There is, however, one point upon which I think that I ought to express my finding precisely, in case it should be material. I am satisfied that there was not, on the part of Gaster, any conscious intention to influence Lockwood or to deflect him from his duty or to do anything underhand. No charge of moral turpitude was made against Gaster, but I think I ought to expand my finding so as to cover some of the suggestions that were made.

It was suggested to him, on the basis of an entry in his diary, that on May 26, 1952, he had sent for Berthon, one of Hunts' inspectors, to come and see him at his office. He had no recollection of any such interview, and I am not satisfied it took place. He did, I think, give instructions to Lockwood in relation both to welding and to the inspection of tyres. I am satisfied that he thought that in so doing he was merely waiving the benefit (in the case of the welding he had satisfied himself there was no special benefit) in the provisions of his contract with Costains, and had no thought of getting Hunts to depart from the enforcement of their usual standards.

Much emphasis was placed on the final paragraph of his letter of June 25, in which he told Hunts that their certificate must bear the stipulated wording and, if they were unable for any reason to give it, their supervision could not have been carried out adequately. I can see nothing wrong in this. He had a contract with Hunts and he was entitled to see that it was carried out. He was entitled to insist that he got the sort of certificate that they had undertaken to give, if in fact they were able to give it; and to point out that, if lack of the supervision which they had contracted to give rendered them unable to give it, they were in breach of their contract. It is really only pointing out the obvious.

I have said already that I think Gaster became increasingly aware that there was something wrong with the reconditioning. It may be that his suspicions were half formed by the time he had his interview with Lockwood on July 8. That may have been why he thought it necessary to protect himself by getting certificates that, so far as he could see, were watertight in their wording. But I do not think that there was anything improper in that. He was not thereby extricating himself from a difficulty, for to all appearances he was adequately protected whichever way the matter went. If Hunts gave their certificate, he could pass it on to the plaintiffs; for it was they, and not he, who, under the terms of his contract with them, had taken the risk of an error by Hunts. If Hunts would not give their certificate, he had his remedy either against Costains or against Hunts themselves if it was due to their failure in supervision. But he had to know where he stood.

I do not think the situation was such that honest dealing required him to cross-examine Hunts and demand that they disprove any suspicions that he may have had. He was, I think,

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entitled to take the view that they must judge for themselves whether they could give the certificate for which he asked. I do not think he was trying to put pressure upon them, or that he thought they were the sort of people upon whom pressure could successfully be put. Even if he thought that Hunts, in order to protect themselves, were willing to give a certificate in a form which they ought not to give it, and he was willing to stand by and take advantage of that, I am not sure that it would be enough: see *Neale* v. *Richardson*.[12] But I do not think that in fact there was anything of this sort. Indeed, the suggestion could not be made without impugning also the credit of Lockwood. It may be that if Gaster had studied as carefully as I have Hunts' reports and Lockwood's letter of June 26, particularly the penultimate paragraph, he would have realized that there must be a good deal which Hunts could not really be in a position to certify. But the full significance of this letter does not start out from the page on a cursory reading. I think the whole truth is that Gaster and Lockwood where imbued with contrary ideas. Gaster thought that Hunts had a standard which was incapable of modification and beyond the reach of influence, and that the only question was whether or not they were prepared to say, in the form for which his contract called, that their standard had been satisfied; while Lockwood regarded himself as obliged to follow his client's instructions, so long as he pointed out the matters for which he was not prepared to accept responsibility.

The plaintiffs advanced two alternative contentions on the D.8 certificates. As they do not require any further findings of fact, I need not do more than note them. The first is that, in relation to each of the units, there is a series of reports and that, if the series does embody a certificate, it is contained in the series and not in the final or in any individual report. The series was intended to be read cumulatively, and unless the whole series was delivered, which it was not, there is no proper delivery of the certificate.

The second point is that each series contains contradictions and inconsistencies, so that, as a certificate, they are bad on their face. The plaintiffs also argued that the revised reports were not valid certificates, because Hunts had already issued final reports to Gaster and so were functus officio. In my judgment, that principle does not apply to this case.

I turn now to the T.D.14 certificates. As I have said, Hunts delivered only two documents in respect of them, and there is no question of their being invited to modify those documents or of their being given any instructions as to how they were to inspect. The plaintiffs' case, therefore, rests solely on the point that the documents delivered were not certificates. In my judgment,

[12] (1938) 53 T.L.R. 539; [1938] 1 All E.R. 753.

they were not, and the reasoning which I have already set out in relation to the D.8s applies a fortiori.

The two reports are not in the same form. In the case of 9120, the formula "the completed unit is accepted as recon-"ditioned to the required standard" is adopted, but there is not anywhere in the report a description of the unit as fully reconditioned. The report on the 7630 describes it as "fully overhauled "and reconditioned," but there is not any statement anywhere which can be construed as an expression of satisfaction by Hunts with the reconditioning. Moreover, when these documents were delivered to the plaintiffs, they were expressly described as not being final certificates but only as latest reports.

Mr. Diplock contends that the description is immaterial, unless it is alleged to amount to an estoppel, and that the court must find on the facts whether the documents are certificates or not. I do not think that it is necessary for the plaintiffs to invoke the doctrine of estoppel. Delivery under a contract does not involve merely a physical act. A seller does not deliver goods by depositing them in the buyer's backyard in the middle of the night. They must be tendered under the contract. These documents were not tendered as certificates. It is not good enough to send some documents described in effect as interim reports which the buyer might put in the wastepaper basket, and then say a year or so later that they really were intended to constitute certificates after all.

In my judgment, there has been a breach of contract in relation to all the machinery except the R.B.43 excavator, and I have now to consider damages. The measure relied upon by the plaintiffs is the difference in value between machinery fully reconditioned in accordance with the contract and machinery in the state in which it was delivered. This is the prima facie measure laid down in the Sale of Goods Act, 1893, s. 53 (3), and it is not disputed that it is the right measure to apply in this case.

In its application, four questions arise: first, what is meant by fully reconditioned in accordance with the contract; secondly, whether there is any evidence that the machines were not so reconditioned; thirdly, how the value of properly reconditioned machines is to be assessed; fourthly, how the actual value of the machines delivered is to be assessed.

I have already drawn attention to the controversy about the meaning of fully reconditioned under the contract, and have stated my conclusion that it means fully reconditioned up to the Hunt standard. I think this conclusion necessarily follows from my view that the parties were contracting in relation to a standard of qualifying set by Hunts, and that Hunts' duty was not that of certifying that a particular contract of reconditioning had been satisfactorily carried out according to its terms. If I had adopted the latter view, then I think it would be for the court now to determine whether the contract of reconditioning had been

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properly carried out or not and, for that purpose, to arrive at its own standard of what the contract required. Hunts being disqualified from acting, it would not be relevant to inquire what view they would have taken of the requirements of the contract. But the view I have taken of the contract, for reasons already given, is that Hunts come into it in two ways. First, the quality of the full reconditioning is to be Hunts' standard, which was thought to be a particularly high one; and, secondly, Hunts' statement that their standard has been complied with is to be conclusive. The second limb necessarily disappears with the disappearance of Hunts as certifiers, but that does not, in my judgment, affect the first.

One may get at the matter in another way. In deciding upon what would be the appropriate standard to take for full reconditioning, the court must have regard to what the parties appeared to contemplate, even if they did not put it into the contract. In this case they clearly contemplated the Hunt standard. It might very well have been—and, indeed, I think the parties thought it was—that the Hunt standard assured a higher standard of reconditioning than was usual. If that were in fact true, and if Hunts' certificate was not supplied, perhaps because the seller refused to take the necessary steps to obtain it, I should not be able to see why the buyer should have to put up with the usual and lower standard of reconditioning.

I do not mean, of course, that the views of any individual inspectors of Hunts would be material or evidence as to their attitude admissible. I mean that where there is a recognized Hunt standard, the sort of which Lockwood gave one or two examples, that is the standard to be applied; where there is not, the court will have to apply such standard as it thinks reasonable. In some cases, as in the case of wearing down of the grip bars, Hunts have an upper and a lower margin. In such a case, I think, it would be right to give effect to the view that the parties evidently entertained, that Hunts' standard was an exceptionally high one, by taking the higher margin.

A particular question has been argued, namely, whether, on the Hunt standard, welding ought or ought not to be accepted. I have already stated that Hunts' practice in 1952 was to accept it faute de mieux. If new parts had been reasonably available, they would not have accepted it; but the general scarcity in 1952 of spare parts, whose purchase was dependent on dollars, was such, Lockwood says, that the practice of welding was universally adopted, and so they were not calling for new parts from reconditioners like Costains. His evidence shows, I think, that if he had been satisfied in any case that spare parts could reasonably be obtained, Hunts would have required them. I think that the Hunt standard that should be applied is that welding ought to be accepted, except in any case in which the plaintiffs can satisfy the referee (as they could have satisfied Hunts) that a spare part could be got.

The next question is whether there is any evidence that the units were not fully reconditioned. In the ordinary way, I should have to determine to what extent they were not fully reconditioned before I could begin to assess the damage. It has, however, been agreed that that task should in the main be discharged by a referee. But Mr. Diplock submits that, as there is no evidence at all to justify the conclusion that the units were not fully reconditioned at the time of sale, the damages can only be a nominal figure for the failure to supply certificates. I shall decide whether or not substantial damage has been proved; and it has been agreed that I shall deal with one substantial matter only in relation to each unit, leaving it to the referee (if I find substantial damage proved) to go into any other matters which the plaintiffs rely upon, and to fix the proper figure for the whole.

[His Lordship, having considered the evidence relating to the condition of the machinery, held that all the tractors had not been fully reconditioned, and that the failure to do so, in the case of the D.8 units was substantial, and continued:] I think I have now covered all questions of principle, and those major questions relating to the assessment of damage which were discussed before me. The hope was expressed on both sides that, once these questions were settled, it might be possible for the parties to agree on a round figure as the appropriate compensation, if any is due. I am sure that it will be in the interests of both sides if that hope can be fulfilled. As I have said, I am satisfied that, in the end, no examination of detail, however meticulous, will of itself produce the right answer, which will have to be arrived at on a broad estimate. There is, however, further detail which, if necessary, will have to be examined to provide a satisfactory basis for such an estimate, and that will have to be done before a referee who will report to me. If, therefore, the parties cannot agree upon a figure, I shall ask counsel to consider what form the order for a report should take and mention the matter again to me.

Meanwhile, and subject to hearing counsel further on the form of the judgment and on costs, I think the most convenient course would be that I should now direct judgment to be entered for the second and third defendants against the plaintiffs, and for the plaintiffs against the first defendants for a declaration that the first defendants have broken the first and third contracts referred to in the statement of claim by delivering thereunder machinery which was not fully reconditioned in accordance with those contracts, and that the plaintiffs are entitled to be paid as damages such sum as shall, upon further inquiry, be determined to represent the difference between the actual value of the machinery and the value which it would have had if fully reconditioned.

Judgment accordingly.

Solicitors: *Freshfields; Booth & Blackwell.*

J. F. L.

[COURT OF APPEAL.]

C. A.

1954
May 27.

Evershed M.R., Denning and Hodson L.JJ.

* CHEETHAM *v.* CHEETHAM.

Husband and Wife—Divorce—Practice—Answer—Amendment—Petition by husband—Adultery and desertion alleged in answer—Application to amend answer by striking out allegation of adultery—No affidavit filed—Matrimonial Causes Rules, 1950 (*S.I.* 1950, *No.* 1940), *r.* 15 (3).

A husband petitioned for divorce on the ground of desertion. His wife in her answer alleged that the husband had been guilty of adultery and desertion by leaving the matrimonial home and she asked to have the marriage dissolved. After service of the answer to the petition, the wife's solicitors applied to have the allegation of adultery struck out of the wife's answer. The reason for the application was that they did not consider the evidence of the husband's adultery sufficient. No affidavit was filed in support of that application but the registrar struck out of the answer the allegation of adultery. The husband did not proceed with his petition. The commissioner rejected the wife's prayer for dissolution on the ground that, since the allegation of adultery had been withdrawn, and he had no explanation why it was withdrawn, there was no evidence of desertion. On appeal:—

Held, (1) that, on the evidence, the wife bona fide and reasonably believed that the husband had committed adultery, and the departure of the husband from the matrimonial home was equivalent to a determination on his part to put an end to the marriage relationship. The wife therefore was entitled to a divorce on the ground of desertion.

Per Hodson L.J. Rule 15 (3) of the Matrimonial Causes Rules, 1950, which requires that an application for leave to amend a petition after service shall be supported by an affidavit, applied by analogy to the wife's answer. The fact that no affidavit had been filed when the wife's answer was amended had misled the commissioner, since the facts were not fully before him.

APPEAL from Judge Fenwick Q.C. sitting as special commissioner.

The petitioner, Fred Cheetham, sought the dissolution of his marriage with the respondent, Edith Cheetham, on the ground that she had deserted him. She in her answer denied desertion and sought the dissolution of her marriage on the ground of the husband's adultery and desertion. The husband did not proceed with his petition. The commissioner dismissed the wife's answer. The wife appealed. The facts are more fully stated in the judgment of Evershed M.R.

G. M. Vos for the wife.

The husband did not appear.

No case was cited in argument.

EVERSHED M.R. This case was tried not upon the petition of the husband, but on the answer of the respondent wife. That

answer originally alleged desertion, and, secondly, adultery on the part of the husband.

In reference to the possibility of proving adultery, it is relevant to note that during the evidence the wife produced a letter written by the husband and found by the wife in the husband's pocket. It was addressed to the woman with whom the adultery alleged in the answer was alleged to have been committed. It was in these terms: "I don't know why I am doing this but as soon as "I got home on Wed-night I sat down to write this letter to you. "I want you that much I keep on thinking about you, and I don't "know where to put myself sometimes. I hope you don't think "I have suddenly gone crackers for writing a letter like this but "I must open my mind to you. I have had some good times in "my own way, but never like I am having them with you, and "I don't want nobody but you. I hope you will always remember "that. I love you that much that I sometimes wish I did not. "You have given me everything that a woman can give to a man, "and if I had a wife like you would make I should never want "to be away from you. I am only sorry that I can't give and "do more for you, because if it was in my power to do so I "certainly would. If you want to keep this letter by all means "do so. How I wish I was with you always, it is now 11.30 p.m. "so I will have to go to bed so will close with all Love." On that letter, one thing needed no emphasis, and that is that it was as good evidence of an adulterous association with the woman to whom it was addressed as could possibly be imagined.

However, the answer having been put in in August, 1953, in the following December, on the application of the wife's own solicitor, unsupported by any affidavit, an application was made to the registrar in the Barrow District Registry for leave to strike out the charge of adultery in the answer, and the registrar struck it out. It is plain that charges made in matrimonial proceedings cannot be struck out in quite the same way as they can be in other proceedings—that is, merely because the party in question desires the withdrawal. There is a public interest involved and there is in cases of this sort an obvious possibility that the reason why the party seeks to have the charge struck out is an improper or collusive one. He or she might have been offered some consideration for doing it; therefore, generally speaking, it requires an affidavit to show that the application is not the result of any collusive conduct.

The reason which the solicitor gave to the commissioner, as we have been informed by counsel today, was that the husband, after leaving the wife, had gone to live in the same building as this woman to whom the letter was addressed. At first sight that would appear to add considerable force to the charge to which strong impetus had already been given by the letter. It was then discovered, however, that the building was divided into wholly separate dwellings, and the woman concerned and the husband lived in separate apartments. For that reason, the

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solicitor—I do not question his discretion and, of course, as he is an officer of the court, still less his complete integrity—decided that his client should withdraw this allegation, and he made this application for that purpose.

I observe, however, that the application was after the date of the answer by some months. The relevance of that is that desertion, when charged, must be for a continuous period up to the date of the answer. On the evidence, it seems clear that, when the husband left, it was because, at the end of a series of quarrels, which arose to no little extent from the husband's habit of going out and drinking, the wife, who had this letter, confronted him with it and required him to give up the woman to whom it was addressed. In effect, it may be fairly said that he was told that he must decide to give the woman up or go. In my judgment, if at that time the wife bona fide and reasonably believed that the husband was having an adulterous association with this woman, she was justified in putting that alternative, and, the husband having elected to go, she would be justified in taking him before the court on the ground that his departure was the equivalent to a determination on his part to put an end to the marriage relationship.

In the circumstances, I should have thought that the wife had established the case she set out to prove. I think that the commissioner was also inclined to that opinion, but what troubled him was that, without any explanation, he felt that the abandonment on the part of the wife of the charge of adultery made it, for practical purposes and as a matter of common sense, difficult for him to say that at any material date she really believed in the adulterous association between the husband and this woman. Unfortunately, the commissioner was not informed, as we have been, of the unusual circumstances in which it came about that the charge of adultery was withdrawn. If he had been, I think it might have satisfied him that, whatever he might think himself of the necessity or the wisdom of giving up the charge, it did not in any way qualify the inference to be drawn from the letter which was in the wife's possession. I think also that the commissioner had perhaps forgotten that the letter was from the husband to this woman, because he appears to have called it a love-letter from another woman. I think that does again make some difference.

In the light of the circumstances as they are now explained, I think this is not, as the commissioner felt, nothing more than a separation by consent. In other words, it was, in the circumstances, conduct by the husband which was equivalent to desertion, that is to say, unequivocal conduct on his part showing that so far as he was concerned the marriage relationship was at an end. For these reasons, I think that the appeal ought to be allowed, and that the wife was entitled to a decree upon her answer. A decree should be pronounced accordingly.

DENNING L.J. It is a chapter of accidents which has brought this case to this court. I can understand the solicitor feeling that if he had only the letter and nothing more, perhaps the court would require stricter proof. So he had the allegation struck out. But it is an unfortunate thing that the commissioner did not know the reason why it was struck out. Owing to those two accidents, a decree was not granted, which, I am sure, the commissioner would have made if he had known all the circumstances. Therefore, I agree with my Lord that now, as the circumstances have been explained, it is a proper case in which a decree nisi should be pronounced.

HODSON L.J. I think that the wife proved her case. I have considerable sympathy with a commissioner who is left in this position. He was told the charge of adultery brought by the wife had been dropped and he then found, having received no explanation of that, that he could not accept that she had at any time reasonably believed in the adultery which was really the basis of the case of desertion. The husband having left the house because he had refused to give up another woman to whom he had written a letter, in effect, admitting adultery, the wife established a case of reasonable belief, belief in the husband's adultery, which was not disputed during a period of three years preceding the petition. The fact that the solicitor went before the registrar and obtained an order for striking out the allegation of adultery appears to have come about because the solicitor thought that the evidence of the husband and this woman living under the same roof was not sufficient for him to be able to establish adultery, although the husband's own letter was strong evidence that he had committed adultery.

The whole affair was wrapt in mystery, because, in my judgment, sufficient attention was not paid to rule 15 (3) of the Matrimonial Causes Rules, 1950, which reads as follows: "An application for leave to amend a petition after service or for "leave to file a supplemental petition shall, unless otherwise "directed, be supported by an affidavit by the petitioner verifying "the new facts alleged and shall, unless otherwise directed, be "served on every opposite party who has entered an appear-"ance." By analogy, I think that applies to the answer in this case which, in fact, is the petition upon which the court was asked to pronounce. It appears from that rule that, for obvious reasons, an affidavit is required in support of applications to amend because there may be at any rate a tendency for charges of adultery to be bought off. There was no affidavit in this case. It is true that the requirement of an affidavit is not absolute, because the court may otherwise direct, as, for example, in cases where a paragraph

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is struck out in default of compliance with an order for particulars. If the rule to which I have referred had received the consideration it ought to have had, the commissioner would not, I think, have been left in the dark in the way in which he was. I agree with the order proposed.

Appeal allowed.

Solicitors: *Hargreaves & Crowthers for Alan Marshall, Barrow-in-Furness.*

B. A. B.

[COURT OF APPEAL.]

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June 1.
Denning and Hodson L.JJ.

* SIMPSON *v.* SIMPSON.

Husband and Wife—Divorce—Practice—Petition within three years of marriage—Exceptional hardship or exceptional depravity—Evidence—Consideration of respondent's affidavit—Discretion of judge—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 2.

An application under the proviso to section 2 (1) of the Matrimonial Causes Act, 1950, by a wife for leave to present a petition within three years of the marriage was acceded to. The judge stated that it was not for him to consider the possibility of the petitioner's allegations being untrue. The husband appealed:—

Held, (1) that the judge was not limited, when exercising his discretion under the proviso, to considering only the petitioner's case, but was also entitled to take into account the husband's answer which might throw doubt on the truth of the allegations made by the petitioner.

Dicta of Goddard L.J. in *Winter* v. *Winter* [1944] P. 72, 75, and Tucker L.J. in *Charlesby* v. *Charlesby* (1947) 176 L.T. 532, 534, applied.

(2) That leave to present the petition should be refused as the evidence showed that the wife's allegations might not be true and also that there was a possibility that the parties might be reconciled.

Decision of Sachs J. reversed.

APPEAL from Sachs J.

The petitioner, Vilma Helena Elizabeth Simpson, sought leave, in February, 1954, to present a petition for divorce, on the ground that her husband, John William Simpson, had been cruel to her, within three years of the marriage under the proviso to section 2 (1) of the Matrimonial Causes Act, 1950.[1] The

[1] Matrimonial Causes Act, 1950, s. 2: "(1) No petition for divorce "shall be presented to the court "unless at the date of presentation of "the petition three years have passed "since the date of the marriage:

"Provided that a judge of the court "may upon application being made "to him in accordance with rules of "court, allow a petition to be pre-"sented before three years have "passed on the ground that the case "is one of exceptional hardship "suffered by the petitioner or of "exceptional depravity on the part of "the respondent . . ." [Special powers are then provided if the petitioner obtains leave "by any mis-"representation or concealment of the "nature of the case."]

"(2) In determining [such applica-"tion] the judge shall have regard to

parties were married on December 11, 1952. The petition alleged acts of physical violence and threats to kill the wife, and it was not disputed that if the petition was accepted at its face value there was a case of exceptional hardship to the wife or exceptional depravity by the husband. In reply to the petition the husband denied the alleged acts of cruelty and exhibited letters in affectionate terms written by the wife to him after the date of the alleged acts of cruelty. For example, on March 18, 1953, at a time when, according to her petition, she had already been treated with violence on three occasions, she wrote a letter to him beginning "My dearest darling husband," saying: "You "are always kind and very good to me," and "To me you are "all my life needs and all I want," and "I still love you just "like I used to write." She went on to use expressions of great affection and described how she missed him whenever he was away, and ended, "I love you my darling Johnnie always, Baby "Vil," followed by symbols for kisses. In November, 1953, at a time when, according to her petition, most of the acts of cruelty had already taken place, she wrote an affectionate letter to him, sending him all her love, followed by symbols for kisses.

The application was heard by Sachs J., and on May 7, 1954, he gave leave to present the petition although three years had not elapsed since the marriage. The husband appealed.

Bernard Lewis for the husband.
Robert Hannay for the wife petitioner.

In addition to the cases referred to in the judgment the following case was cited in argument: *Bowman* v. *Bowman.*[2]

DENNING L.J. stated the facts, and continued:—The question that has arisen for decision is whether the petition has to be taken at its face value, or whether the court is entitled to look at the affidavit sworn by the husband in answer to it. The husband has sworn an affidavit to which he exhibits two letters written by the wife which contain statements apparently inconsistent with the allegations of cruelty. [His Lordship referred to the two letters summarized above.] Section 2 (1) of the Matrimonial Causes Act, 1950, provides that a judge may allow a petition to be presented within three years of the marriage on the ground that the "case" is one of exceptional hardship or of exception depravity. Sachs J. read that as meaning that "the case as made in the petition" must be one of exceptional hardship or exceptional depravity. He said that it was not for him "to enter into the possibility of the allegations being

". . . the question whether there is "a reasonable probability of a recon- "ciliation between the parties before "the expiration of the said three "years."

[2] [1949] P. 353; 65 T.L.R. 461; [1949] 2 All E.R. 127.

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"untrue," or "to go into the likelihood of the case being established." He thought that he could only look at the petition of the petitioning wife and her affidavit in support of it, and he could not have regard to the husband's affidavit in answer. In my opinion, that is not a correct interpretation of the section. The observations of Goddard L.J. in *Winter* v. *Winter* [1] and of Tucker L.J. in *Charlesby* v. *Charlesby* [2] show that there can be no doubt that a judge, when considering one of these applications, is not confined to the petition and the affidavit in support, but he can also look at the affidavit in answer. If the affidavit in answer is destructive of the petitioner's case, the judge will dismiss the application. Even if it is not altogether destructive of the petitioner's case, but only throws doubt on it, the judge is entitled to have regard to that doubt in coming to his decision whether to grant leave or not. It seems to me, therefore, that the judge was wrong in his ruling in point of law. He should have exercised his discretion upon the affidavits as a whole. He did not do that.

In these circumstances, the judge not having exercised his discretion, and all the material being before us, it is for this court to exercise its discretion. In exercising our discretion, we must have regard to the letters which the wife wrote, and we must also consider the question of reconciliation. In all applications of this kind the possibility of reconciliation is a most important aspect of the case. The letters show that at one time the wife was very much in love with her husband. The husband says that her complaints are largely hysterical and may respond to treatment. He says that if she were treated it would be possible for them to resume a normal married existence. In those circumstances, it seems to me that there is a possibility of reconciliation, and it is not one of those cases where we should give leave to present a petition within three years.

It was suggested that we might send the case back so that the wife might supplement her affidavit by further material. That is not a course which we should encourage. These applications are not meant to be preliminary trials. They are meant to be dealt with simply and inexpensively. There should be an affidavit on each side, but there should not be affidavits piled upon affidavits. We ought not to send the matter back for the filing of further affidavits, but we ought to decide it on the material before us.

I think this appeal ought to be allowed, and the application to lodge the petition within three years should be refused.

HODSON L.J. We are asked to review the exercise of the discretion of the judge on an application by the wife for leave to lodge a petition for divorce within three years of the marriage. Section 2 (1) of the Matrimonial Causes Act, 1950, provides: "No

[1] [1944] P. 72, 75.

[2] (1947) 176 L.T. 532, 534.

"petition for divorce shall be presented to the court unless at "the date of the presentation of the petition three years have "passed since the date of the marriage: . . ." But there is a proviso which enables the court, in its discretion, to give leave for a petition to be presented before that time on the ground that the case is one of "exceptional hardship" suffered by the petitioner or of "exceptional depravity" on the part of the respondent. In the same proviso there is a further reference to "the nature "of the case." The judge, in my view, has put too narrow a construction upon the proviso in emphasizing the use of the word "case" and "the nature of the case" as being only the case set forth by the petitioner in her petition and affidavit.

It is of course true, as was made clear by this court in *Winter* v. *Winter*,[3] that in deciding what constitutes "exceptional hard-"ship" or "exceptional depravity" a judge is entitled to act on the prima facie evidence in the affidavits filed with the application, and if, in the proper exercise of his discretion, he grants leave to present the petition, his decision will not be reviewed by the Court of Appeal. That proposition, however, does not involve that the judge, who is to exercise his discretion, is limited to the affidavit or affidavits put forward on behalf of the proposed petition. It is conceded by the parties in this case that the judge was persuaded that he was so limited.

There is no transcript of his judgment but a note was taken on each side. On the one hand, it was thought that he said that he could not consider the possibility of the wife's case not being established. On the other hand, it was thought that he said he could not enter into the likelihood of the wife's case not being established. I think that the judge felt that the position was a difficult one, and, indeed, no doubt having that in mind, he gave leave to appeal. But his attention was not drawn to *Winter* v. *Winter*,[3] in which Goddard L.J. said[4]: "In my opinion, the "words mean that the judge has come to a conclusion that "the allegations made in the affidavits filed on the application "are such that, if proved, they would amount to exceptional "hardship or depravity, though of course he may take into "consideration the affidavits, if any, filed in opposition to assist "himself in forming a conclusion as to the likelihood of the case "proving to be of that character." I think that Scott and du Parcq L.JJ. said nothing inconsistent with that. In case it should be thought that Goddard L.J. was confining himself to the consideration of whether the affidavits of the opposition threw light on the exceptional hardship and depravity, as opposed to the proof of the case, I think some assistance is to be gained from the judgment of Tucker L.J. in *Charlesby* v. *Charlesby*[5] because he was referring to the judgment of Goddard L.J. in *Winter* v. *Winter*.[3] He said, paraphrasing Goddard L.J.:

[3] [1944] P. 72.
[4] Ibid. 75.
[5] 176 L.T. 532, 534.

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"No doubt it is the duty of the judge to deal with the affidavits "of the petitioner as prima facie correct, but at the same time "as part of the material of the case, and in judging whether he "should exercise his discretion or not, he would have regard to "the affidavit sworn by the respondent." I think "the affidavit "sworn by the respondent" is part of the material at which the court must look if any affidavit is filed in opposition. That is clearly laid down by proper appreciation of the judgments to which I have referred. If it were otherwise, it would seem to be futile, except possibly on the question of the prospect of reconciliation, for a respondent to file any affidavit at all.

These applications are matters which are determined judicially after hearing both sides. Rule 2 of the Matrimonial Causes Rules, 1950,[6] provides the machinery, including machinery for an affidavit or affidavits, to be used in support of the summons, it does not exclude those sworn by the respondent, which would be utterly useless unless the court were entitled to pay attention to those affidavits.

Having said that the judge had misdirected himself in the way which I have mentioned, that does not dispose of this appeal, because the judge went on to consider what the position would be if he were wrong in his approach. Then he added: "The "letters," which have been referred to, "did raise in his mind "certain doubts as to the truth of the petitioner's case," though he added: "These doubts could be resolved of course "because the letters might be capable of explanation."

It is conceded by Mr. Hannay, on behalf of the wife, that there must be cases in which the affidavit of the respondent can be looked at, and the full rigour of the rule laid down by the judge cannot be maintained; but he distinguished the cases in which the wife's or the petitioner's case is not destroyed but merely rendered doubtful. However, the judge, I think, was not exercising his discretion in the light of the husband's affidavit, which in his view did throw doubt on the wife's case.

[His Lordship referred to the evidence summarized above, and continued:] Taking into consideration all these matters, and the doubts which the judge has entertained, and which are entertained by this court, as the material here is the same as that which was before him, it seems to me that this is a case in which we ought to express our own view on the matter and that we should dismiss the wife's application.

Mr. Hannay has argued that it would be right to give her a further opportunity of supplementing the evidence which she had previously given. I have considered that matter, and I have come to the conclusion that that would not be right. It is not desirable for the parties to be encouraged to put before the court a mass of material, because the court would find itself then in even greater difficulty than it necessarily now is in reaching a prima

[6] S.I. 1950, No. 1940.

facie conclusion on contradictory affidavits. Nor, I think, is it contemplated that the contradictions in the affidavits are to be resolved at this particular stage. The wife has had the opportunity of putting forward her case, and the husband's affidavit has been filed in answer. The material thus before the court, I think, ought to be treated as the material on which this court can properly act. For these reasons, as well as those given by my Lord, I think this appeal should be allowed, and the wife's application dismissed.

Appeal allowed, petition to be taken off the file, wife to have her costs up to the amount of security agreed at £25.

Solicitors: *Sydney Davidson & Co.; Charles Caplin & Co.*

E. D.

[QUEEN'S BENCH DIVISION.]

* THOMSON *v.* CHAIN LIBRARIES LD.

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May 13

Lord Goddard C.J., Hilbery and Donovan JJ.

Criminal Law — Obscenity — Obscene libels—Seizure—Onus of proof—Publications seized from respondents' premises—Respondents summoned to show cause why the publications should not be destroyed —Magistrates' functions—Obscene Publications Act, 1857 (20 *&* 21 *Vict. c.* 83), *s.* 1.

A number of books and postcards having been seized from the respondents' premises, the respondents were summoned to show cause why the publications should not be destroyed under the provisions of the Obscene Publications Act, 1857, s. 1. It was submitted that the appellant's refusal to indicate passages in the books which were alleged to be obscene, or to indicate in what respects the postcards were alleged to be obscene, or to state the nature of any innuendo relied upon, meant that the respondents could not properly or adequately deal with the questions in issue and thereby could not have a fair trial. It was also submitted that as the appellant had not by evidence or otherwise specified the nature of the complaint, or shown a prima facie case that books and postcards were obscene, an order should be made directing the publications to be restored to the respondents. The magistrates were of the opinion that the respondents' contentions were well founded and ordered the return of the publications. On appeal:—

Held, that the justices took a wrong view of their functions. It was not for the prosecution to read out particular passages unless the justices asked them to point out some particular thing. It was for the justices to look at the publications and come to their own decision and, if they were satisfied that the publications were obscene, to order them to be destroyed unless they were required as proof in other proceedings.

Per Lord Goddard C.J. It only confused justices to mention innuendos in connexion with postcards. If any innuendo only were relied upon then prima facie the thing would not be obscene.

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Observations in *Cox* v. *Stinton* [1951] 2 K.B. 1021; [1951] 2 T.L.R. 728; [1951] 2 All E.R. 637 applied.

Per Hilbery J. The Act made an exception to the general rule that the prosecutor who affirms must discharge the burden of proof for that which he affirms.

CASE STATED by Swindon justices.

On January 14, 1954, on the adjourned hearing of a summons calling on the respondents, Chain Libraries Ld., to show cause why certain books and postcards, seized and brought before the court by the appellant, John Rennie Thomson, should not be destroyed under the provisions of the Obscene Publications Act, 1857, the justices ordered that the books and postcards should be returned to the respondents.

On the hearing of the summons on December 3, 1953, the respondents by their solicitors asked for an adjournment, which was granted. The chairman of the bench said that although the justices had read and considered the books and were ready to proceed, they would adjourn the hearing for six weeks.

On the adjourned hearing the following facts were proved or admitted:—The respondents were the occupiers of certain shop premises in Swindon. On complaint made by the appellant on oath to two justices for the borough of Swindon, they granted a special warrant under the provisions of section 1 of the Obscene Publications Act, 1857.[1] On September 18, 1953, the appellant,

[1] Obscene Publications Act, 1857, s. 1: "It shall be lawful for . . . any "two justices of the peace, upon com- "plaint made before . . . them upon "oath that the complainant has "reason to believe, and does believe, "that any obscene books, . . . pic- "tures, drawings, or other represen- "tations are kept in any . . . shop, "room, or other place within the "limits of the jurisdiction of any "such . . . justices, for the purpose "of sale or distribution, . . . lending "upon hire, or being otherwise pub- "lished for purposes of gain, which "complainant shall also state upon "oath that one or more articles "of the like character have been sold, "distributed, . . . lent, or otherwise "published as aforesaid, at or in con- "nexion with such place, so as to "satisfy such . . . justices that the "belief of the . . . complainant is "well founded, and upon such . . . "justices being also satisfied that any "of such articles so kept for any of "the purposes aforesaid are of such "character and description that the "publication of them would be a mis- "demeanour, and proper to be prose- "cuted as such, to give authority by "special warrant to any constable or "police officer into such . . . shop, "room, or other place, . . . to search "for and seize all such books, . . . "pictures, drawings, or other repre- "sentations as aforesaid . . . , and to "carry all the articles so seized before "the . . . justices . . . ; and such . . . "justices shall thereupon issue a sum- "mons calling upon the occupier of "the house or other place which may "have been so entered by virtue of "the said warrant to appear within "seven days before . . . any two "justices in petty sessions for the "district, to show cause why the "articles so seized should not be "destroyed; and if such occupier or "some other person claiming to be "the owner of the said articles shall "not appear within the time afore- "said, or shall appear, and such . . . "justices shall be satisfied that such "articles or any of them are of the "character stated in the warrant, and "that such or any of them have been "kept for any of the purposes afore- "said, it shall be lawful for the . . . "justices, and . . . they are hereby "required, to order the articles so "seized, except such of them as . . . "they may consider necessary to be "preserved as evidence in some fur- "ther proceeding, to be destroyed "at the expiration of the time here- "in-after allowed for lodging an "appeal, . . ."

under and by virtue of the warrant, seized from the respondents' premises four postcards and twelve books. On November 26, 1953, the postcards and books were duly laid before one of the justices who thereupon issued the summons. The books and postcards appearing in court were those seized in accordance with the warrant. In the books certain pages were marked with cellophane tape, but no evidence was adduced before the justices as to how such marking was introduced or as to what it was intended to mean. The books and postcards were kept on the respondents' premises for the purpose of sale or distribution for gain and certain of the books had been lent on hire for gain.

It was contended on behalf of the appellant that, in the premises, the onus lay on the respondents to show cause why the books and postcards should not be destroyed and in reliance on such contention, and the books and postcards being then in court in the justices' custody, the solicitor appearing for the appellant did not put the books or postcards in evidence and did not invite or draw the court's attention to any one of the books or postcards, or to any particular passage in any books which he relied on as obscene nor did he, as regards either the postcards or the books, specify in what respect such alleged obscenity existed nor was any evidence called as to any such matters. It was also submitted that the appellant having seized the books and postcards and carried them before the magistrate in accordance with the warrant had discharged his duty.

It was contended on behalf of the respondents and on behalf of the publishers and owners of three of the books that it was for the appellant to satisfy the court that the books and postcards were obscene and to show a prima facie case by putting the books and postcards in evidence, and by indicating passages in the books which were alleged to be obscene, and by indicating in what respects the postcards were alleged to be obscene and where an innuendo was relied upon indicating the nature thereof. It was also submitted that the refusal of the appellant to indicate passages in the books which were alleged to be obscene, or to state the nature of any innuendo relied upon meant, having regard to the large volume of printed matter concerned, that the respondents could not properly or adequately deal with the questions in issue or put forward argument for the court's consideration on any particular innuendos alleged, and thereby, the respondents could not have a fair trial of the matters in issue; that as the appellant had not, by evidence or otherwise, specified the nature of the complaint or shown a prima facie case that the books and postcards were obscene, an order should be made directing the books and postcards to be restored to the respondents.

The justices were of the opinion that all the respondents' contentions were well founded and they accordingly ordered that the books and postcards should be returned.

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The question for the opinion of the court was whether the justices' determination was correct in law and if not what should be done in those premises.

Robert Hughes for the appellant.
Gerald Draycott for the respondents.

The following cases were cited in argument: *Cox* v. *Stinton* [2]; *Reg.* v. *Truelove*.[3]

LORD GODDARD C.J. This is a case stated by the justices for the Borough of Swindon, who seem to have got into rather a tangle with regard to what is to be shown or done in prosecutions under the Obscene Publications Act, 1857. That Act, as I have said on a previous occasion, in *Cox* v. *Stinton*,[1] is an Act which contains in itself its own particular code. It is an Act designed as a measure of preventive justice; it is to prevent the dissemination of filthy literature, pictures, etc. It is not an Act which in itself contains any penalties, except for the destruction of obscene publications.

The procedure is: first, an information has to be laid by someone, generally the senior officer of police, stating on oath that there are in the justices' jurisdiction some obscene publications which are being sold or distributed. If the justices are satisfied that the complaint which is laid before them constitutes a proper case for action, they issue a warrant, which is, in effect, a search warrant. Armed with that warrant the police officer or other person can go to the premises where he believes these obscene publications are and seize them. He then brings them before the justices, and if the justices, after having looked at these books, decide that they are not obscene, they will not do anything, but if they decide that they may be obscene they then issue a summons.

Here again the issuing of the summons is a procedure of its own, and it calls on the persons summoned to show cause why the publication should not be destroyed. [His Lordship read the relevant part of section 1 of the Obscene Publications Act, 1857, and continued:] The section is perfectly clear. When the return day for the summons arrives, the justices have to be satisfied that the books are obscene. The only way that they can be satisfied of that is by reading them and looking at them. It does not require evidence to satisfy the justices either that they are or are not obscene; the justices must look at them for themselves.

With regard to the postcards, exactly the same position prevails, and it is only confusing the justices to have anything said to them about innuendos. "Innuendo" means a secondary

[2] [1951] 2 K.B. 1021; [1951] 2 T.L.R. 728; [1951] 2 All E.R. 637.

[3] (1880) 5 Q.B.D. 336.

[1] [1951] 2 K.B. 1021.

meaning; a meaning because of something which is known to particular people is an innuendo. If a thing has a secondary meaning I should say, prima facie, that it would not be obscene.

A thing is either obscene or it is not obscene, but the justices should look at it and must look at it.

In the present case the justices, when an application was made for an adjournment, apparently said that they had read and considered the books and were ready to proceed. If they had read and considered the books, I do not know why, when the case came on after the adjournment, they did not give their decision.

If the justices would read the section which I have read just now, they would see exactly what they have to do; they have to be satisfied that the books are obscene. It is not for the prosecution to proceed to read out particular paragraphs unless the justices ask the prosecution to address them or to point out some particular thing. It is for the justices to look at the publications themselves. I do not say that they need read every word of the publications; of course, it may be that the police or other informant would mark certain passages which would show the justices at once that the books were obscene, or they could see whether the books were obscene. At any rate, it is for the justices to look at the books in order to come to their own decision. Then, if they think that the books are obscene, they must order them to be destroyed. They are required to do that, except where it may be necessary to keep them for use in other proceedings. What the Act is obviously contemplating is that the owners of these books could be prosecuted, and there was such a case at the Old Bailey a session or two ago, for publishing obscene literature.[2] These books may have to be kept for the purpose of proof.

The justices took a wrong view of their functions in the present case, and the case must go back to them with an intimation that it is for them to say, having read and looked at the books themselves, whether the books are obscene or not. If they are obscene and if they are satisfied, there seems no question about it but that it is their duty to make an order for their destruction.

HILBERY J. I am of the same opinion. The code, as was pointed out in *Cox* v. *Stinton*[3] under the Act of 1857, is a special code. It is urged before us that that is a criminal proceeding, and the general rule in a criminal proceeding is that the prosecutor who affirms must discharge the burden of proof for that which he affirms, but, as this court pointed out in *Cox* v. *Stinton*,[3] this Act provides a special procedure and makes an exception to the general rule. It is important, I think, to remember that it is for the justices to satisfy themselves that the books or

[2] See *Regina* v. *Reiter* [1954] 2 W.L.R. 638; [1954] 1 All E.R. 741.

[3] [1951] 2 K.B. 1021.

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Hilbery J.

articles complained of are obscene; the books are under the procedure, and when the procedure is adopted under which the complaint is made and brought before the court, once those books are brought before the court the justices have to be satisfied that they are obscene. As my Lord has pointed out, if obviously they are books which could not be considered as obscene the magistrates would not issue a summons. If, prima facie, those books are obscene when they are brought into court, the justices issue a summons, as they did in this case. The Act provides that such summons is to call on the occupier of the house or other place which may have been so entered "by virtue of the said warrant to "appear within seven days before such police stipendiary Magis-"trate or any two Justices in Petty Sessions for the district to "show cause why the articles so seized should not be destroyed."

That plainly, in the particular circumstances, throws the onus on the person who has been the occupier of the premises where the obscene literature is on sale to show cause why those articles which are before the court should not be destroyed.

The fact that the Act goes on to say, ". . . such magistrate "or justices shall be satisfied that such articles or any of them "are of the character stated in the warrant" does not mean that the justices are there and then called upon, in the court at the hearing of that summons, to go through the books. If they have already read them—the books having been brought into the court—and they say as they said here that they have read them and are ready to proceed, as they are the persons to decide on whether they are obscene or not, they have done all that is necessary as the preliminary which has to be observed before the occupier of the premises discharges the burden which is then put upon him, that is to say, to show cause why they should not be destroyed.

I think that the justices have been misled here by this talk about what ought to be proved and shown by the prosecution. What the prosecution had done here was all that it was required to do by the statute. I am satisfied that the order should be as my Lord has said.

DONOVAN J. I entirely agree. Mr. Draycott complains that there was no indication that the justices had read or looked at the books. They did in fact say that they had at the first hearing when the case was adjourned and when Mr. Draycott was not there. He also says that there was no evidence that they had read or looked at the postcards; he might have asked them that.

Appeal allowed.
Case remitted.

Solicitors: *Darley, Cumberland & Co. for Townsends, Swindon; Bulcraig & Davis.*

C. J. E.

[QUEEN'S BENCH DIVISION.]

* BAKER v. JONES AND OTHERS.

[1953 B. No. 2744.]

1954
May 17, 18, 19; *June* 4.

Lynskey J.

Maintenance of Suit—Common interest—Unincorporated association—Libel actions against officers and members of central council—Defendants' costs paid out of association's funds.

Tribunal—Domestic—Control by courts—Unincorporated association—Council empowered to be sole interpreters of rules—Jurisdiction of court—Association of weightlifters. Arbitration—Ouster of jurisdiction of courts.

An unincorporated association recognized as being the authority controlling weightlifting in the United Kingdom, by its rules vested the government of the association in a central council consisting of the officers and a number of members. It empowered the central council to be the sole interpreters of the rules and to act on behalf of the association regarding any matter not dealt with by the rules, the decision of the council to be final in all cases and in all circumstances. Following disagreements between the members, two libel actions were brought against certain officers and members of the central council, the first by a professional coach who the council had refused to appoint as coach to an Olympic weightlifting team, and the second by a member of the association in respect of the publication of an allegedly defamatory article in a magazine and its republication in the association's news-sheet. The central council authorized the payment of two sums of £100 to solicitors out of the association's funds in respect of the defendants' costs in each action, and the sums were duly paid.

In an action by a member of the association against the officers and members of the central council for a declaration that the use of the funds for such a purpose was improper:—

Held, (1) that the provision in the rules giving the central council the sole right to interpret the rules was contrary to public policy and void.

Scott v. *Avery* (1856) 5 H.L.C. 811 and *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175 applied.

Held, (2) that there was no power under the rules for the central council to authorize or the officers to use the funds for the purpose proposed; and further, that even if the rules had so permitted, the use of the funds for such a purpose would be unlawful and would constitute maintenance, since the defendants had no legal common interest in the actions and were therefore intermeddling in litigation in which they had no concern.

Alabaster v. *Harness* [1895] 1 Q.B. 339; 11 T.L.R. 96; *Oram* v. *Hutt* [1914] 1 Ch. 98; 30 T.L.R. 55, and *Alfin* v. *Hewlett* (1902) 18 T.L.R. 664 applied.

ACTION.

The plaintiff, Harry Baker, was a life member of the British Amateur Weightlifters' Association (hereinafter referred to as BAWLA), an unincorporated body recognized as the authority

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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controlling the sport of weightlifting in Great Britain. The defendants W. E. Jones, John Charles Lavender, Frederick Taylor and Edward James Stone were the president, chairman, honorary secretary and honorary treasurer respectively of the association and there were in addition 34 other defendants who were present and past members of the central council of BAWLA. The association itself was not a party to the action.

The "Constitution (General Rules of the Association)" by which the members agreed to be bound provided, inter alia: Rule 2. "The object of the BAWLA is as follows: "To promote weightlifting as a sport and weight-training as a "means of physical improvement. In furtherance of this object "the BAWLA to hold displays; British, county and other "championship meetings wherever possible and practicable; "grant diplomas for world, British, county and other 'special "'records' as may, from time to time, be determined; to "encourage the practice of weight-training through the provision "of qualified instructors." Rule 34: "The government of "BAWLA shall be vested in a Central Council which shall "consist of the officers of the Association and sixteen other "members. . . ."

By rule 40 (vi) the council were empowered "to make such "regulations for putting into effect the rules of the BAWLA as "they may deem desirable from time to time" and by sub-rule (vii) "to be the sole interpreters of the rules of the BAWLA "and to act on behalf of the BAWLA regarding any matter not "dealt with by the rules"; and by sub-rule (viii), "The decision "of the Central Council, in all cases and in all circumstances, "shall be final." Rule 43 provided that cheques should be signed by the honorary secretary and honorary treasurer, and rule 44 provided that no rule should be amended, added to or cancelled except at an extraordinary General Meeting called for that purpose or at an Annual General Meeting.

During or before 1951, differences of opinion arose between one of the defendants, Percy Frederick Cranmer, a life member and president of the association from 1926–50, and the defendants Lavender and Taylor, with regard to the appointment of one William Pullum as professional coach for the British Olympic Weightlifting team at Helsinki in 1952, Cranmer being anxious that Pullum should be appointed and Lavender and Taylor preferring the claims of one Al Murray who was in fact appointed by the central council. After the appointment had been made, as a result of views expressed by Pullum to Cranmer, Cranmer submitted a memorandum to the central council at its meeting on December 15, 1951, as a result of which it was resolved "That "the chairman be authorized to seek legal advice as to any neces-"sary action to protect the interests of the association and its "honorary officers in connexion with the matter." No action was taken following the resolution.

On January 1, 1952, Cranmer resigned the presidency of the association and his membership of the central council, but retained his membership of the association. Between December 28, 1951, and March 31, 1952, seven other members of the central council also defendants in the action resigned, being replaced by others of the defendants named in the proceedings. On March 19, 1952, Pullum started proceedings against the honorary secretary, Taylor, and two other members of the central council, the defendants Hartnell and Watkins, claiming an injunction and damages for libel, slander and malicious conspiracy to injure him in his position and business. A month later Cranmer commenced libel proceedings against the defendant Lavender, who had become chairman of the central council, Stone, the honorary treasurer, and Barrs, the editor of a magazine "Vigour" in respect of an article written by Lavender published in the March issue of "Vigour" and republished in the BAWLA news-sheet. There was no resolution of the central council authorizing publication of this article, although Stone was authorized to issue a news-sheet to various societies and others affiliated to or members of BAWLA. On April 28, 1952, the solicitors acting for the defendants in both actions requested Taylor to send £100 on account of the defendants' costs in the Pullum action and also requested Lavender to send £100 in respect of the defendants' costs in the Cranmer action. On May 1, 1952, a cheque for £100 drawn on the BAWLA account was sent to the solicitors, signed by Stone and countersigned by Taylor who was informed by Stone that the cheque was sent "as authorized by Mr. Lavender pursuant to the "decision of the central council at their meeting on December 15, "1951." The cheque was duly paid out of the association's account. In the meantime, Lavender and Stone had sent their own cheques for £50 each in respect of their own costs as defendants in the Cranmer action. They were subsequently reimbursed by cheques drawn on the BAWLA account after a meeting of the central council on May 17, 1952, at which it was resolved that the association should pay their legal charges in the action. No mention was made in the central council's report to the Annual General Meeting of BAWLA held on March 21, 1953, of either action or any payment in respect thereof or any liability for the defendants' costs thereof, the only reference to the matter being an entry in the financial statement entitled "Deposit on account "of Legal Costs."

On June 10, 1953, the plaintiff issued a writ against the defendants, claiming a declaration that they were not entitled to spend the money of the association by paying it to solicitors in respect of the legal costs relating to the two actions; that the payment of £200 referred to in the balance sheet as a deposit on account of legal costs was improper and illegal and contrary to the rules of the association and that a resolution, if any, purporting to authorize such payment was ultra vires and illegal. He also claimed an injunction.

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At a central council meeting on September 12, in an attempt to safeguard the defendants' position and defeat the plaintiff's claim, a series of resolutions were passed and recorded to the effect that, in the view of the central council, it was in the interests of the promotion of weight-lifting that the defendants Taylor, Hartnell and Watkins (the defendants in the Pullum action) and the defendants Lavender and Stone (the defendants in the Cranmer action) members and officials of the central council, should be supported as to their costs as defendants in those actions; that neither of such matters were dealt with by any of the general rules of the BAWLA; that the payments of £100 in respect of the defendants' costs in each action were approved and confirmed by the central council so far as they had power to approve and confirm them; and that the central council desired to make further similar payments as and when it might desire or consider it necessary so to do and intended itself and authorized all its officials to take the necessary steps to justify the payments made and to establish the right and power of the central council to make such similar payments thereafter. On September 16, pursuant to leave of the court, the plaintiff added as defendants all the present members of the central council and those who had resigned between December 28, 1951, and January 11, 1952.

The plaintiff contended that the payments made by the defendants in respect of the legal costs of the two actions were improper and illegal as constituting the common law misdemeanor and tort of maintenance; that it was contrary to the rules of the association and an improper use of the funds by the defendants.

The defendants Jones, Lavender, Taylor, Stone and fourteen other defendants denied (in the first defence) that the payments could or did constitute the tort or crime of maintenance, alleging that they had been made by the central council for the benefit of its servants or officials or agents who were persons for whom the council was liable. They also relied on the terms of rules 34 and 40 of the constitution and the decisions of the central council made on December 15, 1951, May 17 and September 12, 1953, and contended that the payments were properly made. They counterclaimed for a declaration that the central council had always been and was entitled to spend the money to pay the legal costs of the defendants in the actions.

The defendant Cranmer and seven other defendants admitted (in the second defence) that the payments were improper and illegal and contrary to the rules as alleged by the plaintiff, but expressly alleged that they neither singularly nor collectively authorized the payments and denied responsibility for the matters alleged in the statement of claim denying that they were members of the central council at the material times.

Roy Wilson Q.C. and *John Platts-Mills* for the plaintiff.

John Hobson for Jones, Lavender, Taylor, Stone and fourteen other defendants.

W. R. Rees-Davies for Cranmer and the remaining defendants.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Breay* v. *Royal British Nurses Association* [1]; *Cyclists' Touring Club* v. *Hopkinson* [2]; *Pickering* v. *Stephenson* [3]; *London Association for Protection of Trade* v. *Greenland.* [4]

Cur. adv. vult.

June 4. LYNSKEY J. stated the facts and continued: The first question which I have to consider is whether the members of the central council of the association are entitled to use or authorize the use of the association's funds in paying the legal costs of some of its members in defending proceedings for tort brought against them in their individual capacities.

The plaintiff says that the members of the central council are not so authorized because the rules do not authorize it. The defendants, on the other hand, contend that not only do the rules authorize them so to use the association's funds for this purpose, but also contend that their decisions cannot be challenged in the courts. The defendants rely particularly on rules 34 and 40 (vii) and (viii). Rule 34 vests the government of BAWLA in the central council. Rule 40 sets out what those powers are. By sub-rule (vii) they are empowered "To be the "sole interpreters of the Rules of BAWLA and to act on "behalf of BAWLA regarding any matters not dealt with by "the rules." Sub-rule (viii) provides: "The decision of the "Central Council, in all cases and in all circumstances, shall "be final." The defendants say that the rules contain no provisions as to how the funds of the association are to be applied and that the central council are the sole interpreters of the rules, and that they have interpreted the rules as authorizing them to use the association's funds in payment of their members' legal costs and that their decision must be accepted as final. The defendant's contention, no doubt, would be right if their rules are valid and binding on the plaintiff, but I have to consider whether the rule which makes the central council the sole interpreters of the rules and their decision final in all cases is valid and binding on the plaintiff.

BAWLA is an unincorporated association. It has no legal entity. The relationship between its members is contractual. That contract is contained in, or to be implied from, the rules. The courts must consider such a contract as they would consider

[1] [1897] 2 Ch. 272; 13 T.L.R. 467.
[2] [1910] 1 Ch. 179; 26 T.L.R. 117.
[3] (1872) L.R. 14 Eq. 322.
[4] [1916] 2 A.C. 15; 32 T.L.R. 281.

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any other contract. Although parties to a contract may, in general, make any contract they like, there are certain limitations imposed by public policy, and one of those limitations may be that the parties cannot, by contract, oust the ordinary courts from their jurisdiction (*Scott* v. *Avery*).[1] The parties can, of course, make a tribunal or council the final arbiter on questions of fact. They can leave questions of law to the decision of a tribunal, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. As Denning L.J. said in *Lee* v. *Showmen's Guild of Great Britain*[2]: "If parties should seek, by agreement, to take the law out of "the hands of the courts and put it into the hands of a private "tribunal, without any recourse at all to the courts in case of "error of law, then the agreement is to that extent contrary to "public policy and void." With this statement of the law I respectfully agree. The interpretation of the rules is a question of law which the courts will examine. In my view, therefore, the provision in the BAWLA rules, making the central council the sole interpreter of the rules and their decision in all cases final, is contrary to public policy and void.

It then becomes necessary for me to consider whether the central council's interpretation of the rules is correct in law. The rules contain no express power authorizing the use of the association's funds in paying the costs of its individual members. Sub-rule (vii) of rule 40 in its second limb does authorize the central council to act on behalf of BAWLA regarding any matters not dealt with by the rules. Although this rule, by its terms, gives the central council very wide powers, it seems to me that it must be read in conjunction with rule 2 of the association's rules which defines the association's objects. The central council cannot use the association's funds for purposes not within the objects.

The defendants contend that it was and is in the interests of the promotion of weight-lifting as a sport, and reasonably incidental thereto, that the costs of the defendants in the Pullum action and the Cranmer action should be paid and, therefore, within the objects of the association. The argument is that all the defendants in these two actions are sued because of what they are alleged to have done or said whilst officers or central councillors of the association and their costs should be paid, as it is in the interests of the sport that officials and members of the association should speak their opinions freely without fear of having to pay their own costs if they are sued. In my view this argument is unsound and one cannot construe rule 2 as making it one of the objects of the association, or a purpose reasonably incidental thereto, that its funds should be applied in paying the personal costs of some of its members in defending

[1] (1856) 5 H.L.C. 811.

[2] [1952] 2 Q.B. 329, 342; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

proceedings brought against them in their personal capacity. The association, being an unincorporated body, could not be liable for the tortious acts either of its officials or council members. The members of the association, individually, would not be liable for such tortious acts, except in so far as they had individually authorized such acts.

There was, in my opinion, no power under the rules for the central council to authorize, or the defendants Taylor and Stone to use, the funds of the association in making payment on account of the costs of the defendants Taylor, Hartnell and Watkins in the Pullum action, or the defendants Lavender and Stone in the Cranmer action, or to pledge the association's funds for further costs to be incurred by these defendants and the defendant Barrs.

This is sufficient to dispose of this action, but the plaintiff takes a further point that, even if the rules did authorize these payments, such payments are unlawful as amounting in law to the crime or civil wrong of maintenance. This question has been argued fully before me and it may be desirable that I should express my view upon it.

Maintenance in earlier days was a far-reaching and important branch both of civil and criminal law. The common law does not approve of the intervention of any man in the litigation of another with which he had no lawful concern, whether that litigation is well founded or not. In these days, however, of insurance policies giving an indemnity against both damages and costs to wrongdoers, trade unions whose rules provide for paying the legal costs of their members, and the Legal Aid Acts, maintenance is not now regarded with the same repugnance as it was by the old common law. The offence and tort of maintenance, however, still exist, and the common law rules, although much modified and, as some say, almost atrophied, still must be applied.

If an unincorporated body chooses to finance an action in tort in which one of its officials or even one of its servants is concerned, in which it has not a common interest, that may amount to the crime or tort of maintenance, and the court will restrain the members or committee of the unincorporated body from using its funds for that purpose and may compel them, if the funds have been used or received for that purpose, to replace the funds. (*Oram* v. *Hutt*,[3] and *Alfin* v. *Hewlett*.[4])

It was suggested in the case before me that the defendants had a common interest with the defendants to the Pullum and Cranmer actions in the result of those actions. They clearly had an interest in the pleas raised in those actions, but that is not sufficient. The law, as I understand it, requires that there should be a legal interest; that is, the judgment in the action itself must affect the rights of the persons encouraging or financing the

[3] [1914] 1 Ch. 98; 30 T.L.R. 55. [4] (1902) 18 T.L.R. 664.

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litigation. (*Alabaster* v. *Harness*,[5] *Alfin* v. *Hewlett*,[6] and *Oram* v. *Hutt*.[7]) In the present case I am satisfied that there was no such legal interest.

It was further contended, on behalf of the defendants, that it would not have been open to Pullum or Cranmer to bring an action for maintenance against the defendants as, until these actions are decided, the plaintiffs in these actions could not prove that they had suffered any damage by the defendants' intermeddling. If both Pullum and Cranmer failed in their proceedings they would be unable to prove that the defendants' intermeddling had caused them any damage, and proof of such damage is a necessary ingredient in an action for maintenance. (*Neville* v. *London Express Newspaper Ld.*[8] and *Wiggins* v. *Lavy*.[9]) This, no doubt, is correct so far as proceedings by Pullum and Cranmer for damages are concerned, but so far as the defendants are concerned they are intermeddling in litigation in which they have no concern. This is unlawful and will be restrained by injunction at least upon the application of a member of an unincorporated society whose funds are being used for this unlawful purpose. (*Oram* v. *Hutt*,[10] and *Alfin* v. *Hewlett*.[11])

In the result, in my view, even if the rules had permitted the application of the association's funds, for the purpose for which it is alleged they have been used or were intended to be used, the use for such a purpose is unlawful as being the tort or crime of maintenance.

There is a further question which I have to consider, and that is how far the defendants who resigned from the council before March 31, 1952, are liable, if at all, for what I have decided is a misapplication of the society's funds. There was no misapplication of these funds before April 30, 1952. In the affidavit filed on behalf of the original four defendants to this action it was alleged that the cheque for £100 dated April 30, 1952, was drawn and paid to their solicitors on the authority of the resolution of the council meetings of December 15, 1952, and it was for this reason that Cranmer and the other defendants who resigned on or before March 31, 1952, were joined as parties to these proceedings. It is therefore necessary for me to consider whether the resolution of December 15, 1951, can be construed as authorizing the drawing and payment of this cheque for £100 to the solicitors for the costs of the defendants in the Pullum action.

The resolution reads: "The chairman be authorized to seek "legal advice as to necessary action to protect the interests of the "association and the honorary officers in connexion with the "matter in question."

[5] [1895] 1 Q.B. 339; 11 T.L.R. 96.
[6] 18 T.L.R. 664.
[7] [1914] 1 Ch. 98.
[8] [1919] A.C. 368; 35 T.L.R. 167.
[9] (1928) 44 T.L.R. 721.
[10] [1914] 1 Ch. 98.
[11] 18 T.L.R. 664.

At that time no proceedings had been commenced by Pullum. In my view, giving the words their widest possible meaning, the resolution did no more than authorize the chairman to seek advice as to any necessary action. Before the chairman could act on that advice he would require further authorization from the council. It is quite impossible to construe that resolution as an authority to the treasurer and secretary to apply the association's funds in paying the costs of the defendants Taylor, Hartnell and Watkins, in the action brought against them personally by Mr. Pullum. The result is that Cranmer and the defendants who resigned on or before March 31, 1952, cannot be held responsible for what was done on and after April 30, 1952.

Declaration (1) *that the payments out of the association's funds were not authorized by the rules of the association and were unlawful;* (2) *that the resolutions of the central council purporting to authorize or confirm these payments were ultra vires and void. Order that the sums paid out be repaid to the funds of the association. Plaintiff to recover his costs from defendants named in first defence. Defendants named in second defence to recover their costs from other defendants. Costs to include costs of counterclaim.*

Solicitors: *Edward Davis, Nelson & Co.; Waterhouse & Co.; G. Howard & Co.*

[COURT OF APPEAL.]

* BATH AND ANOTHER *v.* BRITISH TRANSPORT COMMISSION.

C. A.
1954
May 31; *June* 1, 2.
Somervell, Birkett and Romer L.JJ.

[1953 B. No. 3260.]

Factory—Floor—Opening—Dry dock—Whether dock an "opening" in a floor—Necessity to fence—Working ledge of dry dock unfenced—Workman returning to work—Fall onto ledge and into dock—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (3), 26 (1).
Factory—Safe means of access. Negligence—Safe system of work—Fencing. Causation.

A dry dock is not an "opening" in a floor within section 25 (3) of the Factories Act, 1937.

The deceased was employed by the defendants in work on the side of a dry dock on a ledge or "altar" some 2 feet 2 inches wide which

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

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was unfenced; and the nature of his work made it obligatory for him to work with his back to the drop. While returning to his place of work, instead of using a concrete bridge a few yards away from the altar, he stepped over an open culvert, fell on to the edge of the altar and thence to the bottom of the dock, some 40 feet below, and was killed:—

Held, (1) that the dock itself was not an "opening" in a floor within section 25 (3) of the Factories Act, 1937, and that, accordingly, there was no statutory duty to provide fencing;

(2) that the concrete bridge provided a safe means of access and that, accordingly, there was no breach of section 26 (1) of the Act;

(3) that the defendants were in breach of their duty at common law in that they ought to have foreseen the possible danger to a workman obliged to carry out his work on this narrow platform with his back to the drop, and had failed to provide adequate fencing to meet this contingency.

Decision of Gorman J. affirmed on one ground.

Appeal from Gorman J. sitting at Winchester Assizes on March 10, 1954.

The deceased, who was employed at Southampton docks by the defendants, was engaged with another man in reconcreting the sides of a dry dock. This work involved an operation known as "shuttering," which is the placing of a timber support parallel with the side of the dock, and thereupon pouring liquid concrete into the resulting cavity. Work was carried out on a ledge or "altar," some 2 feet 6 inches wide reduced by about 4 inches by reason of the timber framework. The altar was unfenced and the deceased worked on it with his back to the drop.

At the time of the accident the deceased was returning to his place of work. Instead of proceeding by way of a concrete bridge a few yards away from the ledge, he stepped over an open culvert, stumbled, fell on to the altar and thence over its edge to the bottom of the dock, some 40 feet below, and was killed.

His widow, and another administrator of his estate, brought an action for damages under the Fatal Accidents Acts, 1846 to 1908, against the defendants, in which she alleged breaches of section 25 (3)[1] and section 26 (1) and (2) of the Factories Act, 1937, and negligence at common law.

Gorman J. found for the plaintiff under both heads of claim and awarded £4,600 damages (reduced on appeal to £3,600).

The defendants appealed.

R. Marven Everett Q.C. and *Mark Romer* for the defendants.

F. W. Beney Q.C. and *Humfrey Edmunds* for the plaintiff.

[1] Factories Act, 1937, s. 25: "(3) "All openings in floors shall be se- "curely fenced, except in so far as "the nature of the work renders such "fencing impracticable."

S. 26: "(1) There shall, so far as "is reasonably practicable, be pro- "vided and maintained safe means of "access to every place at which any "person has at any time to work."

The following cases were cited in argument: *Taylor* v. *R. & H. Green and Silley Weir Ld.*[2]; *Street* v. *British Electricity Authority*[3]; and *Adsett* v. *K. and L. Steelfounders and Engineers Ld.*[4]

SOMERVELL L.J. stated the facts and the findings of the trial judge and continued: The trial judge decided that all those claims succeeded, that there was a breach of the Factories Act, or at any rate of section 25 (3) and section 26 (1), and also negligence at common law. With respect, I have come to the conclusion that there was not a breach established here of section 25 (3) of the Act. The general nature of a dry dock is familiar. It is a large excavation with built-up sides of concrete into which a ship can float and the water is then pumped out and work can be done on the ship. It seems to me quite impossible to regard the excavation which constitutes the dry dock as an opening in the floor. I do not think that I can add much on that point. One is sometimes tempted to construe perfectly familiar words, but if they are, as these words are, perfectly familiar, all one can do is to state whether or not one regards them as apt to cover or describe the circumstances in question in any particular case. I cannot myself regard this dry dock into which this man fell as an opening in a floor.

With regard to the second point, whether a safe means of access was provided within section 26 (1) there is, I think, a certain difficulty in discovering what the judge had in mind when he considered that issue. If it had been suggested that this open culvert constituted a means of access which was unsafe it could be pointed out with some force by the defendants that there was a few yards further along from the place where this man was working a concrete bridge which a man could cross without having to step over the culvert. On the other hand, if the judge had in mind the necessity of protective fencing, which I will consider in connexion with the question of negligence at common law, another question arises which I will determine later. With regard to section 26 (2) which concerns the provision of secure footholds and hand-holds, in my view it has not been established that this place came within the ambit of that subsection. I think that there may have been both secure footholds and hand-holds, and even if there were not it may be that a claim under this head would fail on causation.

But I have come to the conclusion that the judge was right in holding that there was here a failure to take due care at common law. I think that the failure was this, and it does raise the question of the application of section 26 (1) and also the question of causation. This first step on which the men were working, from which there was a steep descent with other steps, the first drop

[2] (1950) 84 Ll.L.Rep. 570, 573.
[3] [1952] 2 Q.B. 399, 411; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[4] [1953] 1 W.L.R. 773, 778; [1953] 2 All E.R. 320.

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being about 6 feet down into the dry dock, was only 2 feet 6 inches in width. That width was lessened to some extent, about 4 inches, by the shuttering which the men were putting up. It was therefore a narrow platform above a big drop and the men would be working with their backs to the drop. The building regulations do not apply, but it is very like the position of men who work on scaffolding high up on a building. Although the work had been going on for some three years without mishap, I think that it was a position in which, if someone had directed his mind to the possible danger of these men working on this very narrow platform with their backs to the drop, some protection should have been afforded behind them. That was the view which the judge took, and though it may be on the borderline I am not satisfied that it was wrong.

That, of course, raises the question of causation. This man was not actually working at the time. He was going to his place of work, but it is plain from the evidence that he was, as one would expect, getting down on to the step at the place where the shuttering was and where there ought in my opinion to have been a protecting fence. It was not, I think, really disputed that if there had been such a fence there it could not have been said that it would not have saved the fall which caused the man's death. It is possible, of course, that he might have fallen over the fence, but the probabilities are, and one has to act on probabilities, that if there had been a fence there it would have saved his life. I think, therefore, that if there should be protection at a place at which a man works and he falls over because there was no protection it is not an answer to say: "At the time when you fell you were getting "to the place and were not actually working at it." On the other hand, I do not think that the fact that an argument on causation does not succeed means that one should apply section 26 (1) and hold that because the deceased was injured when he was approaching his place of work that therefore there was a breach of that subsection. It is a point in a narrow compass and it may not be of great importance, but I do not think that the fact that the injury occurred in the way I have described entitled the plaintiff to maintain that there was a failure to provide safe means of access. In my judgment the only failure established in this case was the failure at common law which applies to this particular type of shuttering work which was being done on the upper tier. I am not laying down any general principle applicable to the ordinary work carried on in dry docks. For these reasons in my judgment the appeal should be dismissed.

BIRKETT L.J. I agree. In this case the widow has received an award of damages at the hands of a judge who listened to the evidence and who found that the defendants were responsible on two heads, firstly, the breach of statutory duty to which my Lord has already referred, and, secondly, at common law. On

the point of statutory duty I do not desire to add anything to what Somervell L.J. has already said, as I agree with the conclusion which he has announced on that matter.

I would like to add a word about the liability at common law. The judge found that the defendants were liable at common law, and it is perfectly plain from the citations from the authorities which he kept well in mind, and from his clear exposition of the facts, that it is impossible to say that on this part of the case he did not direct himself absolutely properly. I think it is conceded that upon this point of common law liability the judge did direct himself in the proper way. It is not too clear from the evidence exactly how this particular accident occurred, but it is clear enough I think to show that the particular place at which this man was working upon this altar was some 2 feet 6 inches wide on the side of the dock. It is equally plain, I think, that the workman was working facing the slatting, as the judge termed it, and no doubt as the work proceeded he concentrated upon that work with his back to the dry dock. It is a remarkable thing that where one sitting in the quietude of this court might say that that was a position of the gravest possible danger, the workmen employed seem to think nothing of it. It was said here with some force that for three years at least this kind of work had been going on. The men have from time to time shifted round the side of the dock erecting the slatting, and nobody had ever suggested that any precaution of any kind should be taken.

Mr. Marven Everett quite properly relied upon the evidence of Mr. Sinclair, the assistant of works, but it was perfectly plain that there was no word of evidence to the effect that the manifest danger here was such that something should have been done. It is perfectly plain from the evidence that if a simple protection had been erected in the way of a rail, such as was in fact erected after the accident, the man would have been quite safe. Mr. Sinclair was asked: "(Q.) You have heard the description of this "accident as to how this man fell? (A.) Yes. (Q.) That fencing" —that is, the temporary fencing which is now erected—"would "obviously be sufficient to protect him in this case? (A.) I would "not say for certain." Then they discussed the question whether he might have fallen through. "(Q.) Would you regard a man "fenced in that way by the top and middle rail as being "humanly speaking safe? (A.) Yes. (Q.) A man without that "fencing and with his mind concentrated on his work is not safe, "is he? (A.) It would depend on the man." Then there was some discussion whether a man might so concentrate on his work that he would forget that there was no protection.

I should have thought that it was an obvious risk to have a man working upon a ledge of that width with a possibility of a fall of this nature. The strange thing is that nothing was done, and indeed, as I understand it, after this accident the reason why the protective fencing was erected was because of the activity of the union who, with the knowledge of this disaster, stipulated

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that their men should not work unless they were protected from danger, and in consequence this simple rail was erected. I think the evidence is fairly plain that had that rail been in existence at the time this man met his death his life might have been saved. In those circumstances I think that the judge had to address his mind to the question, bearing all the circumstances in mind, what was the kind of risk to which this workman was subjected. It is perfectly plain that he certainly had that matter in mind. In the case of a man upon that ledge working in that position with his face towards the work on which he was concentrating and his back to the danger of which I have spoken, there was undoubtedly a risk.

The next question, therefore, is what would a reasonable employer, contemplating that situation, do: what precautions ought he to take to lessen that risk and to make the position of the workman more secure? The answer, of course, based on the facts of the three years previous experience was that there was no reason for it. Mr. Sinclair did not think it was necessary and no workman had called for it. I think that the judge was entitled to say, looking at all the circumstances, that a reasonable employer would have taken some precaution to avoid that risk which was in the circumstances quite manifest. A slip or momentary forgetfulness might cause a man to fall with the most dreadful consequences. I think for my own part that this case ought to be considered in this light: here was a man who was at the moment getting down on to this step to do this work, and as I understand from the evidence he had actually alighted upon his feet on that place but was not able to maintain his balance. In all the circumstances I think, therefore, that the judge, having properly directed himself and having given his mind to the exact facts and heard the evidence, came to the conclusion on those facts, and applying the law that the defendants had been guilty of negligence at common law. I think that unless there was something which ought to compel this court to disturb that judgment it ought to remain where it is. I would, therefore, dismiss the appeal.

Romer L.J. I agree. I think that there are no sufficient grounds for disturbing the judge's findings on the question of negligence at common law, and I have nothing to add to what my brothers have said on that aspect of the case.

With regard to section 25 (3) of the Factories Act, 1937, I cannot for my part share the judge's view that the dry dock itself, which was in question here, was an opening in a floor within that provision. The section is manifestly directed to fencing openings in the floors of factories. By reason of section 151 of the Act, which is the definition section, dry docks and their precincts are factories and are, therefore, brought prima facie within section 25, and, accordingly, if there was a cavity in the "precincts," whatever that word may properly mean in relation to a dry dock, it

would be within section 25 and so also, I suppose, if an opening were to be made for some purpose or other in the bottom of the dock. But if one reads the relevant definition in section 151 into section 25 one would find as a result that it requires that "all openings in floors of dry docks including the precincts thereof "shall be securely fenced." As a mere matter of language it seems to me to be an untenable contention that dry docks themselves are within the meaning of the word "openings." That interpretation would result in applying to the main object itself a requirement which is referable only to one of its constituent parts. I think, therefore, that it is plain that a dry dock itself is not an opening in a floor and subject to the requirements of fencing imposed by section 25 (3).

As regards section 26 which concerns safe means of access, I do not think myself that subsection (2) really has any bearing on this case or the circumstances of the accident. As to subsection (1), I agree with my Lord, and I am not really quite sure what precisely the judge had in mind when he found that the defendants were in breach of that statutory obligation. I think on the whole that he was impressed by the presence of the culvert close to the edge of the dock, and by the evidence that this unfortunate man walked or jumped over it, and having done so, stumbled and went over the side. On the assumption that safe means of access from that direction had to be provided, I think he was holding that the presence of the culvert was a breach of the obligation imposed by section 26 (1). But if that be so, it seems to be a sufficient answer to the suggested breach that as is shown in a photograph, a perfectly safe means of access was in fact provided for anybody approaching the dock from that direction by the strip of concrete which the photograph shows at the end of the culvert. On that view it seems to me that it is not possible to hold that the defendants were in breach of section 26 (1), and I cannot agree with the judge that they were. Having regard, however, to the judge's finding of common law negligence which we ought, in my opinion, to uphold on the facts, this appeal must fail.

Appeal dismissed, save that the award of £4,600 damages was reduced to £3,600.

Solicitors: *M. H. B. Gilmour; Arnold Carter & Co.*

[PROBATE, ETC., DIVISION.]

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Mar. 2;
Apr. 27, 28.

Lord Merriman P., and Sachs J.

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Husband and Wife—Justices—Clerk—Interventions by clerk—Notes of evidence based upon proof—Impropriety.

Husband and Wife—Justices—Appeal to Divisional Court—Costs—Impropriety of clerk—No order against justices or clerk—Representation by amicus curiae. Legal aid—Costs—Solicitor—Attendance of country solicitor. Solicitor.

Where both parties are represented at the hearing a justices' clerk is no more entitled to step into the arena and conduct a litigant's case for him than is a magistrate. It is important in the interests of justice that the clerk should not give even the appearance of seeking himself to conduct the case of either party, or to limit the way in which that case is conducted, although he has a duty to assist the court as to what is and is not relevant.

It was alleged, inter alia, on a husband's appeal from a decision of justices that there had been interference by the clerk to the justices with the cross-examination of the wife and with the conduct of the examination-in-chief of the husband. There was also undisputed evidence that the justices' clerk had before him at the hearing a copy of the wife's proof which he had used as the basis of his notes of her evidence-in-chief:—

Held, that since the interference alleged was proved, and there had been a substantial obstruction by the clerk in the proceedings, there must be a re-hearing.

Per curiam: It is undesirable that a proof of evidence should be before a justices' clerk at the hearing of a case, and in no circumstances should such a proof be used as the basis of his notes of evidence. A bound notebook should normally be used for such notes although there cannot be a rule of universal application.

APPEAL from an order of Newcastle and Ogmore justices sitting at Bridgend, adjudging a husband to have deserted his wife.

The following statement of facts is summarized from the judgment of Sachs J: The marriage took place in December, 1950, one child, Christine, was born in 1951, and the parties finally parted on March 1, 1952. There had already been an earlier parting of some duration. It was common ground that the occasion of the parting in March, 1952, was a quarrel which resulted from the wife having been out at a dance on the previous night, where she removed her wedding ring, and that on this occasion the husband's brother, at whose house the husband and wife were staying, ordered the wife out of the house. The husband acquiesced in the order, and thereafter did not want to have anything more to do with the wife. Before this parting there had been a number of quarrels, due to complaints by the husband that the wife returned home late at night. It also appeared to have been common ground at the trial that at any rate on two occasions the wife had been away for one or two nights from the place at which she was living, without having given any particular explanation of her absences.

A second child was born to the wife, on October 24, 1952, and there was a conflict of evidence as to when complete sexual intercourse last took place between the husband and wife, and in particular whether that intercourse was on a date or dates likely to have resulted in the birth of a child. The husband sought at the trial to establish that his wife had committed adultery, and that even if he were unable to establish that adultery he had reasonable ground for believing that it had taken place, in view of the general conduct of the wife during the marriage. Alternatively, he alleged that the general conduct of his wife had been such as to justify him in not having anything more to do with her.

On November 5, 1953, the justices held that the husband had been guilty of desertion and made an order accordingly. They found that there had been no evidence given to justify the allegations of the husband that the general conduct of the wife since the marriage had been sufficient to absolve him from the charge of desertion.

The substantial ground of the appeal was an allegation that the clerk had so interfered at the hearing before the justices that the trial as a whole had been unsatisfactory, that justice did not appear to have been done, and that in particular all the appropriate evidence which had been available on behalf of the husband did not, in fact, come before the justices. Various matters were put forward in support of this allegation while at the same time no suggestion was made against the bona fides of either the justices or the clerk, nor was any suggestion made that they had acted at any stage with an improper motive. The main points put forward were (1) that there had been interference by the clerk to the justices with the cross-examination of the wife; (2) that there had been interference by the clerk with the conduct of the examination-in-chief of the husband; and (3) that the announcement of the reasons, before the court's decision, was made by the clerk, as opposed to being made by the chairman of the justices. (A conflict of evidence upon the third point was not in the circumstances finally resolved by the court.)

The husband, also complained that the wife's solicitor, just before the hearing of the case, had handed to the clerk a copy of the wife's proof of evidence, that that proof had been used by the clerk as the basis of his notes of her evidence-in-chief, and that the clerk had taken no notes at all of the cross-examination of the husband.

When the appeal first came on for hearing on March 2, 1954, affidavits by the husband's solicitor, the clerk to the justices, one of the justices who sat at the hearing, the wife's solicitor, and by a solicitor unconnected with the case who had been present during a considerable portion of the trial, were put in evidence. The appeal was adjourned to give the justices and their clerk an opportunity of reply and for the amplification of matters arising in the affidavits. It was expressly stated by the

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court that an opportunity was to be given to all concerned to put on record such further material as might be needed, in order that the court might be fully seized of the facts, so as to come to a decision. A number of further affidavits were then filed, and the court was assured that the justices and the clerk had had every opportunity of dealing with the matters raised in the affidavits filed both before and after the initial hearing of the appeal.

The evidence on the question of interference with the course of the proceedings given by the husband's solicitor, who was himself clerk to a neighbouring bench of justices, was to the effect that at a relatively early stage in the cross-examination of the wife, after some twelve or so questions, the clerk had commenced to object to certain questions which he (the husband's solicitor) was putting to the wife. These questions, in the main, related to the conduct of the wife. The husband's solicitor, further stated that "by his frequent interventions and directions "the clerk to the justices was allowed substantially to control "the conduct of the proceedings." He averred that the clerk had intervened without reference to or discussion with any of the justices. It was further stated that the interventions of the clerk were such that he, the husband's solicitor, was prevented in practice from dealing in cross-examination of the wife with a number of relevant facts, and, in particular, with facts relevant to the general conduct of the wife, which were alleged to have induced in the husband a reasonable belief that the wife had committed adultery. These statements by the husband's solicitor as to interference with his cross-examination were to some extent supported by the affidavit of the independent solicitor who stated that after argument between the husband's solicitor and the clerk to the justices the former had desisted from questions which he had been asking. The clerk denied that he had restricted the husband's solicitor's cross-examination, but set out a list of the suggestions which he, the clerk, had made to the husband's solicitor as to the questions which should be put in cross-examination.

As to the second allegation, the husband's examination-in-chief followed an unsuccessful submission of no case. His solicitor stated: "At the commencement of my examination-in-"chief of the husband the clerk to the justices again intervened "(without prior reference to or discussion with the justices) to "say that the only thing that concerned the court was this "question of adultery prior to the parting on March 1, 1952. He "then detailed the five or six points which he wished to be put "to the husband and indicated that they were the only questions "which need be put . . . , I prefaced the first question to the "husband by saying: 'Since I am prohibited from putting any-"'thing further to you, will you now answer these questions.' "The clerk to the justices did not object or make any comment "on my use of the word 'prohibited' in that context. I then

"put to the husband the questions which had been enumerated "by the clerk to the justices in the order and in the form which "he had indicated. During the course of such questions I "referred to the fact that I was unfortunately compelled to put "leading questions to the husband. The solicitor for the wife "then stated that he was not going to object since they were "helping his case in that form." The independent solicitor, referring to what had taken place, averred:—"At the commence-"ment of the examination-in-chief of the appellant I recall the "clerk to the justices enumerating five points or questions that "should be put to the appellant. [The solicitor for the husband] "then put to the appellant the five questions preceded by a "statement to the effect that 'since I appear to be prohibited "'from putting anything further to you will you now answer "'these five questions'." The examination-in-chief of the husband, apart from five main questions, consisted merely of some half-dozen questions ancillary to the five.

The wife's solicitor stated in his affidavit: "After the sub-"mission by the appellant's solicitor that he had no case to "answer and the justices' ruling that there was a case to answer "the clerk to the justices indicated that there were certain "questions which he enumerated that the appellant was required "to answer. To the best of my recollection the clerk put these "questions to the appellant's solicitor who in turn put them to "the appellant. The appellant's answers to these questions are "set out in his evidence-in-chief in the notes of evidence filed, "and are the first four sentences in his evidence."

The court accepted evidence that a proof of the wife had been physically used at the hearing as the basis upon which the clerk took the notes of the wife's examination-in-chief.

Geoffrey Howe for the husband appellant.
Philip Owen for the wife respondent.
Tasker Watkins for the justices.

LORD MERRIMAN P. I will ask Sachs J. to give the first judgment.

SACHS J., stating the facts, referred to the suggestions made to the husband's solicitor as to questions for cross-examination, said that it indicated the way in which the clerk had been attempting to govern in detail the cross-examination of the wife, that it was likely that an advocate would be embarrassed by the interventions, and that, in the result, though a certain amount of cross-examination about the wife's conduct appeared upon the notes of the evidence taken by the clerk, it nevertheless seemed that the husband's solicitor had been deterred from putting questions which were undoubtedly relevant. Referring to the accounts of what had happened upon the examination-in-chief of the husband, his Lordship said that the state of affairs was obviously

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one which called for some satisfactory explanation on oath from the clerk to the justices or from the justices themselves. Four affidavits had been filed on behalf of the justices and their clerk, but none of them mentioned the examination-in-chief of the husband. The court did not appear on this appeal to have had that full and careful assistance in the way of affidavits from either the justices or their clerk which an appellate court normally required, and to which it was, in the circumstances of such a case, entitled.

His Lordship continued: In this somewhat difficult state of affairs it is first necessary to assess the evidence as a whole in so far as it relates to allegations of undue interference by the clerk to the justices. It seems evident that the allegations of fact by the husband's solicitor in relation to interference both with the cross-examination of the wife and the examination-in-chief of the husband are in substance established as accurate. Both the independent evidence and the inferences to be drawn from the other affidavits support this view. There was, indeed, a suggestion made on behalf of the justices that when it came to dealing with the examination-in-chief of the husband the clerk did no more than to amplify the refutation of the submission of no case. The evidence does not appear to be consistent with this suggestion; but the point is, whether some limitation was or was not in effect placed upon examination-in-chief of the husband. It seems to me that a limitation was placed, and that it was an undesirable limitation.

The third point raised by the husband's solicitor, that of the alleged undue interference by the clerk as to the announcement of the reasons for the court's decision, has resulted in a considerable conflict of evidence between the various affidavits filed on this appeal. Apart from those affidavits, however, this court has, for the first time, today seen the notes of the clerk to the justices. In those notes there appears a passage which relates both to the decision of the justices and to the reasons, as purported to be given by them at the time. It is one of the less happy features of this case that the contemporaneous note of the reasons given by the justices at the time was excised from the copy of the general notes sent up on this appeal to this court. What appears on that note is not inconsistent with the version of the husband's solicitor as to who it was who announced the decision of the court, but the reasons themselves agree with those stated in the affidavit of the wife's solicitor. In all the circumstances of this case, it does not appear necessary further to resolve the conflict of evidence on the point as to who made the announcement.

Both parties were represented at the trial by solicitors; accordingly, neither of them was in need of assistance as to how to present the case in court. Both parties were entitled, within the limits of relevancy and reasonableness, so to conduct their

case as seemed best to their legal representatives in court. In those circumstances a justices' clerk is no more entitled to step into the arena and conduct a litigant's case for him than is a magistrate himself. Indeed, it is important in the interests of justice that the clerk should not give even the appearance of seeking himself to conduct the case of either party, or to limit the way in which that case is conducted. At any particular trial this need to allow freedom to the litigant has from time to time to be balanced against the clerk's duty to assist the court as to what is and what is not relevant—matters, however, on which it is not for him to give a ruling himself. Sometimes the dividing line between the part a clerk may, on the one hand, take in order to see that the time of the court is not wasted, and the interventions on the other hand which, in the interests of justice appearing to be done he ought not to make, is difficult of demarcation. In the present case, however, it is clear that the clerk overstepped the line to a considerable degree, and put substantial obstruction in the way of the husband's solicitor's conduct of his client's case.

The clerk seems to have given the appearance both of being master of the conduct of the husband's case and even to some degree of being master of the court, as regards what should and should not be given in evidence. It is, perhaps, a symptom of this attitude of the clerk that after the short examination-in-chief of the husband it was the clerk who took up the cross-examination, although the wife was represented in court by a solicitor. Then, having finished and noted his own cross-examination, the clerk did not take one single note of the cross-examination by the wife's solicitor. Indeed, looking at the notes of evidence as taken by the clerk, this court was at first under the impression that there had been no cross-examination at all by the wife's solicitor, but, in fact, the wife's solicitor, in the course of his frank affidavit, has set out that he did cross-examine the husband at some length, and it is clear from that affidavit that his cross-examination elicited facts of importance. Some of those facts were of assistance to the husband, some were of assistance to the wife, but in neither case was any note taken of them, an omission which is, in itself, contrary to what has been laid down as a clerk's duty in relation to taking notes.

The result of what I have previously referred to as the substantial obstruction of the husband's solicitor's conduct of his client's case was that a considerable amount of evidence was not adduced in chief which he would otherwise have sought to obtain from the husband. Indeed, the notes of evidence clearly reveal that something appears to have gone wrong at the trial. Those notes reveal an examination unnatural in sequence, and curtailed as regards the number of questions to quite an unusual degree. Vital points were not put to the husband in examination-in-chief. Many of those vital points were discussed in argument before this court today, but they are points which perhaps it is undesirable to

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recapitulate, in view of the order which this court may be making. The result was that justice certainly did not appear manifestly to be done at this stage. Accordingly, upon the facts which I have so far stated, in my opinion the trial was an unsatisfactory one, and the decision of the justices cannot stand.

That, however, leaves over the question which has been raised in relation to the wife's proof having been handed to the clerk to the justices, and as to the way in which the clerk's notes were taken upon that proof. The fact is clear that during the trial a proof of the wife, which she had given to her solicitors, so it is said, in August, 1953, was before the clerk. Equally it is clear that it was, in fact, physically used as the basis upon which the clerk took the notes of the wife's examination-in-chief. The facts that led to this state of affairs are not so clear. In August, 1953, a summons was taken out by the wife, which I will refer to as the earlier summons. This court has been told from the Bar that it was a summons under the Guardianship of Infants Act, 1886 and 1925, but the clerk's affidavit seems to indicate a difference on that matter. On the taking out of the summons in August, 1953, a document, also in the form of a proof was then lodged with the clerk to the justices. The second document is different in its contents from the first, and whether or not it related to the earlier summons is not clear, nor is it clear whether the second one was originally handed over to the clerk to the justices on November 4, 1953, as being material upon which a fresh complaint was founded, or whether it was actually handed to him on the morning of the trial, as seems more likely from the affidavits which have been put before us.

These doubts, however, do not affect the question now before the court, i.e., as to the propriety of a proof of the complaint being before the clerk during the hearing of the summons, and, further, as to the propriety of its being used by the clerk as a document upon which to take his notes. The court is not considering what is and what is not proper material upon which a summons can be issued. I note that in the court at Bridgend there seems to be no court notebook in which the justices' clerk takes notes. He appears to use, as a practice, the complainant's proof as being part of his notebook, simply altering any portions of the proof which he thinks have not been given in evidence, and making such additions to that proof as he thinks accord with the evidence as given. For subsequent notes he uses deposition paper. This court has been informed of no reason why a bound notebook is not used as in neighbouring courts. While there neither is, nor can be, a rule of universal application as to the exact form in which notes of matrimonial matters should be taken in varying circumstances, it is right to make it clear that it is obviously preferable that normally there should be used for such notes the usual bound notebook.

That the proof of the wife was before the clerk during the hearing of the case was of itself clearly undesirable; indeed, this

was conceded at the Bar by those who sought to support the decision in this case. Such a document, not having been seen by the other party's representative, is apt to be regarded with suspicion by that other party. Further, in no circumstances should such a proof be used as the basis of the notes of the clerk to the justices. His duty is accurately set out in Rayden on Divorce, 6th ed., p. 542, as follows: "It is the duty of the "Clerk to the Magistrates or Justices to take a full note of the "evidence given at the hearing of the application." The responsible nature of that duty has frequently been emphasized. As long ago as *Cobb* v. *Cobb*,[1] it was stated that "Unless notes are "taken and furnished, the [Summary Jurisdiction (Married "Women)] Act [1895] would be unworkable, for it would be "impossible for us, without the notes, to do justice between the "parties upon these appeals."

In more than one instance the notes contain unaltered the phraseology of that proof of evidence which the wife's solicitors had taken some months earlier. In such circumstances this court cannot be certain that when it receives upon an appeal a note thus compiled it contains the true shades of wording which the witnesses, in fact, used. Notes so taken are unreliable, and the method used in this case was wrong, and, indeed, dangerous in so far as the interests of justice are concerned. It was for these reasons, indeed, very properly conceded by counsel for the justices that notes taken in the way which this clerk used here cannot fairly be said to be real notes of the evidence given.

Accordingly, there was an error both in the proof being before the clerk at trial, and in the clerk making that proof the basis of his notes. But, as the husband's solicitor appears to have seen the proof being handed to the clerk, the husband cannot, upon this appeal, rely on this error in procedure, nor, indeed, does he raise it as one of his grounds of appeal. The general importance of this matter of the notes lies in the fact that this appeal has brought to light something touching the interests of justice in relation to the court at Bridgend. Its particular relevance to this case lies in the fact that where there are notes of this type before a clerk they may have some bearing on his attitude of mind towards such allegations as may be sought to be put forward by the opposing party.

But, as I have already indicated, this appeal does not turn on the question of these notes. It is on the obstruction placed in the way of the husband's solicitor in conducting his case that this appeal turns. It is on that ground that, in my view, a fresh trial is necessary: and as a fresh trial is necessary it follows that nothing more need be said on the merits of the case or as to the weight or otherwise of any matters excluded by the procedure adopted on November 5, 1953. Those are matters for the new trial. I would only add that, if those questions which were

[1] [1900] P. 145, 146.

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excluded on November 5, 1953, had resulted in answers favourable to the husband, or, indeed, if the husband's case had been allowed to be conducted freely by his solicitor, there might have been a different result. It is not, however, for this court to express any opinion as to what the result would have been.

Lord Merriman P. I agree. With regard to the main issue, I am in complete agreement with the concluding observations of Sachs J. If favourable answers had been obtained to the questions in cross-examination of the wife, or in examination-in-chief of the husband, which the husband's solicitor was deterred from putting in the circumstances which have been described by Sachs J., it might conceivably have thrown a fresh light on the rest of the evidence. More than that it is not necessary to say. I also agree emphatically that this is clearly a case in which the principle that justice must manifestly be seen to be done has been infringed.

With regard to the use of the proof of the wife, it is no part of my business to dictate to the Bridgend court how the details of an information sworn to by a complainant shall be recorded, but I am strongly of opinion that it is highly undesirable that that record, whatever form it takes, and particularly if it takes, as it did in this case, the form of a proof of evidence, should be transferred to the actual hearing as the basis of the notes of the complainant's evidence given in open court. The objections to that practice are so obvious that it is unnecessary to dilate upon them, and, indeed, no attempt has been made to defend the practice. The objections are indisputable, and I hope that this will be the last instance in which the practice is followed in that particular court. I would only add, as another footnote, so to speak, to what Sachs J. has said, that its relevance in this case is not that it is raised as a substantive ground of appeal, nor, indeed, could it have been raised, I think, for the reasons given by my brother, but that it is, in my opinion, impossible to ignore the possibility that the use of this proof as the basis of the note may have been a factor which induced the apparent reluctance of the clerk to widen the area of investigation.

The result is that the appeal must be allowed, the order set aside, and the wife's complaint remitted for rehearing by a completely fresh panel of the justices, and I would add the suggestion that on the rehearing it would be desirable that a deputy for the clerk should be appointed.

[It was submitted on behalf of the husband that, although he was an assisted person, he was paying a substantial contribution towards his own costs, and that in the event it would appear that part of the cost of the appeal had arisen from the manner in which the hearing had been conducted by the intervention of the clerk. Some redress, either for the legal aid fund or for the husband,

should be found by making an order for costs against the clerk, or against the justices.]

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LORD MERRIMAN P. How could we? We invited the assistance of the justices, who very properly briefed counsel to appear, in effect as amicus curiae, so that the matters which have been so faithfully dealt with by Mr. Tasker Watkins might be put before us. But the justices are not here as parties against whom an order can be made.

[The court was asked about the costs of the attendance of the country solicitors.]

LORD MERRIMAN P. I suppose that we are entitled to express an opinion; but we cannot bind the taxing master. But we are both clearly of the opinion that it was eminently desirable that the country solicitors on both sides should attend. It would have been a very great embarrassment to the court had they not done so.

Appeal allowed; case remitted for rehearing.

Solicitors: *Helder, Roberts & Co. for B. Edward Howe, Nicholas & Toms, Port Talbot; Rutland & Crauford for Walter P. David & Snape, Bridgend; Torr & Co. for R. H. C. Rowlands, Cardiff.*

J. B. G.

[CHANCERY DIVISION.]

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Revenue — Profits tax — Company — Income stock — Interest on income stock payable only so far as net profits sufficient—Whether interest deductible in computing company's profits for purposes of profits tax —Not a "distribution"—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *ss.* 19 (1), 20 (1); *Sch. IV, para.* 4—*Finance* (*No.* 2) *Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 48), *s.* 14 (1).

As a result of a scheme of reduction of a company's capital there was issued to preference shareholders 5 per cent. cumulative stock. The income stock was constituted by an instrument dated May 4, 1938, clause 5 of which provided for the stock's redemption and for payment of 5 per cent. interest on it until redemption. The interest was to be payable only to the extent to which the company's net profits for the year ended September 30, 1938, and for each succeeding year ended on September 30 should suffice to pay it, and was to be cumulative:—

Held, that the payments of interest on the stock were properly allowable in computing the company's profits for the purposes of profits tax by virtue of para. 4 of Sch. IV to the Finance Act, 1937 and of section 14 (1) of the Finance (No. 2) Act, 1940, since

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those payments were payments of interest on money and were not distribution of profits. Holders of income stock were not, as such, members of the company, but were persons towards whom the company's liabilities were defined by the trust instrument and not otherwise. They were, in fact and in law, in the position of debenture holders, and the condition that if there was no profit interest was not payable was only a measure of the company's liability.

Walker (A. W.) & Co. v. *Inland Revenue Commissioners* [1920] 3 K.B. 648; 12 T.C. 297 and *Inland Revenue Commissioners* v. *Mashonaland Railway Co. Ld.* (1926) 12 T.C. 1159 distinguished.

APPEAL by the Crown from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated set out the following facts: At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on July 15, 1953, the Pullman Car Co. Ld. (hereinafter called "the company") appealed against two assessments to profits tax made on it for the chargeable accounting period beginning on October 1, 1948, and ending on September 30, 1949, being a first assessment in the sum of £14,000 and an additional assessment in the sum of £7,250.

The questions of law for the opinion of the court were whether, in the circumstances hereinafter set forth, payments described as interest paid by the company in the said chargeable accounting period to holders of 5 per cent. cumulative income stock (a) were properly allowable as deductions in computing the company's profits for the purposes of profits tax by virtue of paragraph 4 of Schedule IV to the Finance Act, 1937, and section 14 (1) of the Finance (No. 2) Act, 1940,[1] and (b) if not so allowable as deductions, were to be taken into account (in so far as they were made

[1] Finance Act, 1937, s. 19: "(1) There shall be charged, on the profits arising in each chargeable accounting period falling within the five years beginning on the first day of April, 1937, from any trade or business to which this section applies, a tax (to be called the 'national defence contribution') of an amount equal to five per cent. of those profits in a case where the trade or business is carried on by a body corporate and four per cent. of those profits in any other case."

S. 20: "(1) For the purpose of the national defence contribution, the profits arising from a trade or business in each chargeable accounting period shall be separately computed, and shall be so computed on income tax principles as adapted in accordance with the provisions of the Fourth Schedule to this Act."

Sch. IV, para. 4: "The principles of the Income Tax Acts under which deductions are not allowed for interest, annuities or other annual payments payable out of the profits . . . shall not be followed: Provided that nothing in this paragraph shall authorise any deduction in respect of—(*a*) any payment of dividend or distribution of profits. . . ."

Finance (No. 2) Act, 1940, s. 14: "(1) No deduction in respect of any interest, annuity or other annual payment shall, by virtue of paragraph 4 . . . of the Fourth Schedule to the Finance Act, 1937, be allowed in computing the profits of a trade or business for the purposes of excess profits tax or the national defence contribution unless the interest, annuity or other annual payment would, on income tax principles, be an allowable deduction in computing profits but for the express provision contained in paragraph (*l*) of Rule 3 of the Rules applicable to Cases I and II of Schedule D that no deduction is to be made in respect of any annual interest or any annuity or other annual payment payable out of the profits or gains."

to stockholders who were also registered as shareholders in the company) as "distributions to proprietors" within sections 35 and 36 of the Finance Act, 1947, for the purpose of computing the profits tax payable by the company.

The company owned a fleet of Pullman cars which were operated under agreements made with various railway companies and subsequently with British Railways. At the beginning of 1938 the issued share capital of the company was £1,125,000, made up of 625,000 cumulative preference shares of £1 each and 500,000 ordinary shares of £1 each. Dividends on the cumulative preference shares were in arrear from February 22, 1932.

About the beginning of 1938 the directors of the company proposed a reduction of capital for the reasons and in the manner set out in a circular dated January 6, 1938. The proposals included the substitution for the 625,000 7 per cent. cumulative preference shares of £437,500 5 per cent. cumulative income stock and 187,500 "A" ordinary shares of £1 each to be effected by paying off or satisfying the sum of 14s. per share, being part of the capital paid up on each of the 7 per cent. cumulative preference shares, and by issuing to the holders thereof in satisfaction of such capital 5 per cent cumulative income stock of nominal amount equal to the amount of the capital paid off or satisfied. The balance of the preference share capital not so repaid or satisfied was to be converted into "A" ordinary shares.

At an extraordinary general meeting of the company held on January 28, 1938, special resolutions were duly passed giving effect to the proposal for reduction of capital contained in the circular and divers consequential matters. On April 11, 1938, the reduction of capital effected by the special resolution was confirmed by the High Court.

The income stock was constituted by an instrument dated May 4, 1938. The attention of the commissioners was in particular drawn to clause 5 of the instrument which, after providing for eventual redemption of the stock and for payment of interest thereon at the rate of 5 per cent. per annum until redemption, provided as follows: "Provided always that the interest on the "stock shall be payable only to the extent to which the net "profits of the company (calculated as hereinafter mentioned) for "the year ended on the 30th September, 1938, and for each "succeeding year ended on a 30th September shall be sufficient "to pay such interest and so that such interest shall be cumu-"lative, that is to say, that if and so far as the net profits for "any such year as aforesaid shall be insufficient for the payment "thereof the deficiency shall be carried forward and shall be "payable out of the net profits for the succeeding year or years "if and so far as the same shall suffice for the purpose. All "interest on the stock which shall become payable out of the net "profits of the company for any such year as aforesaid shall in so "far as not previously paid be payable within 30 days after such "profits shall have been certified as hereinafter provided but the

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"company may whenever in the opinion of the directors the "available profits of the company justify such payment pay "the interest on the stock or any part thereof by half-yearly "payments on April 1 and October 1." The income stock was in due course quoted on the Stock Exchange and there were numerous dealings over the years.

Full interest was paid on the income stock under the instrument to March 31, 1939, and 2 per cent. interest was paid for the following half-year. No further payment of interest was made until 1947, when payments again began to be made. As a result of payments made on January 1 and November 24, 1947, and April 1, 1948, only 2½ years' interest remained in arrear on September 29, 1948.

Between the date of issue and September 29, 1948, substantial amounts of the income stock were redeemed and on September 29, 1948, the company gave notice of its intention to redeem at par on December 31, 1948, the whole of the outstanding income stock, the notice being coupled with an offer to stockholders to convert their holdings into 4½ per cent. preference shares, the company's capital having meanwhile been increased by the creation of 500,000 4½ per cent. cumulative redeemable preference shares of £1 each.

Payment of outstanding arrears of interest on the income stock was made on October 1, 1948, amounting to £45,184 before deduction of income tax, provision having been made in the accounts of the company for the year ended September 30, 1948, for the payment of the equivalent net amount of £24,851. On December 31, 1948, the outstanding income stock was redeemed and the company at the same time paid interest on that stock from October 1 to December 31, 1948, amounting to £4,517 before deduction of income tax. It was in respect of that amount of £4,517 that the question of law (a) hereinbefore set out arose. The question of law (b) hereinbefore set out affected an amount of £28,618, being such part of the two said amounts of £45,184 and £4,517 as was paid, under deduction of income tax, to persons who were registered as shareholders of the company.

A member of the firm of chartered accountants who were auditors to the company gave evidence, which the commissioners accepted, that the interest payable under the instrument constituting the income stock was a charge which fell to be made against the profits of the company, according to the ordinary principles of commercial accounting, to arrive at the company's profits for the purpose of distribution of dividends. In relation to the Crown's contention that payment of interest to holders of income stock who were also registered as members of the company should be treated as part of the "gross relevant "distributions to proprietors," he produced a number of illustrations of individuals and companies holding both income stock and "A" or "B" shares in the company. These included a number of nominee companies which held "A" or "B" shares

in addition to substantial holdings of income stock. In such cases it was not possible to determine whether the shares and the stock were held for the same person or for different persons.

For the company it was contended: (1) that the interest paid to the holders of income stock should be deducted in computing company's profits for the purpose of profits tax, by virtue of paragraph 4 of Schedule IV to the Finance Act, 1937; (2) that in any event that interest did not form part of the gross relevant distributions to proprietors of the company within sections 35 and 36 of the Finance Act, 1947, and, in particular, was neither a "dividend" nor a "cash bonus" within section 36 (1) (*a*); and (3) that the assessments under appeal ought to be reduced accordingly.

For the Crown it was contended: (1) that the interest on the income stock was not "interest" within paragraph 4 of Schedule IV to the Finance Act, 1937, or, alternatively, if it was such interest, the payment of it was a payment of dividend or distribution of profits within the proviso to paragraph 4; (2) that the said interest was not allowable as a deduction in computing the company's profits for the purpose of profits tax; (3) that the said interest, in so far as it was paid to persons who were registered as members of the company at the date of payment, should be included in the gross relevant distribution to proprietors of the company by virtue of sections 35 and 36 of the Finance Act, 1947; and (4) that the assessments should, subject to certain necessary adjustments to the figures, be confirmed.

The commissioners who heard the appeal gave their decision in favour of the company in the following terms, expressing no opinion on the question of law (b) hereinbefore set out which, in view of their decision on the question of law (a) hereinbefore set out, did not arise: (1) The commissioners held that the "interest" paid to the holders of income stock of the company in the chargeable accounting period in question was "interest payable out of the profits" of the company within paragraph 4 of Schedule IV to the Finance Act, 1937, and was not a "payment of dividend or distribution of profits" within subparagraph (*a*) of the proviso to paragraph 4. (2) The commissioners reached that conclusion from a perusal of all the documents relating to the income stock to which they were referred; in particular, the terms of the special resolution passed on January 28, 1938, and of the instrument dated May 4, 1938, indicated to their minds that the "interest" in question was in truth interest on loan capital of the company, payable out of the company's profits, and they did not read the proviso to clause 5 of the instrument as pointing to any different conclusion. (3) It followed that in their opinion that interest was deductible in computing the company's profits for the purposes of profits tax. Accordingly, they held that the appeal succeeded in principle and they left the figures to be agreed.

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Agreement of the figures on the basis of the commissioners' decision in principle was in due course reported to them and, on September 24, 1953, they determined the appeal by confirming the first assessment and reducing the additional assessment to £2,382 13s.

The Crown appealed from that decision.

Millard Tucker Q.C. and *Sir Reginald Hills* for the Crown.

Heyworth Talbot Q.C., R. E. Borneman Q.C. and *H. M. Allen* for the company.

The cases cited in argument are referred to in the judgment.

HARMAN J. This is an appeal by the Crown against the decision of the Special Commissioners on a profits tax appeal by the Pullman Car Co. Ld. The commissioners allowed the appeal, holding that in computing its profits tax liability the company was entitled to deduct sums paid to the holders of its income stock in respect of its financial year 1948–9, this sum being described by the company as "interest."

The income stock came into existence as a result of a scheme of reduction of the company's capital sanctioned by the High Court in 1938. It was redeemed in the year 1948. Immediately before the scheme came into force the company's capital consisted of 625,000 7 per cent. cumulative preference shares of £1 each, the interest on which was six years in arrear, and 500,000 ordinary shares of £1 each. The company was advised that its main asset, namely, Pullman cars, was much over-valued. The object of the reduction was to reorganize the balance sheet on a realistic basis. It is thus described in a circular sent to shareholders in 1938: "Under the scheme it is proposed that the book value of the "cars and equipment be reduced by £533,617, this amount to "be provided as to £450,000 by reducing the existing 500,000 "ordinary shares of £1 each by 18s. per share to 500,000 ordinary "shares of 2s. each entitled to one vote per share, and as to "£83,617 by appropriating part of the balance now standing to "the credit of profit and loss account. The scheme further "provides for the reconstitution of the preference share capital "and the variation of the rights attaching thereto as follows:— "1. For the present issue of 625,000 7 per cent. cumulative "preference shares there will be substituted:—£437,500 5 per "cent. cumulative income stock and 187,500 'A' ordinary shares "of £1 each."

The necessary resolutions were passed and the sanction of the court to the reduction was obtained. The ordinary shares were reduced to 2s. in the usual way, but the preference shares were treated differently, 14s. nominal of each share being replaced by the income stock and 6s. nominal by new "A" ordinary shares. The income stock was created by what is called an instrument, from which I take the following: "This instrument

"entered into the fourth day of May, 1938, by the Pullman "Car Co. Ld. . . . witnesseth and the company hereby agrees "with all persons whose names are for the time being entered "in the register hereinafter mentioned as holders of the said "stock (and to the intent that such persons shall be entitled "to enforce the provisions of this instrument as against the "company) and declares as follows: . . . 4. The stock shall be "held subject to the conditions set forth in the schedule hereto ". . . 5. As and when the stock or any part thereof ought to be "redeemed or paid off in accordance with the conditions set forth "in the said schedule hereto the company shall pay to the stock-"holders or to those whose stock ought to be redeemed or paid "off the full amount of the stock held by them respectively or "as the case may be such part of the stock as in accordance with "the said conditions ought to be redeemed or paid off and such "payment shall operate in satisfaction of the amount of the "stock so redeemed or paid off and the company shall in the "meantime until the stock is redeemed or paid off but subject "as hereinafter provided pay to the stockholders interest on "the stock held by them respectively at the rate of 5 per "centum per annum calculated from October 1, 1937: Provided "always that the interest on the stock shall be payable only to "the extent to which the net profits of the company (calculated "as hereinafter mentioned) for the year ending on September 30, "1938, and for each succeeding year ending on September 30 "shall be sufficient to pay such interest and so that such interest "shall be cumulative, that is to say, that if and so far as the "net profits for any such year as aforesaid shall be insufficient "for the payment thereof the deficiency shall be carried forward "and shall be payable out of the net profits for the succeeding "year or years if and so far as the same shall suffice for the "purpose."

Up to March, 1939, the full interest (so-called) was duly paid, but then fell into arrear. Payments were resumed in 1947, and by September, 1948, two and half years' arrears remained. Stock was from time to time redeemed, and the whole was paid off by the end of that year together with the so-called interest. It is in respect of interest payments in 1948 that the question arises, the company maintaining and the Crown denying that the "interest" payments were in law interest or other annual payments payable out of the profits of the company within the meaning of Schedule IV, paragraph 4, to the Finance Act, 1937. This Act created the national defence contribution, which was renamed "profits tax" in 1946, and section 19 (1) of the Act provides: "There shall be charged, on the profits arising in each "chargeable accounting period falling within" the years of charge, ". . . a tax . . ." Section 20 is in these terms: "(1) For the purpose of the national defence contribution, the "profits arising from a trade or business in each chargeable "accounting period shall be separately computed, and shall be

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"so computed on income tax principles as adapted in accordance "with the provisions of the Fourth Schedule to this Act." In Schedule IV, I find an elaborate code altering to the extent stated the usual income tax principles under Schedule D. Paragraph 4, which is the relevant one, is in these terms: "The principles of "the Income Tax Acts under which deductions are not allowed "for interest, annuities or other annual payments payable out "of the profits . . . shall not be followed: Provided that nothing in "this paragraph shall authorise any deduction in respect of— "(*a*) any payment of dividend or distribution of profits. . . ."

To that I must add section 14 of the Finance (No. 2) Act, 1940, which by way of precaution provides as follows: "(1) No "deduction in respect of any interest, annuity or other annual "payment shall, by virtue of paragraph 4 . . . of the Fourth "Schedule to the Finance Act, 1937, be allowed in computing "the profits of a trade or business for the purposes of excess "profits tax or the national defence contribution unless the "interest, annuity or other annual payment would, on income "tax principles, be an allowable deduction in computing profits "but for the express provision contained in paragraph (*l*) of "rule 3 of the Rules applicable to Cases I and II of Schedule D "that no deduction is to be made in respect of any annual interest "or any annuity or other annual payment payable out of the "profits or gains." Thus, in order to qualify the payment must be such as but for paragraph (*l*) of rule 3 would be a payment deductible for income tax purposes.

It is the Crown's contention that the so-called interest is in truth a distribution of profits. Therefore, it is necessary to analyse the position of the income stockholders. It seems clear to me that a holder of this stock is not as such a member of the company. He is a person towards whom the liabilities of the company are defined by the so-called instrument, and not otherwise. These obligations consist of a covenant to redeem under certain conditions, and in the meanwhile to pay, but only if and when the profits allow it, what is called interest. The stockholder is in fact and in law in the position of a debenture-holder. He has, it is true, no charge in respect of either payment, but that is not essential, though usual in a debenture. There is a sinking fund, and there are terms of redemption, and the schedule to the instrument reads much like a debenture trust deed.

Why, then, is the so-called interest any different from ordinary debenture interest? Because, says the Crown, its payment is contingent on the earning of sufficient profits. It is argued that to promise such a payment is really to confer on the promisee a share in the profits of the concern, and the performance of that promise is in truth a distribution of profits, or alternatively, is in the nature of a dividend. Therefore, so runs the argument, even if it should be conceded that the payments

are interest and so forth within paragraph 4, they are excluded by the proviso (*a*) as being a distribution of profits.

I find this argument entirely unconvincing. It seems to me that holders of income stock are in the position of people who have lent money to the company, and they are not proprietors nor sharers in the profits as such. True, in the absence of profit no interest becomes payable, but that is only the measure of the company's liability. I find nothing strange in the conception of a debenture-holder whose right to interest is so limited, and am of the opinion that the commissioners were entirely in the right in finding as they did. "We hold that the 'interest' paid to the "holders of income stock of the company in the chargeable "accounting period in question was 'interest payable out of the "'profits' of the company within paragraph 4 of Schedule IV to "the Finance Act, 1937, and was not a 'payment of dividend or "'distribution of profits' within subparagraph (*a*) of the proviso "to the said paragraph 4."

It was suggested to me that of the two expressions in the proviso the first, namely, "payment of dividend," was intended to apply to corporations, and the other, "distribution of profits," to unincorporated concerns. This, I think, may well be so, but it is unnecessary for me to decide it.

It is said, however, by the Crown that I am precluded from coming to the conclusion which I would otherwise have reached by two cases decided by Rowlatt J., one in 1920 on similar words relating to excess profits duty, and the other in 1926 on other but not materially different words in connexion with corporation profits tax. I need hardly say any decision of that judge on this subject merits most careful attention.

The first of these cases was *A. W. Walker & Co.* v. *Inland Revenue Commissioners*.[1] That case was concerned with the terms of a loan made to a firm of corn merchants, who under an agreement made in 1914 had agreed in consideration of a loan of £4,000 to pay the lender while it was outstanding £200 a year, and in addition three-twentieths of the profits of the firm between £1,000 and £3,000—that is to say, a maximum of £300. The document provided that this should not constitute a partnership. The firm was allowed only the £200 as a deduction in computing its profits, and appealed, claiming that the extra £300 was also interest on the borrowed money. This claim was rejected by the judge. Among other things, this was said[2]: "For excess profits "duty, generally speaking, the profits of a trade or business are "calculated as if for income tax, but there is an exception "made with regard to deduction of interest on money borrowed "for the purpose of the trade or business in the second para-"graph of Part I of the Fourth Schedule to the Finance (No. 2) "Act, 1915. That says that 'The principle of the Income Tax "'Acts under which deductions are not allowed for interest on

[1] [1920] 3 K.B. 648; 12 T.C. 297.

[2] [1920] 3 K.B. 648, 652; 12 T.C. 297, 301.

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Harman J.

"'money borrowed for the purpose of the trade or business, or "'for rent, or royalties, or for other payments income tax on "'which is collected at the source (not being payments of "'dividends or payments for the distribution of profits), . . .' is "not to be followed. Therefore it comes to this that interest "on money is deductible but distribution of profits is not "deductible. Now I have come quite clearly to the conclusion "that the commissioners are right here. They have allowed the "£200 a year which is interest on money, and they have dis-"allowed the other £300, which seems nothing but giving the "lenders a share of the profits eo nomine. They both, of course, "are in consideration of the loan; that is why they are paid, there "is no doubt about that, but they are different things, and the "people who have lent this money have got interest and they "have got a share of the profits—that is the long and short of it. "They have got interest which is payable to them as a debt, it "matters not whether the concern prospers or languishes; they "have got the other thing, which is a share of what the business "earns, and that is not interest, that is simply a share of the "profits. If there are profits they get a share, if there are "no profits they do not get anything. It is simply, as it says in "the agreement, a share of the profits."

That case seems to me distinguishable from the present, though it has no doubt a superficial resemblance in that the amount of the return which the lender gets on his loan depends in both cases on the prosperity of the borrower. In *Walker's* case [3] the lender, as the provision excluding partnership shows, was made a quasi-proprietor. He did get interest on his money to the tune of £200 whether the business prospered or no, but he was made a sharer quoad ultra. The two rights stand clearly distinguishable on the document of loan.

In the present case the stockholder is in no sense a proprietor or member of the company. He is simply a debenture-holder whose right to interest is contingent.

In the other case, *Inland Revenue Commissioners* v. *Mashonaland Railway Co. Ld.*,[4] the facts are far different from those I have here to consider. The Mashonaland Railway Co. had provided a sum of £800,000 to enable another company, the Beira Co., to build a railway. The latter company in return was under a liability to pay an annual sum out of its earnings, or if insufficient the whole of its earnings, to the Mashonaland Co. This was called a rentcharge. The question was whether this sum was "a payment for distribution of profits," those being the relevant words in the statute. Rowlatt J. held that it was, and followed his own decision in *Walker's* case.[5] He said [6]: "The "question here is, in my opinion, whether this is a distribution "of profits. They are profits, because they are income tax "profits, but is this a distribution of profits? I do not quite

[3] [1920] 3 K.B. 648; 12 T.C. 297.
[4] (1926) 12 T.C. 1159.
[5] [1920] 3 K.B. 648; 12 T.C. 297.
[6] 12 T.C. 1159, 1168.

"know what other payments, income tax on which is collected "at the source, may be left in that expression after you have "taken out the exceptions, but it does seem to me that I cannot "avoid saying this is a distribution of profits. 'Distribution' "is what it turns on. Does that mean something merely by "way of a dividend (saying the same thing very much over again), "something in respect of which there is no consideration except "the subscription of shareholders' capital, or something of that "sort? I do not think I can so limit it, and I think I am bound "by my own decision in the *Mahratta* case,[7] and, more par-"ticularly, in *Walker's* case.[8] In *Walker's* case, for facilities "afforded to the company, a gentleman was awarded three-"twentieths of the profits, and I said: 'He is given a share of "'the profits without being made a partner. He has a share "'of the profits limited to three-twentieths.' Here they have "a share of the profits limited to £42,500. I do not think you "can state it more clearly than that, and therefore it seems to "me I am bound by my own decision and, if that principle is "wrong, recourse will have to be had to another court to put it "right." No other court has been asked to put it right. But the facts in that case, particularly by the terms of the instrument which created the loan are so different from those in the present case that it seems to me, with all respect to those who urge to the contrary, that I get no help from it, and do not feel constrained by it to alter the opinion which I have formed, that the payments here in question are interest on money and not distribution of profits. I therefore dismiss the appeal.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Ashurst, Morris Crisp & Co.*

K. R. A. H.

[7] (1926) 12 T.C. 1111.

[8] [1920] 3 K.B. 648; 12 T.C. 297.

[COURT OF APPEAL.]

* MONTAGU AND ANOTHER *v.* BROWNING AND ANOTHER.

C. A.
1954
June 17, 18.
Singleton, Denning and Morris L.JJ.

[Plaint No. 796.]

Landlord and Tenant—Rent restriction—Standard rent—Meaning of "rent"—Tenant performing services for owner—Tenant paying as rent difference between quantified value of services and rental value of house — Subsequent increase in tenant's wages — No pecuniary rent paid after increase in wages—Character of tenancy not affected by wage increase — Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12 (2), (7)—*Rent and Mortgage Interest Restrictions Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 71), *s.* 3 (1).

Landlord and Tenant—"Rent."

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In 1941 the trustees of a synagogue employed the first defendant as caretaker to the synagogue and at the same time let to him a house within the ambit of the Rent Restriction Acts. From 1941 to 1946 he paid as rent a weekly sum of 10s., the difference between the estimated value of his services and the estimated rental value of the house. His wife, the second defendant, carried out the caretaker's duties. In 1946 the trustees increased the caretaker's wages by 10s. a week, and thereafter he paid no rent in money form.

In 1953 the trustees sought to recover possession of the house, contending that, as the increase in wages in 1946 constituted a new agreement by which the rent became payable entirely in services, the protected tenancy came to an end at that date. The county court judge made the order for possession, holding himself bound by dicta in *Hornsby* v. *Maynard* [1925] 1 K.B. 514, that rent in the Rent Restriction Acts meant pecuniary rent only. On appeal by the defendants:—

Held, that the character of the protected tenancy created in 1941 was not changed and no new agreement came into being as a result of the increase in wages in 1946, and the cessation of monetary payments by the tenant; and that the tenancy remained within the protection of the Rent Restriction Acts.

Per Denning L.J. Where rent is not payable in money but in kind, so long as the parties have by agreement quantified the value in terms of money, the sum so quantified is the rent of the house, within the meaning of the Rent Restriction Acts.

Dicta of Shearman and Salter JJ. in *Hornsby* v. *Maynard* [1925] 1 K.B. 514, 524, 525; 41 T.L.R. 102 questioned.

APPEAL from Judge H. C. Leon, sitting at Willesden County Court.

In June, 1941, Browning, the first defendant, was appointed caretaker of the Wembley Synagogue by the plaintiffs as trustees of the United Synagogue, the value of his services as caretaker being estimated at £40 a year. At the same time the plaintiffs let to him a dwelling-house of which they were the owners at 12, Forty Road, Wembley Park, the rental value of which was estimated at £66 a year; and it was agreed that he should pay the difference between his wages and the rental value of the house, namely, £26 a year or 10s. a week as rent or balance of rent for the house. The rateable value of the house was £34 per annum.

That arrangement continued until February, 1946, the second defendant (wife to the first defendant) taking over and in fact performing the services of caretaker, her husband being employed on other full-time work elsewhere.

In February, 1946, the managers of the Wembley Synagogue decided by resolution that, in view of the additional work of cleaning the synagogue which was being done by the defendants, the remuneration should be increased by 10s. a week, or £26 a year, and the minister to the synagogue called on the wife and said: "I have good news for you. You won't have to pay the "10s. a week any more. We are raising your wages," to which she replied: "Thank you very much." From that date no further cash was handed over by the defendants.

On August 28, 1953, the trustees determined the defendants' employment, and later required them to leave the premises on October 9, 1953. They remained in possession and on March 22, 1954, a valid notice to quit was served on them. The trustees then began the action claiming possession against the first defendant on the ground that by virtue of a new agreement made in February, 1946, the first defendant ceased to pay a rent within the meaning of the Rent Restriction Acts,[1] and accordingly ceased to be a protected tenant.

The first defendant, who appeared in person, resisted the claim, stating that he felt he had always paid rent because he and his wife had never received wages.

The plaintiffs contended that they were entitled to judgment, on the basis of the decision of the Divisional Court in *Hornsby* v. *Maynard*,[2] where it was said that rent in the Rent Restriction Acts meant pecuniary rent.

The county court judge found (1) that from June, 1941, to February, 1946, the first defendant was a tenant of the plaintiffs paying a rent partly in money and partly in services, the value of those services being agreed between the parties as being worth £40 per annum; and (2) that from February, 1946, no rent in money was paid, credited, offered or demanded, and that from that time the first defendant was a tenant of the plaintiffs, paying his rent entirely in services, which were agreed between the parties as being worth £66 per annum. He expressed the view that had it not been for the decision in *Hornsby* v. *Maynard*,[2] he would have been prepared to hold that the tenant who provided evaluated services was paying a rent of more than two-thirds of the rateable value of the house, and was thus protected by the Rent Restriction Acts; but, having regard to both the judgments in that case, in which Shearman and Salter JJ. expressly stated as a ground for their decision that "rent" meant a pecuniary rent and that nothing else would do, he was bound by that decision to decide in favour of the plaintiffs; and he accordingly gave judgment for possession in three months. He suggested that the defendants

[1] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12 (2): "This Act shall apply to a house "or a part of a house let as a separate "dwelling, where either the annual "amount of the standard rent or the "rateable value does not exceed—(*a*) "in the metropolitan police district, "including therein the City of London, one hundred and five pounds; "(*b*) in Scotland, ninety pounds; and "(*c*) elsewhere, seventy-eight pounds; "and every such house or part of "a house shall be deemed to be a "dwelling-house to which this Act "applies."
Rent and Mortgage Interest Restrictions Act, 1939, s. 3 (1): "Without "prejudice to the operation of the "two preceding sections in relation "to any dwelling-house to which the "principal Acts applied immediately "before the commencement of this "Act, the principal Acts, as amended "by the last preceding section, shall, "subject to the provisions of this section, apply to every other dwelling-"house of which the rateable value on "the appropriate day did not exceed "—(*a*) in the metropolitan police district or the city of London, one "hundred pounds."

[2] [1925] 1 K.B. 514; 41 T.L.R. 102.

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should appeal from his judgment and said that it was a proper case for legal aid to be granted to them.

The defendants appealed. Their application for legal aid was refused by the relevant local committee on the ground that there was no reasonable ground for bringing, defending, or being a party to, the proceedings.

S. W. Templeman for the tenants. Now LQ.
A. H. Ormerod for the trustees.

The cases cited in argument are all referred to in the judgments.

SINGLETON L.J. This is an interesting case, more interesting than some of those which arise under the Rent Acts. [His Lordship stated the earlier facts and continued:] In 1941 there was created a tenancy of the house between the trustees and Mr. Browning; and it is not disputed that at that time there was created a tenancy to which the Rent Acts applied.

In 1946 the trustees realized that much more work had to be done in the way of cleaning the synagogue and that the duties of Mr. and Mrs. Browning, the caretakers, were much heavier than they had been during war-time, and so they passed a resolution dated February 18, 1946, in these terms: "Mr. P. Milstone "proposed and Mr. S. Schonfeld seconded that the wages of the "caretaker be increased by £26 per annum, making a total of "£66 per annum." That increase was 10s. a week, and it meant that the wages to be paid to the caretaker, or caretakers, were precisely the same as the yearly value which had been placed on the house. The minister called to see Mrs. Browning, and said to her: "I have some good news for you; you won't have to pay "10s. a week any more; we are raising your wages." "Thank "you very much," said Mrs. Browning.

It is said on behalf of the trustees that that constituted an entirely new agreement, and that from that moment—I suppose from the moment of communication to Mrs. Browning—there was no tenancy which was protected by the Rent Acts, but that there came about an arrangement which was not the letting of a house for rent, but an arrangement that the Brownings should have the house in return for services rendered. I do not think that that was the agreement. Mr. Browning said that "there was no "suggestion of a new agreement of tenancy when the plaintiffs "agreed to pay me or my wife an extra 10s. a week." Mrs. Browning, in response to the news from the minister, had said: "Thank you very much." There was nothing to alter the nature of the tenancy between the parties; indeed, the minutes of the trustees showed that the trustees had agreed to pay the caretaker an extra 10s. a week in wages, which would put up the total payment to £66 a year. If there was (as I think it is clear there was) a tenancy which was covered by the Rent Acts between 1941

and 1946, I cannot see that any change was made by that which took place in 1946.

[His Lordship read section 12 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 [repealed by the Act of 1939] and section 3 of the Rent and Mortgage Interest Restrictions Act, 1939, and continued:] Rateable value is now the test. There remains, however, in force section 12 (7) of the Act of 1920, which is in these terms: "Where the rent payable in "respect of any tenancy of any dwelling-house is less than two-"thirds of the rateable value thereof, this Act shall not apply "to that rent or tenancy nor to any mortgage by the landlord "from whom the tenancy is held of his interest in the dwelling-"house, and this Act shall apply in respect of such dwelling-house "as if no such tenancy existed or ever had existed."

Before the Rent Acts come into operation there must, of course, be a tenancy; and if there is a tenancy there is usually a rent. When this house was first let to Mr. or to Mrs. Browning there was a rent; no one disputes that; but it was submitted to the county court judge that the change which took place in 1946 took the case out of the Rent Acts altogether, and the county court judge acceded to that submission, and said: "On the "evidence called before me I found as a fact (as counsel for the "plaintiffs submitted I should find) (1) that from June, 1941, "until February, 1946, the first defendant was a tenant of the "plaintiffs paying a rent partly in money, viz., 10s. per week, "and partly in services, the value of those services being agreed "between the parties as £40 per annum; (2) that from February, "1946, no rent in money was paid, credited, offered or demanded "and that from that time the first defendant was a tenant of the "plaintiffs paying his rent entirely in services, which were agreed "between the parties as being worth £66 per annum."

I do not think that that last finding is warranted on the evidence. The minutes show that there was an increase of wages. The wages had to be paid in some way, and it was probably a saving to the officials of the synagogue not to have to make cross-entries. I cannot see that there was an agreement between the parties under which the tenancy of the house which had existed prior to that time was altered or changed. There was a tenancy to which the Rent Acts applied from the years 1941 to 1946: that is common ground. There was no change in the character of that merely by the increase of wages or merely by the remarks made by the minister to Mrs. Browning: "We are putting up your "wages, so you need not pay the 10s."

The county court judge would have been inclined to decide the case in favour of the defendants but for the citation to him of *Hornsby* v. *Maynard*,[1] decided by the Divisional Court in 1924. There are passages in the judgment of Shearman J.[2] and in the

[1] [1925] 1 K.B. 514; 41 T.L.R. 102.
[2] [1925] 1 K.B. 514, 524.

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judgment of Salter J.[3] on which reliance was placed by counsel for the trustees, and which impressed the county court judge. Towards the close of the judgment of Salter J. there are these words[4]: "The most important of the points taken on behalf of "the defendant may be thus stated: Suppose that a dwelling-"house, which had been let to a tenant at the full standard rent, "was let to a new tenant on the terms that that tenant should "pay the full standard rent in money and should allow the land-"lord the use of part of the house rent free, or should take the "landlord as a lodger or render him certain services, is the "additional benefit thus given by the tenant to the landlord "'rent' within the meaning of the Act of 1920, so that the rent "of the house has been thereby 'increased' within the meaning "of section 1 of that Act? The pecuniary consideration for the "demise is not larger, but the actual consideration is larger. The "question is whether or not 'rent' in section 1 and the other "sections of the Act refers only to money. At common law the "term 'rent' was not restricted to pecuniary rent. Tenancies "under which the rent was payable by way of services were "formerly very common, and such tenancies are still to be met "with. In this Act, however, having regard to its own provisions "and to the authorities decided upon it to which our attention "has been called, I think that the term 'rent' applies only to "pecuniary rent. I regret to have to come to this conclusion, "because it follows that the Act can be in some respects evaded."

I think that it may be necessary at some time for those words of Salter J. and some words of Shearman J. to the like effect to be reconsidered. I do not think that the decision of the Divisional Court in *Hornsby* v. *Maynard*[5] affects the present case in any degree. There was a protected tenancy from 1941 to 1946, and the same class of tenancy remains notwithstanding the increase of 10s. in the wages, and notwithstanding the fact that the one was written off against the other. There was no new agreement which put an end to the old tenancy or which changed its character.

I would add this. Everyone realizes that the trustees have been acting as they thought best in the interests of those for whom they are trustees. If this had been, or could properly be considered as, a service letting, and if they required the premises in order to put in another caretaker, they might have a remedy: they might be able to obtain possession. But that part of their claim was not proceeded with before the county court judge, and it does not arise here. It appears to me that the appeal should be allowed and that the judgment given in the county court should be reversed.

DENNING L.J. Rent is usually quantified in money and paid in money, but it is not necessary in law that it always should be

[3] [1925] 1 K.B. 514, 525.
[4] Ibid.
[5] [1925] 1 K.B. 514.

so. The position at common law is stated in the latest edition of Woodfall at p. 330 (25th ed., 1954): "... there is no occasion for "it to be, as it usually is, a sum of money: for spurs, capons, "horses, corn, and other matters, may be, and occasionally are, "rendered by way of rent: it may also consist in services and "manual operations; as to plough so many acres of ground, and "the like; ..." In Rent Act cases, according to an observation of Shearman J. in *Hornsby* v. *Maynard*,[6] the position is different. He said that the term "rent" in section 1 and the other sections in which it occurs is rent payable in money and money alone. I cannot agree with that restricted meaning of the word "rent." It seems to me that even under the Rent Acts, in cases when rent is not payable in money but in kind, as in goods or services, then, so long as the parties have by agreement quantified the value in terms of money, the sum so quantified is the rent of the house within the meaning of the Rent Restriction Acts; and, if it exceeds two-thirds of the rateable value, the house is within the Acts.

If the tenancy is determined and the landlord has no further use for the services the landlord can recover the standard rent in lieu of the services. I say nothing about the position where the services are not quantified in money, which was the case in *Hornsby* v. *Maynard*,[6] except to say that even on that point some of the observations in that case may need reconsideration. Suffice it to say in the present case that, accepting the findings of fact of the county court judge, nevertheless the tenant was protected because there was the quantified sum which the services were worth, £66 a year. The house was, no doubt, let to him in consequence of his employment, but the landlords do not suggest that they can bring the case within the provisions of the Act so as to recover possession on that score. I agree, therefore, that the appeal should be allowed accordingly.

MORRIS L.J. I entirely agree. It seems to me that the evidence does not warrant the conclusion that a new tenancy arrangement was made in February, 1946, and the male defendant says that there was no suggestion of a new agreement of tenancy when the plaintiffs agreed to pay him or his wife an extra 10s. a week; and the case can be decided on that ground. I do not think, therefore, that it is necessary in this case to express any final opinion in regard to *Hornsby* v. *Maynard*.[6] It is, I think, relevant to note that in *Insall* v. *Nottingham Corporation*[7] Somervell L.J. in his judgment said[8] that he would like to reserve for further consideration a case in which the court were confronted with a lease which, on the face of it, had in addition to rent some

[6] [1925] 1 K.B. 514, 524.
[7] [1949] 1 K.B. 261; 64 T.L.R. 617; [1948] 2 All E.R. 232.
[8] [1949] 1 K.B. 261, 274.

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further consideration which could be evaluated in money. I agree, for the reasons given, that this appeal succeeds.

At the conclusion of the hearing, Mr. TEMPLEMAN for the defendants informed the court that the defendants had been refused a legal aid certificate to appeal on the ground that they had not shown a reasonable ground for taking, defending, or being party to the proceedings.

DENNING L.J. But the county court judge had indicated that it was a proper case.

SINGLETON L.J. I should have thought in the ordinary course that if a judge expresses the view that a party ought to have legal aid to appeal against his decision, it is probably the most important factor for a legal aid committee to consider.

Appeal allowed.
Order of county court judge set aside.

Solicitors: *Stiles, Wood & Co.; Hyman, Isaacs, Lewis & Mills.*

M. M. H.

[PROBATE, ETC., DIVISION.]

1954
June 17.

* PRACTICE DIRECTION (RESEALING).

Probate—Resealing—Grant—Confirmation—Resealing at Principal Probate Registry—Provision of copies for deposit.

At present the copy of a Scottish confirmation or Northern Irish or colonial grant which is required to be deposited at the Principal Probate Registry on resealing must be provided by the applicant.

As an experiment, the registry is now proposing to accept, at the option of the applicant, a confirmation or grant lodged for resealing without an accompanying copy, and to prepare and retain a photographic copy officially at a charge of 1s. 6d. per sheet.

It is not expected that this procedure will delay the resealing.

June 17, 1954.

D. A. NEWTON,
Secretary,
Principal Probate Registry.

[QUEEN'S BENCH DIVISION.]

*LAMPERT AND ANOTHER v. EASTERN NATIONAL OMNIBUS CO. LD.

1954
Mar. 16, 17, 18.

Hilbery J.

[1949 L. 28.]

Damages — Personal injuries — Husband and wife — Wife disfigured through defendant's negligence—Husband's desertion after accident —Damages for loss of husband.
Husband and Wife — Tort — Negligence — Negligence of third party. Damages—Consortium, loss of.

A wife, in an action for negligence following a road traffic accident, alleged that in consequence she became so disfigured that her husband left her, and she claimed that in assessing the general damages the court should take this matter into consideration:—

Held, that although the wife was not entitled to damages for loss of consortium of her husband, if she lost him as a result of the tortious negligence of the defendants which caused her injury, that was an element in the damages which she could recover. On the facts, it was not established that the wife had lost anything of value by reason of her husband's desertion, or that he had left her because of her disfigurement; accordingly, she was not entitled to damages under this head.

Dictum of Lord Goddard C.J. in *Best* v. *Samuel Fox & Co. Ld.* [1952] A.C. 716, 732; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394 applied.

ACTION.

The plaintiffs, who were husband and wife, claimed damages for injuries sustained by the female plaintiff when involved in a collision between a motor-car owned by her and an omnibus the property of the defendants and driven by their servant. The male plaintiff, who deserted the wife after the accident, although originally a party to the action, did not appear and was not represented, and judgment was accordingly awarded against him.

On September 21, 1947, the male plaintiff was driving the motor-car on the Great North Road with the female plaintiff in the front passenger seat. At a point on a straight length of road the motor-car was approaching the defendants' omnibus, which was stationary at the near side of the road and facing in the same direction, and had stopped some 125 yards to 135 yards short of a cross-roads and some 20 yards or 25 yards short of a stationary lorry. On starting off, the driver of the omnibus made a hand-signal to indicate that he was about to pass the lorry, and the omnibus was driven with its offside wheels near to the centre of the road as the driver intended to turn off to his right at the cross-roads. It was doubtful whether the driver of the omnibus repeated his signal after he had passed the lorry, and as the motor-car reached the omnibus, which was by then beginning to

[Reported by LESLIE CRAYMER, Esq., Barrister-at-Law.]

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turn across the road to enter the side turning, it collided with the omnibus.

At the date of the accident the plaintiff was the owner of a small business. In addition to special damage amounting to £611, and the loss on the business consequent on her injury, the plaintiff claimed damages for the loss of her husband. In evidence she alleged that in consequence of the facial and bodily disfigurement caused to her by the accident her husband had said that he could not bear to live with her and had deserted her. He returned temporarily in order to obtain money to go to America and the female plaintiff gave him £250 in the hope that he would obtain employment there and then send for her. This hope was not fulfilled as the husband returned to England and stayed a few days in the plaintiff's house, she staying in the next house because they were estranged. The plaintiff took out a summons for maintenance, and in August, 1949, an order was made against the husband. Afterwards he disappeared and the plaintiff had never heard of him since, had received no maintenance and had been unable to enforce the order.

Martin Jukes and *F. B. Purchas* for the female plaintiff.
R. O. Armstrong-Jones for the defendants.

HILBERY J. stated the facts, referred to the special damage and to the business carried on by the plaintiff, and continued: The plaintiff claims that in consequence of the negligence which she alleges against the defendants she was disfigured, and that the result has been that her husband has left her.

It is plain that a wife, under English law, has not, and never has had, a claim by way of trespass on the case, merely for loss of consortium. But the plaintiff is not alleging as a cause of action the loss of consortium, but that she lost her husband, who deserted her as a result of the tortious negligence of the defendants which caused her injury. She alleges that this is part of the consequential damage which flowed from their negligence. That, I think, is a distinction which can properly be drawn.

In *Best* v. *Samuel Fox & Co. Ld.*[1] there is a passage in the speech of Lord Goddard where, having referred to *Lynch* v. *Knight*,[2] he says[3]: "I think there is much to be said for the "opinion of Rich J. in *Wright* v. *Cedzich*,[4] in which he closely "analyses the case"—that is, *Lynch* v. *Knight*—"and comes "to the conclusion that Lord Campbell was not supporting the "right of a wife to bring an action for loss of consortium, but was "considering whether the estrangement of a husband from his "wife with consequent distress and suffering of the latter due "to the slander was not sufficient special damage to support the "action."

[1] [1952] A.C. 716; [1952] 2 T.L.R. 246; [1952] 2 All E.R. 394.
[2] (1861) 9 H.L.C. 577.
[3] [1952] A.C. 716, 732.
[4] (1930) 43 C.L.R. 493.

Slander would be a tort, and it would be actionable as a tort by the married woman, if she could support it with proof of special damage. In *Wright* v. *Cedzich* [5] Rich J. is pointing out that the consequential damage may be the loss of the husband by estrangement brought about by the tortious act.

In the present case if the facts showed that the plaintiff had really lost anything of value in losing her husband—if lose him she did because of the disfigurement she suffered—it might well be that that would be an element in the damages which she could recover, because it would be in the line of consequential damage following from the tortious act done towards her. But I cannot think that there is anything to be added to the damages on this particular head, because it is clear to my mind, from the plaintiff's own evidence, that she and her husband had been getting on very badly for a long time. He had turned out to be a very different man from the man that she thought she was marrying at the time that she married him. She had thought that he was a commercial traveller and an honest worker, but she found that he was helping a bookmaker, and was resorting to racecourses and was gambling, and, being unable to get him to correct his ways, they quarrelled. They were estranged before this accident happened, to a large extent. When she came out of hospital and he saw her disfigured he made that an excuse for leaving her. He extracted £250 of her money to go off to America and then came back and deserted her, more, I think, because of his own failings in character than because of the disfigurement. I am not satisfied that her disfigurement was genuinely the reason for his deserting her. In the circumstances, I do not think that there is any sum to be added under that head.

[His Lordship referred to the plaintiff's personal injuries and continued:] I think that the plaintiff's general damage ought to be £2,500, in addition to which she ought to receive the £611 special damage, making a total of £3,111.

However, in the circumstances in which she was being driven I have to examine whether she is affected by her husband's negligence, if he was negligent in the course of this accident. That he was driving in circumstances such that, if he was negligent, that negligence also is her negligence, I have no doubt. They were going on a holiday together in her car; she delegated to him part of the driving; he was driving at the time and she was seated beside him, and had the right to control his driving, and the duty to do so if, for example, he was driving unlawfully.

The question, therefore, is whether the husband or the omnibus driver was wholly responsible, or was each of them guilty of some negligence causing the accident, and, if so, in what fractions ought that responsibility to be distributed as between the two?

[5] 43 C.L.R. 493.

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LAMPERT v. EASTERN NATIONAL OMNIBUS CO. LD.

[His Lordship considered the evidence and continued:] In my view there was negligence on both sides. In the circumstances, therefore, the female plaintiff, as she too is affected in the particular circumstances by the negligence of her husband in the driving, must receive half her damages.

Judgment for the female plaintiff for £1,555 10s.

Solicitors: *Patersons, Snow & Co.; A. D. Vandamm & Co.*

[PROBATE, ETC., DIVISION.]

*LOGAN v. LOGAN.

1954
June 30.

Collingwood J.

Husband and Wife—Maintenance—High Court—Children—Periodical payments—Whether court has power to make order for payment direct to children—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 23 (1).

The court has no power to make an order for payments direct to the children of the marriage on an application by a wife for periodical payments under section 23 of the Matrimonial Causes Act, 1950.

ORIGINATING SUMMONS.

A wife took out an originating summons in March, 1954, under section 23 of the Matrimonial Causes Act, 1950, alleging that her husband had been guilty of a wilful neglect to provide reasonable maintenance for herself and the three infant children of the marriage.

Dimitry Tolstoy and *Basil Webb* for the wife.
C. A. Marshall-Reynolds for the husband.

The question arose during argument upon the merits whether, if wilful neglect to maintain were found, an order might be made, in respect of any provision for the children, that payments should be made direct to the children, as was sometimes ordered in respect of maintenance under section 26 of the Act,[1] in order to obtain certain income tax benefit.

[1] Matrimonial Causes Act, 1950, s. 23: "(1) Where a husband has "been guilty of wilful neglect to pro- "vide reasonable maintenance for his "wife or the infant children of the "marriage, the court . . . may, on "the application of the wife, order "the husband to make to her such "periodical payments as may be "just; . . ."

S. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, . . ."

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COLLINGWOOD J., after finding upon the merits of the case (which do not call for a report) that the husband had been guilty of a wilful neglect to provide reasonable maintenance for the wife and the infant children of the marriage: I was invited by counsel for the applicant to order the payments to be made direct to the infant children. In my opinion the court has no power to make an order in that form under section 23 of the Matrimonial Causes Act, 1950.

Order for periodical payments accordingly.

Solicitors: *Curwen, Carter & Evans; Sidney Elphick.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* SPICER v. SPICER (RYAN INTERVENING).

1954
June 16, 17.

Karminski J.

Husband and Wife—Divorce—Practice—Intervener—Lesbianism alleged—Allegation not proved—Dismissal of intervener from suit.

Where charges of Lesbianism are not established the intervener is entitled to be dismissed from the suit.

A wife formed an affection for another woman of such a kind as to give her husband grave cause for anxiety as to the precise nature of that association, which he alleged by his petition to be Lesbian. The wife persisted in her association against the husband's entreaties, and the husband's health was affected:—

Held, that although there was no physical Lesbian relationship, the conduct of the wife had been such in the circumstances as to amount to cruelty.

DEFENDED PETITION by a husband for divorce on the ground of cruelty.

The gravamen of the charges made by the husband concerned his wife's association with another woman, Ryan. That association was alleged to have been of a Lesbian nature, and charges of Lesbian practices were made in the petition. The wife denied the allegations made against her, and denied that she had been guilty of cruelty; and the woman concerned intervened to deny the charges of Lesbianism.

The intervener did not give evidence, as the charge of actual Lesbian practices was not pursued, the court indicating that the charge of cruelty had been established on the evidence given upon matters other than the accusation of an actual physical relationship.

Melford Stevenson Q.C. and *Victor Williams* for the husband.
Ifor Lloyd Q.C. and *King Anningson* for the wife.
Percy Hollins for the intervener.

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SPICER v. SPICER (RYAN INTERVENING).

KARMINSKI J. I think that I can deal with this case on the evidence before me as it stands. I emphasize the words "as it "stands," because I have not heard yet the evidence of Mrs. Ryan, the intervener, who was at all times, I understand, denying the charges of Lesbian practices between herself and the respondent wife, and who was prepared to go into the witness-box and deny them on oath. Mr. Ifor Lloyd, for the wife, has indicated that the case alleged by the husband against the wife is cruelty. I have had a good deal of evidence that the wife admittedly formed an affection for another woman of such a kind as to give her husband grave cause for anxiety as to the precise nature of that association; more important still, when his suspicions were aroused and he was anxious that she should discontinue that association she persisted in it against his entreaties and against his best endeavours. In so doing I am satisfied beyond any doubt that she occasioned him actual physical injury as well as a reasonable apprehension of future injury to his health should her conduct continue. There was medical evidence before me from a doctor which left no doubt in my mind as to the injury and the extent of the injury.

So far as the precise nature of the association between the respondent wife and the intervener is concerned, I am making no finding, nor is it necessary for me, as I see it, so to do. I bear in mind once more the important fact that not only has the wife denied any physical association, and has denied it on oath, but that the intervener has taken an active part in the suit in the sense that she intervened, instructed counsel on her behalf, and has pursued her denials up to this moment, and still maintains them. That being so, I want to make it absolutely clear that in finding cruelty I am making no finding of any physical relationship between the respondent wife and the intervener; but on the evidence before me, which has been extensive, I have no doubt that I can and ought to find as proved the cruelty alleged in the petition. I do so, and on that ground I pronounce a decree nisi.

Hollins submitted that the intervener should be dismissed from the suit, and said that there did not appear to be an accepted practice in such cases.

KARMINSKI J. The position of those who are the subject of such charges is rather an odd one. If a woman is named in the ordinary way she is charged with adultery in a wife's suit and she then intervenes, and if the charge against her fails as a result of not being proved she is entitled to be dismissed from the suit.

Hollins. That is why I made the application.

KARMINSKI J. Mr. Lloyd, I understand that you were in a very recent case of a similar nature before Davies J.? [1]

[1] *Edwards* v. *Edwards*, unreported, May 12, 1954.

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SPICER v. SPICER (RYAN INTERVENING).

Lloyd. Yes, my Lord. The woman intervener was dismissed from the suit after the charges had been rejected.

KARMINSKI J. Where charges of this kind are not proved (I use that term in the technical sense), it would seem to be right that some order of the kind indicated by you should be made. I shall dismiss the intervener from the suit.

[No application was made in respect of the intervener's costs.]

Decree nisi. Intervener dismissed from suit.

Solicitors: *Allen & Overy; Reid Sharman & Co.; Bower, Cotton & Bower.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* PRACTICE DIRECTION (COLONIAL PROBATE).

1954 *June* 21.

Probate—Practice—Resealing—Application — Advertisement — Colonial Probates Acts, 1892 *and* 1927 (55 *&* 56 *Vict. c.* 6 *and* 17 *&* 18 *Geo.* 5, *c.* 43).

The Non-Contentious Probate Rules, 1954, which come into force on October 1, 1954, provide (inter alia) that applications for resealing under the Colonial Probates Acts, 1892 and 1927, need not normally be advertised.

The registrars of the Principal Probate Registry are prepared to consider favourably applications to dispense with advertisement during the period before the new rules come into force.

June 21, 1954.

D. A. NEWTON,
Secretary.

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* KENYATTA AND OTHERS *v.* THE QUEEN.

J. C.*

1954 *July* 6, 7.

PRACTICE NOTE.

Privy Council—Appeal—Jurisdiction — Criminal matter — Failure to appeal first to final court of appeal of colony.

On the hearing of a petition for special leave to appeal from a judgment of the Supreme Court of Kenya, dated February 15, 1954, which had affirmed a decision of a resident magistrate convicting the petitioners of managing and assisting in the

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* *Present*: LORD GODDARD, LORD MORTON OF HENRYTON, LORD COHEN, and LORD KEITH OF AVONHOLM.

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management of an unlawful society (Mau Mau) and of being members of the society, the question was raised by the Board whether the petition was competent in view of the fact that the petitioners sought to come direct to the Board and had not first appealed to the Court of Appeal for Eastern Africa, and attention was called to *Dagnino* v. *Bellotti*,[1] where it was said: "The "proper course for the appellant to have adopted was, if he "considered that the verdict was not warranted by the evidence, "to move the court for a new trial. He has not exhausted the "remedies which the rules and practice of the court directed "should be observed in cases where a verdict of the judge and "assessors is objected to on the ground that it is not warranted "by the evidence."

D. N. Pritt Q.C., *R. K. Handoo* and *Ralph Millner* for the petitioners. There is nothing in the legislation establishing the Court of Appeal of Eastern Africa to say that the right of application to the Privy Council for special leave shall be interfered with in any way. That right, under the Judicial Committee Act, 1844, is that: "It shall be competent to Her Majesty, by any order "or orders . . . made with the advice of Her Privy Council, to "provide for the admission of any appeal or appeals to Her "Majesty in Council, from any judgments, sentences, decrees "or orders of any Court of Justice within any British colony or "possession abroad, although such court shall not be a court of "errors or a court of appeal within such colony or possession."

Melford Stevenson Q.C., *A. G. Somerhough Q.C.* and *J. G. Le Quesne* for the Crown. The theoretical possibility is not disputed of bringing a petition direct from the Supreme Court of Kenya, but it is submitted that there is a discretion in the Board and that it would be wrong to permit an appeal to the Privy Council in the present case since the right to go to the Eastern Africa Court of Appeal has not been exhausted.

Pritt. It being conceded that the Board has jurisdiction, the only question is whether any, and if so what, weight should be attached to the failure to appeal first to the Court of Appeal for Eastern Africa, and it is submitted that in all the circumstances no weight should be attached to it. What little authority there is on this matter shows that one can go straight from the court of first instance to the Board, but it cannot be imagined that anyone would be encouraged to do that today. [Reference was made to Bentwich, Privy Council Practice, 3rd ed. (1937), p. 125.] *Dagnino* v. *Bellotti*[1] was a civil case, and it does not help or hinder on the present point.

The BOARD directed the hearing of the petition to continue and, having heard it on its merits, dismissed it, LORD GODDARD (presiding) saying: "Their Lordships do not find it necessary to

[1] (1886) 11 App.Cas. 604, 606.

"decide whether the fact that the applicants did not first appeal "to the Court of Appeal for Eastern Africa ought in this parti-"cular case to be regarded as a ground for refusing leave, because "they are of opinion that apart from that question no grounds "have been established which would justify their Lordships in "advising Her Majesty to grant leave."

C. C.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

[COURT OF APPEAL.]

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1954
July 1.
Singleton, Jenkins and Hodson L.JJ.

* *In re* LORD HYLTON'S SETTLEMENT. BARCLAYS BANK LD. *v.* JOLLIFFE.

[1953 H. No. 4323.]

Trust and Trustee — Scheme to avoid tax — Jurisdiction of Chancery Court to sanction—Compromise—Protected life interest—Construction summons — Decision of court of first instance that protected life interest not determinable—Appeal—Compromise of appeal—Jurisdiction of Court of Appeal to sanction compromise varying beneficial interests.

Settlement. Revenue—Tax avoidance scheme. Court of Appeal—Jurisdiction—Compromise of appeal—Variation of beneficial interests.

Under a settlement made in 1923 the income of a trust fund was payable to a tenant for life until some act or event should happen whereby the income would become vested in or charged in favour of some other persons, in which event discretionary trusts would come into operation in favour of the tenant for life, his wife and issue. By clause 10 of the settlement it was provided that, after the death of the tenant for life, the trust fund was to be held in trust for the issue of the tenant for life in such shares and with such gifts over "and with such provisions for their respective advancement (either "overreaching the interests prior to this power or not) and main-"tenance and education and otherwise in such manner for the "benefit of such issue" as the tenant for life should by deed or will appoint, with ultimate trusts in default of appointment for the children of the tenant for life at 21 or marriage. The tenant for life had had three children, and by an appointment made in 1951 he appointed the whole trust fund and the income thereof in favour of his eldest son, if he should attain the age of 21 years. The eldest son attained the age of 21 in 1953 and the tenant for life requested his trustees to pay the whole trust fund to the eldest son. The tenant for life's two younger children were still infants.

The trustees of the settlement took out a summons to have the effect of clause 10 of the settlement and the appointment determined. Harman J. declared that the tenant for life had no power to appoint the whole fund to his eldest son. The eldest son appealed on the ground that Harman J. had misconstrued clause 10.

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The Court of Appeal was asked to sanction the compromise of the appeal on the terms that the trustees should raise out of the trust fund a sum of £5,000 and hold that sum upon trust for the benefit of any future wife of the tenant for life and the children of the tenant for life other than the eldest son as thereby provided and, subject as aforesaid, the trust fund should be held upon trust for the eldest son free from the prior trusts of the settlement to take effect during the life of the tenant for life. The result of the compromise would be to effect a large saving in estate duty should the tenant for life survive five years:—

Held, that the court had jurisdiction to sanction the compromise and that it should be approved.

Chapman v. *Chapman* [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798 distinguished.

APPEAL from Harman J.

By a settlement dated December 27, 1923, made between the late Lord Hylton as settlor of the first part, the plaintiffs Barclays Bank Ld. as trustees of the second part, and the fourth defendant, the present Lord Hylton (hereinafter called Lord Hylton), of the third part, a trust fund was settled upon trust to pay the income to Lord Hylton during his life until some act or event should happen whereby the income, if belonging absolutely to him, would become vested in or charged in favour of some other person, on which event discretionary trusts were to come into operation for the benefit of Lord Hylton, his wife and issue. Clause 10 of the settlement provided that after the death of Lord Hylton the capital and income of the trust fund shall be held in trust for his issue "at such times and if more than one in such shares and "with such gifts over and with such provisions for their respective "advancement (either overreaching the interests prior to this "power or not) and maintenance and education and otherwise in "such manner for the benefit of such issue or some or one of "them as [Lord Hylton] shall by deeds revocable or irrevocable "or by will or codicil appoint but so that under any appointment "a child shall not otherwise than by way of advancement take a "vested interest except being a son or sons upon attaining the "age of 21 years or being a daughter or daughters upon attaining "that age or upon marriage"; and in default of any appointment trusts were declared in favour of Lord Hylton's children.

Lord Hylton had had three children, the first defendant Raymond Hervey Jolliffe (hereinafter called Mr. Jolliffe) who attained the age of 21 on June 13, 1953, and the second and third defendants who were not yet of age.

By an appointment dated May 7, 1951, expressed to be supplemental to the settlement Lord Hylton irrevocably appointed: "1. The said trust fund and any other property subject to the "trusts of the settlement and the income thereof as from the "date of this deed shall be held in trust for Mr. Jolliffe if he shall "attain the age of 21 years.

"2. The statutory power of expending income of the said trust "property for or towards the maintenance education or benefit of

"Mr. Jolliffe shall not be exercised during the lifetime of Lord "Hylton except on the request in writing of Lord Hylton.

"3. The statutory power of paying or applying capital of the "said trust property for the advancement or benefit of Mr. Jolliffe "shall be exercisable with the following extension and modifica-"tions (that is to say) the said power (a) shall extend to and "be exercisable over the whole of the said capital (b) shall be "exercisable during the lifetime of Lord Hylton so as to over-"reach all such prior interests as aforesaid and (c) shall during "the lifetime of Lord Hylton be exercised in accordance with "such directions as he may from time to time give to the trustees "in writing and not otherwise."

On June 5, 1951, Lord Hylton signed a request to the plaintiffs, as trustees of the settlement, requesting and authorizing them to advance the whole trust fund to Mr. Jolliffe forthwith.

The plaintiffs took out a summons to have clause 10 of the settlement and the appointment construed. Harman J. held that in clause 10 "advancement" was used in its strict sense and that Lord Hylton had no power to direct payment of the whole fund to his eldest son. Harman J. made an order declaring that, upon the true construction of clause 10 and in the events which had happened, the plaintiffs held the trust fund upon trust for Mr. Joliffe absolutely in remainder expectant on the death of Lord Hylton and further that there was power under the appointment of 1951 to apply any part or the whole of the capital of the trust fund for his advancement in some definite way as Lord Hylton should direct, on the trustees being satisfied that the payment was an advancement. The income of the trust fund was still payable to Lord Hylton, no forfeiture of his life interest having occurred.

Mr. Jolliffe appealed on the ground that Harman J. had given too restricted a construction to the provisions as to advancement in clause 10 and he asked the court to declare that the plaintiffs held the trust funds in trust for him absolutely. If the appeal were successful it was not disputed that a large sum would be saved in estate duty should Lord Hylton survive five years.

Before the appeal was heard the parties agreed to compromise the appeal upon the terms that the plaintiffs, as trustees, should forthwith raise the clear sum of £5,000 out of the trust fund and hold that sum and the investments representing it upon trust for the benefit of any future wife of Lord Hylton and his children and remoter issue, other than Mr. Jolliffe, as therein provided, and that, subject to that payment, they should hold the capital and income of the trust fund on trust for Mr. Jolliffe absolutely by way of acceleration of the absolute interest to which he was entitled under the appointment and free from all prior trusts to take effect during the life of Lord Hylton. Lady Hylton agreed to this compromise.

When the matter came before the Court of Appeal for its approval the question was raised whether, since Harman J. had

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decided the point of construction at issue, the court had power, having regard to the decision of the House of Lords in *Chapman* v. *Chapman*,[1] to approve the compromise on behalf of the infants and other persons who might become interested in the event of Lord Hylton forfeiting his life interest.

Geoffrey Cross Q.C. and *Kenneth Elphinstone* for Mr. Jolliffe. The court is asked to approve this compromise. It has jurisdiction to do so. There is a real dispute here between the parties about the true construction of clause 10 of the settlement. The matter was argued before Harman J. for a day and a half and there is a point of substance to be argued on appeal. The ambiguity in clause 10 appears on its face. This case is not within the scope of the decision of the House of Lords in *Chapman* v. *Chapman*.[1]

J. L. Arnold for the two infant children of Lord Hylton.

E. I. Goulding for Lord Hylton.

A. H. Droop for the trustees.

The COURT held that it had jurisdiction to sanction the compromise and that it should be approved and the appeal dismissed.

B. A. B.

Solicitors: *Slaughter & May; Withers & Co.*

[1] [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798.

[CHANCERY DIVISION.]

1954
May 20, 21.
Harman J.

* STOW BARDOLPH GRAVEL CO. LD. *v.* POOLE (INSPECTOR OF TAXES).

Revenue—Income tax—Capital or income expenditure—Gravel merchant—Cost of right to take gravel—Whether capital expenditure or expenditure on stock-in-trade—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

A company of sand and gravel merchants, in consideration of a payment of £2,000, acquired the benefit of a contract to take a deposit of sand and gravel. They later exercised an option contained in the contract, under which they acquired for £2,250 a right to take a further deposit. The company did not treat the gravel in any way but merely removed it from the soil and carted it away to be sold. The company claimed that the sums of £2,000 and £2,250 were expended on the purchase of stock-in-trade and therefore admissible as deductions in the computation of their profits for the purpose of Case I of Sch. D. The General Commissioners held that they were not allowable deductions. On appeal by the company from their decision, the Crown contended that the sums were not

expended in the purchase of stock-in-trade but were capital expenditure, being expenditure to acquire the right to go on the land and win the gravel:—

Held, that the purchase of the deposits by the company was a purchase of stock-in-trade; and the sums were admissible as deductions for the purpose of computing profits under Sch. D.

Golden Horse Shoe (New) Ld. v. *Thurgood* [1934] 1 K.B. 548; 18 Tax Cas. 280 applied.

APPEAL by case stated from the Commissioners for the General Purposes of the Income Tax Acts for Freebridge Marshland in the County of Norfolk.

The case stated so far as relevant provided: By an agreement dated October 29, 1947, Luddington Estates Ld. (on whose land were considerable deposits of gravel) agreed to sell to Gorbould Bros., a firm of contractors, a deposit of gravel and sand ballast on approximately 8 acres of their land for the sum of £2,000. No estate or interest in the land was acquired by the purchasers, their rights being expressly limited to having access to the land for the purpose of removing the gravel and sand ballast by one gateway only.

Gorbould Bros. did not work or excavate any part of the deposit of gravel and sand covered by the agreement, the benefit of which was acquired by the appellant company, Stow Bardolph Gravel Co. Ld., in consideration of £2,000, under an oral agreement with Gorbould Bros. The appellant company, who were sand and gravel merchants, proceeded to excavate the deposit of sand and gravel and to sell it in the course of trade. They did not treat or process the gravel but merely dug it up or raked it off the surface and carted it away in a lorry.

In 1949 the appellant company, in exercise of an option contained in the agreement of 1947, obtained access on like terms to a further deposit of sand and gravel lying on an adjoining 2¼ acres of land at the price of £1,000 per acre, making a total of £2,250. On the exercise of that option the appellant company became entitled to a further option exercisable within five years over a third piece of land.

The appellant company claimed that in the computation of their profits for the purpose of Case I of Sch. D [1] to the Income Tax Act, 1918, they were entitled to deduct the sums of £2,000 and £2,500 paid respectively to acquire the agreement of 1947 and in the exercise of the first option under that agreement, on the ground that it was expenditure incurred in the acquisition of trading stock, or expenditure of a revenue character wholly and exclusively for the purpose of the company's trade.

[1] Income Tax Act, 1918, Sch. D, Case I, r. 3: "In computing the "amount of the profits or gains to be "charged, no sum shall be deducted "in respect of—(*a*) any disbursements "or expenses, not being money wholly "and exclusively laid out or expended "for the purposes of the trade . . . "(*f*) any . . . sum employed or in-"tended to be employed as capital in "such trade . . ."

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The General Commissioners held that the two sums in question were not admissible as deductions. The company appealed against that decision.

Hilary Magnus for the appellant company.

Sir Lynn Ungoed-Thomas Q.C. and *Sir Reginald Hills* for the Crown.

Cases cited in argument other than those set out in the judgment: *Coltness Iron Co.* v. *Black* [2]; *Gowan* v. *Christie* [3]; *Hughes* v. *British Burmah Petroleum Co. Ld.*[4]; *Inland Revenue Commissioners* v. *Broomhouse Brick Co. Ld.*[5]; *Morant* v. *Wheal Grenville Mining Co. Ld.*[6]; *Moseley* v. *Wimpey & Co. Ld.*[7]

HARMAN J., having stated the facts, continued: The appellants' trade is that of sand and gravel merchants and the case has been treated throughout under Sch. D and not under Sch. A. The only question that I have to determine is whether, in making up their accounts, they were entitled to debit against the profits of the sale of this gravel the money paid, first, for taking over this contract and, secondly, for exercising the option. No one seeks to make any distinction between the two.

It is argued on behalf of the appellants that this is a mere purchase of stock-in-trade—their stock-in-trade being sand and gravel—and that all they do is to go on the land, shovel the sand and gravel into a lorry, and sell it to their customers, so that it is as much their stock-in-trade as any other article in which a trader might deal.

It is said on behalf of the Crown that the sand and gravel is not a chattel detached from the soil, but something which has to be worked as if it were in a mine or a quarry; and that all that was bought under this contract was a capital asset, namely, the right to go on the land and win the gravel and the sand and to carry it away. The cost of working the sand and gravel, the Crown conceded, may be charged, but not the price paid for the contract. The sums of £2,000 and £2,250 are, according to the Crown, merely capital expenditure incurred by the company in order to acquire these valuable rights.

The nearest case to this on the facts is *Golden Horse Shoe (New) Ld.* v. *Thurgood*,[1] a case before the Court of Appeal, where a company had bought a dump of "tailings" lying on the soil which contained a certain amount of gold, but which formed no part of the land in the sense of being, in any way, affixed to it. The Court of Appeal, reversing the decision of Finlay J., held that the company was entitled to deduct the price paid against

[2] (1881) 6 App.Cas. 315; 1 T.C. 287.
[3] (1873) L.R. 2 Sc. & Div. 273.
[4] (1932) 17 T.C. 286.
[5] (1952) 34 T.C. 1.
[6] (1894) 11 T.L.R. 67; 3 T.C. 298.
[7] (1945) 61 T.L.R. 411; [1945] 1 All E.R. 674; 27 T.C. 315.
[1] [1934] 1 K.B. 548; 18 Tax Cas. 280.

its profits. Lord Hanworth, in his judgment, had much to say about fixed and floating capital, and observed [2]: "The question "involved is always a troublesome one, and is not rendered less "difficult by recalling the principle which has many times been "approved in the courts, that prudent directors of a company "would make provision for the wasting character of their enter-"prise." He cited *British Insulated and Helsby Cables Ld.* v. *Atherton* [3]—where an attempt was made to decide what was a capital payment and what was an income payment—and a number of other cases, and continued [4]: "The above cases serve to "establish the difficulty of the question rather than to affirm "any principle to be applied in all cases. Indeed, in the last "case cited, [*Atherton's* case [5]] Lord Cave says that a payment "once and for all, a test which had been suggested by Lord "Dunedin in *Vallambrosa Rubber Co.* v. *Farmer*,[6] was not true "in all cases, and he found authority for that statement in *Smith* "v. *Incorporated Council of Law Reporting for England and* "*Wales* [7]; and the *Anglo-Persian* case,[8] already referred to, is "another. The test of circulating as contrasted with fixed "capital is as good a test in most cases to my mind as can be "found; but that involves the question of fact: was the outlay "in the particular case from fixed or circulating capital? It is "clear that there may be an immediate outlay for the purpose "of the trade carried on, a large outlay on the stock in trade "which is to be marketed over such a span of time as the business "warrants."

For that proposition he cited *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*,[9] and said [10]: "After careful considera-"tion of the present case, in the course of which my mind has "fluctuated on either side, I think it is to be decided upon its "own facts." It is clear, therefore, that he was doing nothing more than deciding the actual case before him, and he decided —and I think that it was the ground for his decision—that the company was entitled to make the deduction in question of the price of the "tailings," because, as he said: "They had not to "win them from the soil; they had been gotten already."

Lord Hanworth then [11] quoted from *Alianza Co.* v. *Bell* [12]: "'If it is merely a manufacturing business, then the procuring "'of the raw material would not be a capital expenditure. But "'if it is like the working of a particular mine or bed of brick "'earth, and converting the stuff worked into a marketable com-"'modity, then the money paid for the prime cost of the stuff "'so dealt with is just as much capital as the money sunk in

[2] [1934] 1 K.B. 558.
[3] [1926] A.C. 205; 42 T.L.R. 187.
[4] [1934] 1 K.B. 560.
[5] [1926] A.C. 205.
[6] (1910) 5 T.C. 529.
[7] [1914] 3 K.B. 674; 30 T.L.R. 588; 6 T.C. 477.
[8] [1932] 1 K.B. 124; 47 T.L.R. 487; 16 T.C. 253.
[9] [1921] 1 K.B. 64; 37 T.L.R. 33; 12 T.C. 358.
[10] [1934] 1 K.B. 560, 561.
[11] Ibid. 562.
[12] [1904] 2 K.B. 666, 673.

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"'machinery or buildings. In my opinion the particular adven-"'ture here belongs to the latter category.'" In that case Channell J. had held that as the company had to work the material up, it was a capital expense to buy it.

Lord Romer, in *Golden Horse Shoe (New) Ld.* v. *Thurgood*,[13] again only decided the case on its own facts, saying[14]: "Unfor-"tunately, however, it is not always easy to determine whether "a particular asset belongs to the one category or the other. It "depends in no way upon what may be the nature of the asset "in fact or in law. Land may in certain circumstances be "circulating capital. A chattel or a chose in action may be fixed "capital. The determining factor must be the nature of the trade "in which the asset is employed." I think that he too relied on the fact that in that case the "tailings" had already been extracted from the mine.

It is said here that the opposite conclusion should be reached, and the reason in substance is because this gravel had never been raked off the soil on which it was lying. This is not a case where the gravel is in any true sense "won" from the soil; nor is any process applied to it. It is not even suggested that a riddle or sieve is used; it is merely shovelled up where it lies, put on a lorry and sold wherever it can be sold. It is argued that what was bought was a mere right to go on the land and win the gravel, but, in effect, in the *Golden Horse Shoe* case[15] what was bought was the licence to go on the land and take away the "tailings," and I think that it is a distinction without difference to suggest that, because nobody had ever before applied a rake to this gravel, it should be treated as capital, whereas if somebody had raked it into little heaps before the contract was made, then its purchase would constitute a different form of adventure. It is the same situation; it is no more and no less attached to the land.

It was decided by the House of Lords in *Russell* v. *Scott*[16] that sand and gravel pits were not taxable under No. 3 of Sch. A, and that they must, therefore, be chargeable under No. 1 of that Schedule. In the present case it was not suggested that Sch. A was applicable. If that be right, the basis of charge must be under Sch. D on the footing that this was the trade of dealing with sand and gravel.

The appellant company were sand and gravel merchants; what they bought under this contract was sand and gravel. They did not work it up or treat it as raw material or do anything with it, so far as I am told, except to load it on a cart and take it away, and it would be to introduce only another artificiality if I were to hold that the fact that this gravel had not been moved made the expenditure upon it a capital outlay, when the expenditure on it would have been a trading cost had it been touched by a rake.

[13] [1934] 1 K.B. 548.
[14] Ibid. 563.
[15] [1934] 1 K.B. 548.
[16] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375.

In my judgment the appellants were buying stock-in-trade when they bought the gravel, and they ought to be allowed to deduct the cost against the money they made by selling it. The appeal will be allowed with costs and the assessment remitted to the Commissioners.

Appeal allowed.

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Solicitors: *Metcalfe, Copeman & Pettefar; Solicitor of Inland Revenue.*

I. G. R. M.

[COURT OF APPEAL.]

* LEWIN *v.* ALLER (INSPECTOR OF TAXES).

C. A.

1954 *July* 7, 8.

Evershed M.R., Jenkins and Hodson L.JJ.

Revenue—Income tax—Earned income relief—Basis of computation—Deduction of charges on income—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *ss.* 14, 17, *Sch. V, para.* 17—*Finance Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 15 (1) (3)—*Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 40 (3).

Court of Appeal—Appellant appearing in person—Right to be heard.

Earned income relief under section 15 (1) of the Finance Act, 1925, is to be calculated by reference to the total earned income, less any sums within section 17 of the Income Tax Act, 1918.[1]

A taxpayer was under obligation to pay out of his income interest on a mortgage and loan, payments to a building society and interest on an overdraft at his bank:—

Held, that in arriving at his earned income for the purpose of computing the earned income relief, all three items should first be deducted, for section 17 of the Act of 1918 was, by virtue of section 15 (3) of the Finance Act, 1925, and para. 17 of the Fifth Schedule to the Act of 1918, brought in to qualify the right to relief contained in section 15 (1) of the Act of 1925.

Adams v. *Musker* (1930) 15 T.C. 413 approved.

Decision of Wynn-Parry J. affirmed.

APPEAL from Wynn-Parry J.

A chartered accountant, Owen Michael Lewin, appealed to the Commissioners for the General Purposes of Income Tax for

[1] Finance Act, 1925, s. 15 (1): "An individual who makes in the manner prescribed by the Income Tax Acts a claim in that behalf and who makes a return in the prescribed form of his total income shall, for the purpose of ascertaining the amount of his assessable income for the purpose of income tax, be allowed a deduction from the amount of his earned income of a sum equal to one-sixth of the amount of that income, . . ."

[The amount of the deduction was increased to one-fifth by section 27 (2) (*a*) of the Finance Act, 1948.]

Income Tax Act, 1918, s. 17: "A claimant shall not be entitled to exemption, abatement or relief in respect of any income the tax on which he is entitled to charge against any other person, or to deduct, retain, or satisfy out of any payment which he is liable to make to any other person."

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the division of Kingston and Elmbridge, Surrey, against an objection to the amount of his claim for an allowance in respect of earned income for the year ending April 5, 1951. The figures for the taxpayer's income during the tax year in question were agreed for the decision of the commissioners as follows: first his share of the profits of the partnership of which he was a member was £1,481; from that there was deducted his national insurance contribution, leaving £1,468, and there was added a family allowance of £13, a Royal Naval Reserve training fee of £35, and £52 representing the Schedule "A" valuation of his residence, which he owned beneficially. The total income so computed was, therefore, £1,568. During the year, however, the taxpayer was under obligation to pay the following sums: first, mortgage and loan interest of £85, secondly, interest to a building society of £56, and thirdly, interest to his bankers in respect of an overdraft, £29. The total charges were, therefore, £170. In paying the interest on the mortgage and loan the taxpayer deducted tax, but the other two payments were paid without deduction of tax. It was conceded that the unearned income represented by the Schedule "A" valuation of £52 had first to be brought into account for tax purposes against the charges, so that they were reduced to £118.

The question for the general commissioners was whether in computing the earned income relief under section 15 (1) of the Finance Act, 1925 (as amended by section 27 (2) of the Finance Act, 1948),[1] the appropriate fraction (one-fifth) should be calculated by reference to the whole of the taxpayer's earned income, less only the difference between the mortgage and loan interest and the unearned income (that is £33), making a total of £1,483; or whether the building society interest and the bank interest ought also to be deducted, making a total of £1,398. The first method, which was followed by the taxpayer, produced an allowance of £297, and the other, which was adopted by the Revenue, produced an allowance of £280. The general commissioners decided that the second method was correct. The taxpayer appealed by case stated by the commissioners. Wynn-Parry J. held that the decision of the commissioners was correct, and the taxpayer appealed. At the hearing of the appeal the question was whether the allowance should be calculated on the earned income, as it in fact was, or whether all the deductions should first be made, the taxpayer conceding that, if section 17 of the Act of 1918 applied, no distinction was to be drawn between the three items of charge.

The taxpayer appeared in person.

Roy Borneman Q.C. and *Montagu Temple* for the Crown.

In addition to the case referred to in the judgment, the following cases were cited in argument: *Commissioners of Inland*

[1] See note on p. 1063.

Revenue v. *Dalgety*[2]; *Earl Howe* v. *Commissioners of Inland Revenue*[3]; *Solomon* v. *Commissioners of Inland Revenue.*[4]

EVERSHED M.R. stated the facts and continued: The point is whether Mr. Lewin is entitled to relief or deduction in respect of earned income calculated by taking one-fifth of the whole of his earned income, as it was in fact, that is, £1,480 odd, or whether he must first allow the balance of the charges, £118, to be deducted from his earned income, so as to enable him to claim relief to the extent of one-fifth of the balance only. The point is simple—simple, at least, to state. Further, if reference is made only to section 15 of the Finance Act, 1925, which is the section now conferring on the taxpayer his right to earned income relief, it would appear, to say the least, that Mr. Lewin would have a very formidable case for arguing as he does in favour of the former of the two alternatives which I have stated. [His Lordship read section 15 (1) and continued:]

The phrase "earned income" has been defined and no question, I think, arises in this case but that it comprehends the whole of the sum which Mr. Lewin derives from his partnership business, together with his family allowance and Royal Naval Reserve training fee. If, therefore, section 15 (1) stood alone, and there were no other relevant sections in any of the taxing statutes, I could see no answer to the submission that he is entitled, in terms of the statute, to deduct from the amount of his partnership earnings, for the purposes of his income tax assessment, one-fifth of those earnings, that is to say, one-fifth of £1,516. That, indeed, was the view which Rowlatt J. took in *Adams* v. *Musker*,[1] to which I will presently return.

Section 15 (1) is not, however, the only relevant statutory provision. Section 15 (3), which I agree with Mr. Lewin may fairly be called a mechanical provision, provides, inter alia, that the provisions of paragraph 17 of the Fifth Schedule to the Income Tax Act shall apply "for the purpose of claims under this "section." In my judgment, it is manifest that the expression "claims under this section," though it covers, of course, claims under subsection (2), must cover claims under subsection (1), that is, claims for an allowance in respect of earned income; and if one turns to paragraph 17 of the Fifth Schedule to the Income Tax Act, 1918, one finds that it is there laid down that an individual must, for the purposes of the income tax administration, make certain declarations, including a "declaration of the "amount of interest, annuities, or other annual payments to be "made out of the property or profits or gains assessed on the "claimant, distinguishing each source." One may, therefore, at this stage ask what the relevance of such a declaration is. In

[2] [1930] A.C. 527; 15 T.C. 216; 46 T.L.R. 349.
[3] [1919] 2 K.B. 336; 7 T.C. 289; 35 T.L.R. 461.
[4] (1933) 18 T.C. 227.
[1] (1930) 15 T.C. 413.

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my judgment the answer to that question is that the right set out in section 15 (1) in apparently unequivocal terms is subject to the operation or application of section 17 of the Income Tax Act, 1918.

Partly out of respect for and fairness to Mr. Lewin's argument I will now consider the history of this legislation. Mr. Lewin reminded us of its origin in the days of the Napoleonic wars, but I do not propose to go back earlier than the Act of 1918. Section 14 of the Income Tax Act, 1918, gave to the taxpayer relief in respect of earned income, but gave it in a way which differs in principle from the method which is enshrined in section 15 of the Act of 1925. Section 14 (1) provided that where the income of the taxpayer did not exceed a certain figure and any part of that income was earned income, the claimant should be entitled to relief from tax in such a way as would reduce the tax liability to the figure that would be arrived at if the tax on the earned income were not at the standard rate, but were at certain other rates. Those rates varied according to the sizes of the income earned. Section 17, to which I have already briefly referred, is in the same fasciculus of sections. [His Lordship read section 17 and continued:] The scheme of relief in respect of earned income was altered in 1920 [by the Finance Act, 1920, Third Schedule] and instead of the words "exemption, abatement," there were substituted the words "allowance or deduction." But for the present case, nothing turns on any difference in the language.

I observe that there is in respect of the three items of charges a slight difference in that, according to the case stated, Mr. Lewin deducted from the mortgage and loan interest the income tax in respect of that interest, as he was entitled to do. Thereby, in effect, and in accordance with the procedure which is enshrined in the General Rules and is well known, he accounted to the Revenue for the tax on the interest, for which otherwise the mortgagee or recipient of the interest would have been liable. The building society interest and the bank interest, however, he paid in full without deduction of tax. I had thought that Mr. Lewin made it plain in the early part of his address to this court that, for the purposes in hand, he did not seek to draw any distinction between the mortgage interest, on the one hand, and the building society and banking interest, on the other. I was not quite sure whether later on he desired to qualify that concession, but, in any case, I am satisfied that there is no valid distinction to be drawn, and Mr. Lewin did clearly tell the court that he accepted the view that section 17 applied to all three items.

I will, therefore, proceed henceforth on the basis that there is no distinction fairly or validly to be drawn between any of these items of interest, and that they are all items which fall within the words which I have read, namely, "income the tax on "which he"—that is, the claimant—"is entitled to charge

" against any other person, or to deduct, retain, or satisfy out of " any payment which he is liable to make to any other person."

I think it must be taken as clear that a taxpayer who sought to claim the relief which section 14 (1) of the Act of 1918 gave to him, would find that the relief was granted subject to a qualifying condition and that by section 17 he had to bring into account against himself, so to speak, such income as was within section 17, that is, the income which would have included the three items of interest which I have already mentioned.

The method of giving relief in respect of earned income enshrined in section 14 of the Income Tax Act, 1918, was subsequently altered and is now to be found in section 15 (1) of the Finance Act, 1925. It will be observed that the difference, putting it briefly, is that instead of paying tax at a lower rate on earned income, an arithmetical calculation of the kind mentioned by section 15 is made, and a deduction is made from the amount of the earned income and tax is then levied at the standard rate upon the reduced figure. As Rowlatt J. observed, in the ordinary case there is not much difference, arithmetically speaking, between paying tax at the full rate on four-fifths of a particular sum, on the one hand, and paying at the rate of four-fifths of the ordinary rate of tax on the whole sum. It will be noticed that section 17, which was formerly a neighbour of section 14 in the Act of 1918, has never been repealed; and the reference in section 15 (3) of the Act of 1925 and paragraph 17 of the Fifth Schedule to the Income Tax Act, 1918, make it quite plain, I think, that, so far from section 17 being repealed, it was clearly in the mind of Parliament as being a section with which and subject to which section 15 would have to be read, just as under the old procedure the relief given by section 14 of the Act of 1918 was qualified by section 17.

If that conclusion is reached, it seems to me necessarily to follow that the point put forward by Mr. Lewin must, by the effect of section 17, be answered adversely to him, namely, that the amount of the earned income deduction is the less sum, computed according to the second of the two alternative methods which I formulated at the beginning of this judgment.

I have so far tried to express in my own language my own conclusion upon this very short question, though perhaps I should not say, as it is an income tax question, that it is a simple matter. But I have done perhaps little more than restate the conclusion which Rowlatt J. arrived at in *Adams* v. *Musker*.[1] The headnote of that case reads: " The appellant made, under " deduction of income tax, certain annual payments which were " charged upon his total income." That means the income taxed at source. " . . . He claimed that in the assessment of his salary " for the year 1927–28 he was entitled to an earned income " allowance of one-sixth of the whole amount of his salary. He

[1] 15 T.C. 413.

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"was given an allowance of one-sixth of the amount of his "salary remaining after deducting from it the amount by which "the charges exceeded the taxed income." It will be noted that, save for the circumstance that the unearned income (or part of it, at any rate) was taxed at source, *Adams* v. *Musker*[1] is on all fours with the present case, and a reference to the figures given shows that it was, in reality, a close parallel.

Rowlatt J. upheld the view of the general commissioners that the amount of the permissible deduction was to be arrived at by deducting from the total salary, that is, the total earned income, the balance of the charges which had not been satisfied by a set-off against the unearned income. That decision has stood for almost a quarter of a century and Mr. Lewin has had to concede, and has stated, that to prevail he must satisfy the court that Rowlatt J. wrongly decided *Adams* v. *Musker.*[1] From what I have already said, it will be appreciated that I do not take that view. I think that Rowlatt J. rightly decided *Adams* v. *Musker*[1] and I am, therefore, not prepared to do other than to follow it. At the end of his judgment Rowlatt J. said, after referring to the previous legislation[2]: "In 1920, and in the Act which is now in "force a different scheme is introduced. Instead of saying that "earned income shall be taxed at a lesser rate, it say that earned "income shall be taxed at the same rate, but you are to take it "as only being five-sixths of what it is, which is much the same "thing as saying it is to be taxed at five-sixths of the normal "rate. Then this rule" (that is a reference to the rule in section 17) "is applied to that, and the only way you can apply it is "by saying, in making the calculation you shall not bring into the "calculation any income which has to be handed on to somebody "else; in other words, you must take the net. That is as I "read it. I do not think there is any other way of making section "17 apply at all, except by reading it in that way. It is intended "to apply, and always has been intended to apply in this way. "I think it is quite clear."

I respectfully agree with that conclusion of Rowlatt J., and it suffices to dispose of this case. But there is an alternative way of meeting Mr. Lewin's claim; that is by reference to section 40 of the Act of 1927 which, among other things, substituted for super-tax what is called "surtax."

Section 40 was in Part III of the Act, which concerned amendments with respect to the method of charging additional income tax and so on. Subsection (3) is a long and elaborate subsection upon which the Crown founded the argument that, whatever else might have been the result of the earlier section, subsection (3), at any rate, made it clear that, for the purpose of calculating such a relief as is here in question, the net amount of the earned income should be taken, after reducing it by any charges of the character, such as the mortgage interest, with

[1] 15 T.C. 413. [2] Ibid. 417.

which we are here concerned. It may be that that is another answer to the claim, and Wynn-Parry J. accepted that argument. I am bound to say that I find the language of subsection (3) somewhat involved, and I think that there is something, at any rate, to be said for the view put forward by Mr. Lewin that it is directed to a different point. On the whole, therefore, I express no view, one way or the other, upon the possible effect in this matter of section 40 (3).

For the reasons I have stated, I think that Mr. Lewin fails in this appeal. I think he has argued his case both well and fairly and, since he has at times been inclined to apologize for taking up time, I wish also to say that he comes here, as it is his right to do, to put his argument before us. Having lost it, he may suffer certain consequences, but I should not wish it to be thought that a litigant who chose to come in person had to apologize for "occupying," as it is sometimes said, "the time of the "court." It is the duty of the court to hear appeals which litigants may choose to bring in person or by counsel. But, acknowledging the courtesy and the clearness with which he has argued his case, I am bound to conclude that in my judgment he is wrong and that his appeal must be dismissed.

JENKINS L.J. I agree.

HODSON L.J. I agree.

Appeal dismissed with costs.

Solicitors: *Solicitor of Inland Revenue.*

E. D.

[QUEEN'S BENCH DIVISION.]

* BASTED *v.* COZENS & SUTCLIFFE LD. AND ANOTHER.

1954
July 9.
Devlin J.

[1953 B. No. 523.]

PRACTICE NOTE.

Costs—Joint tortfeasors—Contribution—Written offer of contribution before trial—To be treated as payment into court—Whether tortfeasor making offer entitled to costs after notional payment into court—R.S.C., Ord. 30, *r.* 2 (2) (*j*).
Joint Tortfeasors.

The plaintiff claimed damages against his employers, Cozens & Sutcliffe Ld., and the Port of London Authority, for personal injuries incurred during the course of his employment which he alleged were due to the negligence of both defendants. Liability was contested. Devlin J. gave judgment for the plaintiff for £6,515 5s. with costs, finding that both defendants were equally liable, and made an order that each of the defendants should pay 50 per cent. of the damages and 50 per cent. of the plaintiff's costs.

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Before the hearing of the action, on June 4, 1954, the second defendants made a written offer to the first defendants to contribute to the extent of 50 per cent. to the damages to which the plaintiff might be entitled. On June 11, there was a direction under Order 30, r. 2 (2) (*j*) that the written offer of contribution might be treated, for the purposes of the first defendants' claim for contribution from the second defendants, as a notice of payment into court.

On the question of costs, it was submitted on behalf of the second defendants that each defendant was liable for 50 per cent. of the plaintiff's costs up to the date of the notional payment into court, but that thereafter the first defendants should pay any further costs that the second defendants might have to pay to the plaintiffs and also that they should pay the second defendants' costs of the proceedings.

D. P. Croom-Johnson and *Leslie Joseph* for the plaintiff.

H. I. Nelson Q.C. and *Bernard Caulfield* for the first defendants.

B. E. Nield Q.C. and *S. O. Olson* for the second defendants.

DEVLIN J. I can give full effect to the rule in this case in the way in which I imagine effect ought to be given. The offer that the Port of London Authority had made is to be treated as if it were equivalent to a payment into court. That means, that any person who disputes the payment into court or the offer as being sufficient, must pay all the costs that have been incurred as a result of the continuance of such dispute, which would otherwise be thrown away. The rule may be very effective in a case where there are, for example, separate proceedings for contribution. The rule may be effective where a large part, or some appreciable part, of a single trial is taken up by a dispute as to whether the proper proportions, if there is any liability, are 50 per cent. or are not 50 per cent.; but in this case there has been no dispute of that sort. Neither party at any time during the trial has even so much as addressed me upon what the proper proportion of contribution should be. They were content to leave it, as, no doubt, it must be left, to the view that I took of the facts of the case. Accordingly, in the circumstances, no costs have been thrown away as the result of the employers having failed to agree the apportionment at 50 per cent., and they cannot be made liable under this rule for costs which the second defendants have incurred in continuing (wrongly as it turned out) to resist that they were liable at all. Accordingly, the order for apportionment of the costs will be that which I have already stated.

Solicitors: *W. H. Thompson*; *Carpenters*; *G. J. D. Tull.*

C. J. E.

[COURT OF APPEAL.]

* ELMS v. FOSTER WHEELER LD.

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1954
July 7, 8.

Somervell, Birkett and Romer L.JJ.

[1952 E. No. 81.]

Building — Safety regulations — Application — "Building" — Power station—Installation of plant—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *regs.* 2 *and* 30 (3).

The defendants, under a contract, installed in a power station four large steam generating plants, consisting of boilers, compartments, cooling chambers and chutes, which when assembled reached a height of something over 100 feet. The installation necessitated the erection of steel stanchions, steel girders and joists, for the purpose not only of supporting the various items of plant but also of providing galleries, stairs and floors to make the portions of the plant accessible.

The plaintiff, a steel erector employed by the defendants, was engaged with other workmen in getting a chute into position by means of chains and pulley tackle. The chute having fouled a cross joist the plaintiff was directed by the foreman to "nip up and "release it." He did so, using the three-inch ridges on the chute as foot and hand holds in climbing and pressing his back against the wall of an economiser. When descending in the same way, however, the plaintiff's foot slipped and he fell through open joists a considerable distance and sustained injury. He sued the defendants for damages, contending that they were in breach of regulation 30 (3) of the Building (Safety, Health and Welfare) Regulations, 1948, in failing to cover securely by temporary boards the joisting through which he fell and above which he had been working:—

Held, that the question whether work which included the installation of plant attracted the Building Regulations must depend on the circumstances of each particular case; that on the facts of the present case the defendants were engaged on the construction of a building and the regulations applied; and that the defendants were in breach of a statutory duty.

Per Romer L.J. The way in which the question may be posed is whether at the time of the accident a building was being constructed and whether the defendants were contributing to its construction. I say "contributing" because it is plain that the words in regulation 2 "the construction of a building" should be read "the construction of a building or any part thereof." The proviso to the regulation shows that the draftsman was using the word "building" in a wide sense.

Decision of Ormerod J. affirmed.

APPEAL from Ormerod J.

The defendants contracted with the City of London Electric Lighting Co. Ld. to manufacture and deliver, unload and erect four steam generating plants at the Bankside Power Station. The plants, of which there were four divisions, consisted of boilers, compartments, cooling chambers and chutes, which when erected resulted in a structure something over 100 feet in height and of still greater width. As found by the trial judge the defendants

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not only put in the boilers etc., but also had to erect a substantial amount of steel stanchions, steel girders and joists, for the purpose both of supporting the various items of plant and also of providing galleries, stairs and floors to make the various portions of the plant accessible when the plant had to be worked.

On May 25, 1951, the plaintiff, a steel erector in the employ of the defendants, was working with other men under a charge-hand getting a chute into position by means of chains and pulley tackle. The chute having fouled one of the cross joists the plaintiff was told by the charge-hand to "nip up and release it." This the plaintiff did by making use of three-inch ridges on the chute as foot and hand holds and resting his back against the wall of an economiser. By these means he got up to another girder and released the chute, but when proceeding to descend in the same way his foot slipped and he fell through open joisting a distance of some 13 feet and suffered injury. It was not contended by the defendants that the plaintiff had been guilty of any negligence in carrying out the charge-hand's orders in the way he did.

The plaintiff's case was that the Building (Safety, Health and Welfare) Regulations of 1948,[1] applied and that the defendants had committed a breach of regulation 30 (3) in failing to cover securely by temporary boards the joisting through which the plaintiff fell a distance of more than 6 feet 6 inches.

The defendants' case was that the contract which they were performing was merely the installation of plant to which the Building Regulations did not apply.

Ormerod J., on May 6, 1954, held that on the facts the Building Regulations did apply and that there had been a breach

[1] Building (Safety, Health and Welfare) Regulations, 1948, reg. 2: "(1) These regulations shall apply to "the following operations, where "undertaken by way of trade or busi-"ness or for the purpose of any indus-"trial or commercial undertaking, or "by or on behalf of the Crown or any "municipal or other public authority, "namely, the construction, structural "alteration, repair or maintenance of "a building (including re-pointing, "re-decoration and external cleaning "of the structure), the demolition of "a building, and the preparation for, "and laying the foundation of, an "intended building whether or not "the building is on or adjacent to the "site of work of engineering construc-"tion within the meaning of the "Factories Act, 1937, and to machi-"nery or plant used in such opera-"tions; and Part VI of these regula-"tions shall apply as respects persons "employed in such operations as "aforesaid: Provided that the fol-"lowing shall not be deemed to "be buildings for the purposes of "this regulation: docks, harbours, "wharves, quays, piers, sea defence "works, lighthouses at sea, river "works, canals, dams, reservoirs, "aqueducts, viaducts, bridges, tun-"nels, sewers, pipelines, filter beds, "gas holders, or pole or lattice work "structures designed solely for the "support of machinery, plant or "electric lines."

Reg. 30: "(3) Subject to para-"graphs (5) and (6) of this regula-"tion when work is done on or "immediately above open joisting "through which a person is liable "to fall a distance of more than "6 feet 6 inches, the joisting shall be "securely covered over by temporary "boards or other covering where and "to the extent necessary to afford "safe access to or foothold for the "work, or other effective measures "shall be taken to prevent persons "from falling."

of regulation 30 (3); and he awarded the plaintiff £1,250 damages.

The defendants appealed.

Marven Everett Q.C. and *Tudor Evans* for the defendants.
John Thompson Q.C. and *R. Geraint Rees* for the plaintiff.

The following cases were referred to in argument: *Hutchinson* v. *Cooksedge & Co. Ld.* [2]; *Street* v. *British Electricity Authority* [3]; *Knight* v. *Demolition and Construction Co. Ld.* [4]

SOMERVELL L.J. This is an appeal from a decision of Ormerod J. The plaintiff claimed in respect of personal injuries which he sustained while he was working for the defendants, who had a contract with the City of London Electric Lighting Co. Ld., to manufacture and deliver, unload and erect four steam generating plants. The plaintiff claims for a breach of duty at common law, and also breach of the Building Regulations. The trial judge held that the Building Regulations were applicable and that there was a breach of them. From that decision the defendants appeal and the first point taken is that the Building Regulations do not apply to what was being done here. [His Lordship read regulation 2 and continued:]

I have read the proviso in full because some argument was based on it, an argument which has some but not always very great force, namely that the excluded matters would be, or at any rate were thought to be, included in the words that preceded and it was therefore necessary expressly to exclude them. If that is a right approach to the construction of the regulation as a whole it would indicate that "the construction of a building" is used in a very wide sense. As against that argument it is to be noted that the form is not perhaps quite the usual form. The form is that "the following shall not be deemed to be buildings" and not, as one might have thought, "shall be deemed not to "be buildings." There is, however, some slight force in that argument.

We have a model of the generating plant and I will very shortly describe it. There are four divisions containing the four generating plants. It is a large structure, we were told something over 100 feet high and rather wider than that I would say from the model. It contains a series of floors or levels connected by gangways and stairways. It would appear to be made of steel and it contains, in addition to the boilers, compartments, cooling chambers, chutes and various things of that sort. The question is whether the work of erecting that structure was the construction of a building.

[2] [1952] 1 All E.R. 696.
[3] [1952] 2 Q.B. 503; [1952] 1 T.L.R. 799; [1952] 1 All E.R. 679.
[4] [1953] 1 W.L.R. 981; [1953] 2 All E.R. 508; [1954] 1 W.L.R. 563; [1954] 1 All E.R. 711.

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Mr. Marven Everett based his argument on a contrast between installation of plant and construction of a building. That was not based on any words in the regulations or in any Act of Parliament and I do not myself find it a really helpful or satisfactory contrast, because I think that the installation of plant may involve the operation of the construction of a building. The judge put it in this way: "I have to decide on the facts of this "case whether it is right to say here that the defendants were "engaged on the construction of a building or whether they were "merely putting something into a building which had been, or "was in the process of being, constructed." He decided, on the model which he saw and on the evidence, that the defendants were engaged on the construction of a building and the regulations therefore applied. I agree with that. I think that was a correct conclusion on the facts of this case, giving the words in the regulation their ordinary meaning.

There was some discussion in argument whether this quadrupartite structure should be regarded as a building itself or as a component part of the whole, which was the Bankside Power Station. I do not find it necessary to decide that because I do not think it matters for the purpose of the issue whether the Building Regulations apply or not. It is a question of words which I think has no relevance to the matter we have to decide.

There remains the question whether the plaintiff has established a breach of the regulations. We have a plan, and there was also a little model. [His Lordship stated the circumstances of the accident and continued:] It was first of all said that there was no safe means of access under regulation 5. The judge negatived that and found a breach of regulation 30 (3). [His Lordship read regulation 30 (3) and continued:] I think it is clear that the plaintiff did fall through open joisting.

The judge, in considering regulation 5, found that there was a safe means of access to the place where it was necessary to get to release this chute by getting onto another girder, then going along where there had admittedly been some boards laid over the chequer work of joists, up a little staircase and along a floor, and in that way he could have got, without any climbing in the sense in which he did climb, to the place where he could release the chute. That might have indicated that that was the proper way for him to go and that he was doing something he ought not to have done and taking a risk he ought not to have taken by climbing up in the way I have described. But that is not, and never has been, the defendants' case. Right at the beginning Mr. Marven Everett said that it was not his case that the plaintiff was doing anything wrong in going the way he did. Indeed, all the evidence, with the exception possibly of one witness, showed that this was a perfectly proper thing for a man to do, skilled as this man was in moving about these structures.

That being so, it seems to me that regulation 30 (3) applies. He was ordered to do work immediately above open joisting and

it is not disputed that he fell a distance of more than 6 feet 6 inches. The open joisting was at the side of the chute and no doubt if it had been covered with planks a small gap would have had to have been left between the planks and the chute to enable it to be lifted up into position. The obvious inference is, however, that, if there had been planks, as in my opinion the regulation say there should have been, the accident would not have happened and he would have fallen a comparatively short distance on to those planks. For these reasons I think that on the two points the trial judge came to a right conclusion and I would dismiss the appeal.

BIRKETT L.J. I am entirely of the same opinion. The substantial point which was argued in the case was the first point taken by Mr. Marven Everett that the Building Regulations do not apply at all to the work which was being done by his clients at the Bankside Power Station. The argument was, of course, that what was being done was merely the installation of plant and was in no sense the undertaking of the construction of a building. It is quite clear, as Mr. Thompson conceded, that you can have an operation which is in itself merely the installation of plant and therefore the Building Regulations would not apply. But what I think it is important to keep in mind is the point which was emphasized by Romer L.J. in the course of the argument, that we have to consider the actual case before the court. Many illustrations were used in the course of the argument, quite naturally, in order to try to illustrate the meaning of the regulations, whether they would apply in this case or the other, and those illustrations ranged over a very wide field. I think it is all-important in deciding these matters that the actual facts of the case before the court should be kept in mind.

My Lord has already indicated what was the nature of the work, but there is a passage in the judge's judgment which puts the matter rather concisely: "In order to instal this plant it "was necessary, of course, not only to put in boilers but also "to erect a substantial amount of steel stanchions, steel girders "and joists for the purpose of not only supporting the various "items of plant which had to be put in, but also for the purpose "of providing galleries, stairs and floors to make the various "portions of the plant accessible when in due course the plant "had to be worked."

It is fairly plain, therefore, that on the facts of this case it is not a simple case of installing plant. Mr. Thompson argued that what was in fact being done was first of all that the defendants were dealing with a part of the construction of the building. He said that in fact what they were doing constituted the construction of a building. So the argument passes to and fro. I myself have come to the conclusion that the Building Regulations do apply to the work in question, and that the judge in the court below took entirely the right view about that. I think

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that the defendants were undertaking the construction of a building within the meaning of these regulations. Mr. Marven Everett pressed upon us that this was making rather an extension of the Building Regulations and that it would make things difficult in future. All that I desire to say about that is that I am not satisfied that those rather lurid prognostications are really justified by the facts as we know them. At all events there is always power in the Minister to make appropriate regulations if any particular hardship should arise. On the facts of this case as we know them I think that the Building Regulations apply to the work which was being done.

With regard to the other point, a rather curious situation arises; but I am satisfied that the judge was right in saying that regulation 30 (3) applied to the facts of this case. In view of the fact that we are upholding the trial judge upon regulation 30 (3) I do not think that it is necessary to say anything about regulation 5, although had that remained a live question I should have had something to say about whether or not the judge was right about that matter. What I think governs the matter is the fact that the plaintiff went up to do the task he was assigned by a route which everybody appeared to agree was a perfectly proper route to take. He was told by the charge-hand, who himself was an experienced steel erector, to go up to this particular place and to release tackle which had become jammed. To an ordinary layman it seems a very hazardous thing to do, but apparently to a skilled steel erector it was all in the day's work. The charge-hand thought nothing about it. The plaintiff went and everybody conceded that that was a perfectly proper thing to do and a perfectly proper route to take. It was when he was returning from that hazardous operation that his foot slipped and he fell on to a concrete floor a distance of some 13 feet and sustained the injuries in respect of which he made his claim.

When regulation 30 (3) is considered, "when work is done"—and he certainly was doing work, he was obeying the instructions of the charge-hand to release this particular jam—"on or immediately above open joisting"—and there can be no question on the facts that that applied to this situation—"through which "a person is liable to fall a distance of more than 6 feet 6 inches." —he did in fact fall 13 feet—"the joisting shall be securely "covered over by temporary boards or other covering where and "to the extent necessary to afford safe access to or foothold for "the work . . .", it is quite clear that if the regulations apply the provisions of that regulation were broken in this case. Therefore, without any further word about regulation 5, it is enough to say that I agree with the finding of the judge with regard to regulation 30 (3) and I think that the appeal should be dismissed.

Romer L.J. I also agree. I only want to say a very few words on the one point which I think is principally troubling the defendants, and that is whether the Building Regulations apply

to this case at all. I agree with my brethren that it is quite impossible to say in a general way that the Building Regulations apply on the one hand or do not apply on the other to work which includes the installation of plant, because it must depend on the circumstances of each particular case whether such an operation attracts the regulations or not.

I think that in the present case the kind of way the question may be posed is whether at the time of the accident a building was being constructed and whether the defendants were contributing to its construction. I say "contributing" because it is quite plain that the words in regulation 2 "the construction of a building" should be read "the construction of a building or "any part thereof." I think that is clear from the regulation as a whole and in particular from the parenthesis which immediately follows upon the word "building." The answer to the question which I have indicated depends on the construction of the regulation and the application of the regulation when construed to the facts of this case. The object of the power station, the structure which was erected, was to house the plant which the defendants introduced into it. In other words, it was a structure designed to accommodate the plant.

The regulation excludes from the word "building" (whatever the word is intended to mean, because it is not defined) amongst other things "pole or lattice work structures designed solely for "the support of plant." That exclusion shows that in the mind of the draftsman of the regulation structures of that description would or might fall within the meaning of "building" as used in the regulation; that is to say, it shows that the draftsman was using the word "building" in a wide sense and in a sense which did not necessarily, from its context or otherwise, exclude that conception. If that is so it would seem a fortiori that he was using it in a sense that would include structures of a more solid kind designed for the same purpose. It would accordingly appear that if a structure is built of a kind such as the Bankside Power Station it prima facie is, or is deemed to be, a building within the meaning of the regulations if it is designed to support plant. That it undoubtedly is, for not only does it accommodate the plant but it gives it both subjacent and lateral support. The operation of constructing the power station was, therefore, in my opinion, a building operation within regulation 2 (1).

The question then arises, Did the work which the defendants undertook form part of that operation? The evidence showed, and I think the judge found, that what the defendants or their sub-contractors did was a contribution to the construction of the power station, inasmuch as they were installing the essential apparatus which it was the object of the outer walls and roof to house and shelter and which was indeed united to those walls and to the outer walls as well as to the foundations of the structure. It is to be noted further, as I understand the matter, that the erection of the undoubted structure itself, the outer walls

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and so on, was proceeding more or less contemporaneously with the installation of the plant itself. Further than that, the defendants were also making stairways and galleries and floors for purposes of access and supervision and so on, such as one would expect to find in many factories.

I accordingly have come to the same conclusion as that at which the trial judge arrived, namely, first, that the purpose and result of the operation which was undertaken were the construction of a building, and, secondly, that the defendants took part in that operation in the sense that they contributed to the structural work. What they undertook to do therefore and did was, in my judgment, an "operation" within the meaning of regulation 2 (1), and the Building Regulations accordingly apply. I again emphasize that the application of the Building Regulations which I think has been established depends on the facts of this particular case. As Birkett L.J. said the defendants need not think necessarily, as apparently they do think, that all kinds of disastrous consequences will arise merely because in this particular case we hold that the Building Regulations apply. In other cases they might not.

On the question of the breach of regulation 30 (3), I entirely agree with what my brethren have said and I have nothing to add.

Appeal dismissed.
Conditional leave to apply to the House of Lords.

Solicitors: *E. P. Rugg & Co.; W. H. Thompson.*

A. W. G.

[PROBATE, ETC., DIVISION.]

1954
June 25.
Lord Merriman P. and Davies J.

* MUNDAY *v.* MUNDAY.

Husband and Wife — Justices — Practice — Constitution of court — Different justices sitting on adjournments — Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 98 (6).

The hearing of an application by a husband to vary an order for the maintenance of his wife which had previously been made against him was spread, owing to adjournments, over three separate days. Three justices were present on the first day, the same three with two additional justices on the second day, and on the third day the first three justices were absent, and the matter was heard by the second two justices and another justice who had not been present previously. The application was dismissed by the justices sitting on the third day:—

Held, that there must be a rehearing before an entirely fresh panel of justices and a different clerk, for there had been a failure to comply with the mandatory provisions of section 98 (6) of the Magistrates' Courts Act, 1952. This was also pre-eminently a case in which the principle that justice must not merely be done, but must be seen to be done, had been infringed.

APPEAL by a husband against an order of the Petersfield justices dated March 3, 1954.

In October, 1950, the justices made an order against the husband for £2 a week for the wife and 10s. a week for each of the two children (one of whom had reached the age of 16 before the date of the order now appealed) on the ground of desertion. An application by the husband in 1951 to reduce the amount of the order was rejected. On another occasion the husband was sent to prison for five days for non-payment of arrears, and a suspended committal order was made against him in July, 1953. A further application to vary the order was made in 1954, his case being that he was unable to maintain the payments under the order.

The application in 1954 was first heard on February 3 by three justices. The husband gave evidence-in-chief and was cross-examined. An adjournment was ordered for the purpose of the production of certain books and documents, and the case came on again on February 17, 1954. At that hearing there were present the three previous justices and two additional justices. Further evidence was given by the husband at that hearing and the wife also gave evidence, which was interposed, concerning her earnings. No objection was taken to the change in the composition of the court nor to the interposition of the wife's evidence. A further adjournment was ordered so that the wife's solicitors might examine the books and documents produced, and the case came on for a final hearing on March 3, 1954. At this hearing the two justices who had been added to the court on February 17, and one who had not attended either of the previous hearings, were present. The three justices who had heard the husband's evidence-in-chief and cross-examination on the first occasion, and the evidence on the second occasion, were absent.

The justices in their reasons for dismissing the husband's application stated, inter alia: "3. Two of us on February 17, "1954, found that the wife was earning a net wage of £4 12s. 6d. "a week as a typist. . . . We considered that the nature of the "wife's job, the amount of her earnings, and her present circum-"stances, did not in themselves justify us in reducing the amount "payable by the husband." They also stated: "The husband's "evidence on each occasion subsequent to the making of the "order [the order of October, 1950] has been to the same effect "—diminishing business, the hope one day of setting matters "right, trade creditors, inability to sell the companies or their "assets or to obtain other employment, financial assistance from "his parents."

Basil Garland for the husband.
N. R. Blaker for the wife.

It was alleged on behalf of the husband and as a ground of appeal that: "The provisions of section 98 (6) of the Magistrates'

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"Courts Act, 1952,[1] were not complied with in that the justices "composing the court were not present during the whole of the "proceedings." It was submitted on behalf of the wife that the whole of the proceedings had in substance been repeated on the third occasion.

Lord Merriman P. This is a husband's appeal against the dismissal by the justices for the Petersfield petty sessional division of Hampshire on March 3, 1954, of his application to vary by reduction an order made against him in October, 1950, on the ground of desertion. The order originally was £2 for the wife and 10s. each for the two children under 16, of whom she was given the custody. One of these children has since reached the age of 16, so that the order has lapsed in respect of that particular child.

The sole question in this case was one of amount. The husband's case in a nutshell was: "I cannot afford to pay." I do not propose to go into the merits of that application because, in my opinion, this case falls to be dealt with on the point which is that taken in the forefront of the grounds of appeal in these words: "That the provisions of section 98 (6) of the Magistrates' "Courts Act, 1952, were not complied with in that the justices "composing the court were not present during the whole of the "proceedings." That that was so is not disputed, except in the sense that it is said that the whole of the proceedings were repeated on the third and last occasion, when the three justices who made the order were present.

[1] Magistrates' Courts Act, 1952, s. 98 ("Constitution and place of "sitting of court"): "(6) Subject to "the provisions of the next following "subsection, [which concerns cases "where the trial of an information has "been adjourned after the accused "has been convicted and before he is "sentenced] the justices composing "the court before which any proceed-"ings take place shall be present "during the whole of the proceedings: "Provided that, if during the course "of the proceedings any justice ab-"sents himself, he shall cease to act "further therein and, if the remain-"ing justices are enough to satisfy "the requirements of the preceding "provisions of this section, the pro-"ceedings may continue before a court "composed of those justices."

[1] Magistrates' Courts Act, 1952, s. 56: "(1) In this Act the expression "'domestic proceedings' means pro-"ceedings—

"(a) under the Guardianship of "Infants Acts, 1886 and 1925; (b) "under the Summary Jurisdiction "(Separation and Maintenance) Acts, "1895 to 1949; (c) under section 3 or "section 4 of the Maintenance Orders "(Facilities for Enforcement) Act, "1920; (d) under subsection (3) of "section 4 of the Family Allowances "Act, 1945, or under that subsection "as applied by subsection (2) of sec-"tion 19 of the National Insurance "Act, 1946; (e) under section 3 of the "Marriage Act, 1949;

"other than proceedings for the "enforcement of an order made under "any of the enactments mentioned in "paragraphs (a) and (b) of this sub-"section, or for the variation of any "provision for the payment of money "contained in an order made under "any of those enactments, or in an "order made or confirmed under the "enactments mentioned in paragraph "(c) of this subsection.

"(2) A magistrates' court when "hearing domestic proceedings shall "be composed of not more than three "justices of the peace, including, so "far as practicable, both a man and "a woman."

[His Lordship reviewed the circumstances of the three hearings, saying of the second hearing:] It is right to say that no objection was taken to the change in the composition of the court by the addition of these two extra justices. It is also right to point out that owing to the definition of "domestic proceedings," [1] an application for the variation of an order under the summary jurisdiction (separation and maintenance) code does not come within the definition, and, therefore, there was nothing vitally wrong in the fact that five justices were sitting. Nor is it necessary, I think, to consider what would have been the position if the matter had ended there, with the original three justices sitting with two additional justices and a certain amount of the evidence, no doubt, being taken again.

It is true that there was a quorum on the last occasion, but it seems to me to be impossible by any process of reasoning to say of the order arrived at by this curious procedure that the justices composing the court before which any proceedings took place were present during the whole of the proceedings. I am unable to accept the argument that in substance there was a hearing de novo before the tribunal of three on the last occasion. It is not the fact, and I do not propose to go through an analysis of the findings. Suffice it to say that it is plain beyond a doubt that a great deal of what these justices have set out as findings of fact was derived from evidence appearing on the notes of the first hearing, at which not one of them was present, and I repeat that one of the three sitting on the last occasion had not been present on any previous hearing of *this application* at all.

Apart from the consideration that section 98 (6) of the Act of 1952 is mandatory, and contains no dispensing power which is remotely relevant to these proceedings, I think that there are wider considerations still, for it seems to me that this is pre-eminently a case in which the principle that justice must not merely be done, but must manifestly be seen to be done, has been infringed.

I turn now to the third of the reasons given by the justices for dismissing this application. I have not gone through the others, beyond stating that it is plain that in reasons 1 and 2 several of the material facts found are derived from the evidence given by the husband-in-chief on the first occasion, which was not heard orally by any single one of those who were present when the order was made. [His Lordship read the third reason as set out above and continued:] The justices are plainly there speaking collectively for all three of them, in contrast with the first sentence of the reason, which refers only to "two of us." So three of them, one of whom had not even seen the wife in the witness-box, made a finding about the nature of the wife's job, the amount of her earnings, and the effect of it. Then they say that they regret that they did not all sit on the three occasions on which the application under review was heard.

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Here I am bound to say that I find a good deal to regret in the reasons which are given, for, as counsel pointed out, the suggestion does appear that this curious procedure has been followed before. But what I think is more important is that it is not likely to satisfy the husband that justice has been done when, in support of the findings on this occasion, it is recorded that the same three justices have on a previous occasion, in 1951, sat on an earlier application to reduce the order and have dismissed that application, or that on a later occasion one member of the court was party to sending the husband to prison for five days for non-payment of arrears, and that on a later occasion still all three members of the present court, as recently as July 22, 1953, made a suspended committal order against the husband, on which it was not necessary to send him to prison because, apparently, his aged parent paid and has continued to pay the necessary instalments. I do not think that it makes it any better that the justices add that the same solicitors had represented the husband on three of the specified occasions, and that on each occasion evidence and accounts similar to those produced to them on the hearing of this particular complaint had been produced then. They summarize it in this way: "The husband's evidence on each occasion subsequent to the making of the order"—"each occasion," not *the* occasion with which they are dealing—"has been to the same effect—diminishing business, the hope one day of setting matters aright, trade creditors, inability to sell the companies or their assets or to obtain other employment, financial assistance from his parents."

I regard this as a very deplorable business. I cannot understand how a man who was not represented could have been subjected to this procedure without any protection from the court, or from the clerk, who ought to have seen that the proceedings were rightly conducted. It is quite impossible to support this order thus arrived at. The dismissal of the husband's application must be set aside.

Davies J. I entirely agree, and save for the fact that this is obviously a matter of some public importance I would not add anything.

It is unnecessary to say any more about the provisions of section 98 (6) of the Act of 1952, which are, as my Lord has said, mandatory and ought to have been within the knowledge of the clerk, if not of the justices themselves, and ought to have been acted upon by him.

All I desire is to add a word on the broader aspect of the case. I am not prepared to go through the notes of the evidence with a tooth-comb, as we were invited to do by Mr. Blaker, to decide whether the hearing on the third occasion was a hearing de novo; though in so far as we did embark upon that examination, it appeared to be plain that the three justices who sat on the last occasion were acting in part upon evidence which none of them

had heard. But, to my way of thinking, the real point is a much broader one. Every layman would believe that all three hearings were part of the same case; indeed, the justices themselves in their reasons speak of the three occasions on which the complaint under review was heard so that all are treated as a part of the hearing. It seems to me to be impossible that any layman could believe for one moment that justice had been done in the circumstances of this case when three persons heard it on the first day, those three plus two others heard it on the second day, and the second two plus a third and without the original three heard and determined it finally. Obviously any member of the public would think, and rightly think, that that was no way for any legal proceedings to be conducted, and would at once come to the conclusion that no fair or proper decision in those proceedings could be arrived at, when they were conducted in such a manner.

I have said that it was obviously the duty of the clerk to know the proper procedure under the section, and I cannot help feeling that, quite apart from the section, the justices themselves ought in common fairness and in common sense to have realized that to conduct proceedings as they did was wholly and obviously wrong. I hope that if, as appears to be the case from the justices' reasons, there is some kind of tradition or practice of this kind in the Petersfield magistrates' court, it will now for ever cease.

LORD MERRIMAN P. The appeal is allowed, the order dismissing the complaint set aside, and the complaint remitted for rehearing by a quorum of justices none of whom has taken any part in the disputes between this husband and this wife. There is no deputy clerk, but it is quite open now, as I understand it, for justices to appoint a deputy for the purpose. It is not for me to say how that shall be done. One knows that as a matter of practice it very often happens that a clerk from a neighbouring petty sessional division is borrowed, and I see no reason why that should not be done in this case. The point is that we are determined that on the next occasion the tribunal shall manifestly be seen and known to be differently constituted in every respect from that which has hitherto dealt with the affairs of these spouses.

Appeal allowed.
Case remitted for hearing by fresh panel of justices.

Solicitors: *Charles Russell & Co. for Johnson & Clarence, Midhurst; Gibson & Weldon for Burley & Geach, Petersfield.*

J. B. G.

[CHANCERY DIVISION.]

1954
July 13, 14

Upjohn J.

* ROBERTSON *v.* ABERDEEN JOURNALS LD. AND OTHERS.

[1953 R. 894.]

Practice—Payment into court—Defendants sued severally—Action for infringement of copyright—Claim for damages against all defendants for infringement and breach of confidence and against two defendants for conversion—Application for the payment of one sum into court by all defendants in respect of all causes of action—Whether permissible—R.S.C., Ord. 22, *r.* 1 (1) *and* (2); *r.* 4 (1).

R.S.C., Ord. 22 permits a payment in by all the defendants together whether they are sued jointly, severally or in the alternative.

In an action where the plaintiff claimed damages against all three defendants for breach of copyright and breach of confidence, and damages against the first and second of them for conversion, the first and second defendants applied under Ord. 22, r. 1 (2) for leave for all three of them to pay into court a single sum in respect of all causes of action:—

Held, that although the causes of action were in law separate and distinct, they were inseparably bound together; that there was jurisdiction under the rules to make the order; and that in the present case the discretion of the court should be exercised in allowing one payment in to be made in respect of all the causes of action, as the plaintiff would not be prejudiced in any way.

PROCEDURE SUMMONS.

The plaintiff in an action against Aberdeen Journals Ld. and two other defendants claimed (1) an inquiry as to the damages suffered by the plaintiff by reason of the infringement of the plaintiff's copyright and conversion and payment of the amount found due, and (b) an inquiry as to the damages suffered by him by the breaches of confidence committed by the defendants and each of them and payment of the amount found due.

The facts and allegations as set out in the statement of claim were as follows: "1. The plaintiff is the author of, and is and "has been at all material times the owner of the copyright in, a "certain memorandum entitled 'Proposed Memorandum on "'Government Fish-Selling Scheme.' 2. The first named "defendants are and have been at all material times the pro-"prietors of, inter alia, two newspapers published in Aberdeen "and entitled respectively 'The Press Journal' and 'Evening "'Express.' The second named defendant is a newspaper "reporter. The third named defendant is and has been at all "material times the Member of Parliament representing the "South Division of Aberdeen in which city the plaintiff was at "all material times resident. 3. On or about January 10, 1952, "the plaintiff delivered to the third named defendant a copy of

"the said memorandum. 4. The delivery of the said memorandum was made in confidence to the third named defendant in her capacity as aforesaid as the defendants and each of them at all material times well knew and understood. 5. In breach of the aforesaid duty of confidence the third named defendant permitted the second named defendant to examine the said memorandum and to copy the same. 6. In further breach of the aforesaid duty of confidence and in infringement of the plaintiff's said copyright the first and second named defendants and each of them have, without the plaintiff's consent, caused to be reproduced and published on January 18, 1952, in the said newspapers the said memorandum or a substantial part thereof. 7. The acts of infringement complained of in paragraph 6 hereof were authorized by the third named defendant without the plaintiff's consent and in further infringement of the plaintiff's said copyright. 8. Further or in the alternative by reason of section 7 of the Copyright Act, 1911, all reproductions of the said memorandum including all infringing copies of the said newspapers are the property of the plaintiff and the first and second named defendants and each of them have converted the same to their own use to the plaintiff's detriment. 9. By reason of the aforesaid breaches of confidence, the aforesaid infringements of the plaintiff's said copyright and the aforesaid conversion the plaintiff has suffered and is calculated to suffer damage."

The first and second defendants applied by procedure summons "for leave for all the defendants or alternatively for each of the defendants either jointly or severally as they may be advised to pay into court a single sum in respect of all causes of action herein."

F. E. Skone James for the defendant applicants.

T. G. Roche for the third defendant.

K. E. Shelley Q.C. and *Douglas Falconer* for the respondent plaintiff.

Cases referred to in argument: *Tallent* v. *Coldwell*[1]; *Exchange Telegraph Co. Ld.* v. *Gregory & Co.*[2]; *Fenning Film Service Ld.* v. *Wolverhampton, Walsall and District Cinemas Ld.*[3]; *Gears* v. *Braley*[4]; *Sutherland Publishing Co. Ld.* v. *Caxton Publishing Co. Ld.*[5]

UPJOHN J. This is an application by two of three defendants with the concurrence of the third defendant, asking for leave for all the defendants to pay into court in a single sum in respect of

[1] [1938] Ch. 653; 54 T.L.R. 564; [1938] 2 All E.R. 107.
[2] [1896] 1 Q.B. 147; 12 T.L.R. 18.
[3] [1914] 3 K.B. 1171.
[4] [1940] 2 K.B. 442; 56 T.L.R. 886; [1940] 3 All E.R. 376.
[5] [1936] Ch. 323; 52 T.L.R. 230; [1936] 1 All E.R. 177.

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all causes of action, pursuant to the discretion vested in the court by Order 22, r. 1 (2).

The nature of the action, as set out in the statement of claim, briefly, is this. It is alleged that the plaintiff is the author and owner of copyright in a certain memorandum entitled "The "Proposed Memorandum on Government Fish-selling Scheme." That memorandum was handed, so it is alleged, by the plaintiff to the third defendant, Lady Tweedsmuir, who is the Member of Parliament for the South Division of Aberdeen, where the plaintiff resides, and it was delivered (so the plaintiff says) to Lady Tweedsmuir in confidence, in her capacity as a Member of Parliament. Then it is alleged that, in breach of that confidence, Lady Tweedsmuir handed the memorandum to the second defendant, one Catto, who is a reporter employed by the first defendants, Aberdeen Journals Ld. The delivery of the memorandum, as I understand it, is admitted, although, of course, it has been denied that the delivery was in breach of any confidence.

Then it is alleged that Catto and the first defendants, also in breach of confidence, published the memorandum, or substantial parts thereof, in certain publications owned by the first defendants, and that is also alleged to be an infringement of the plaintiff's copyright—and also to be a conversion under section 7 of the Copyright Act, 1911.

The causes of action against the defendants, as appearing in the statement of claim, are, therefore, these: against Lady Tweedsmuir, that she handed the document to Mr. Catto in breach of confidence, and, secondly, that she authorized the publication and consequential infringement of the plaintiff's copyright. No claim is made against Lady Tweedsmuir for conversion. Then the causes of action against the first and second defendants are these: first, the use of the confidential information; secondly, infringement of copyright; and thirdly, conversion.

In those circumstances it is plain that leave is required if it is desired to pay a lump sum into court to meet all causes of action, for rule 1 (2) of Ord. 22 provides: "Where the money is "paid into court in satisfaction of one or more of several causes "of action the notice shall specify the cause or causes of action "in respect of which payment is made and the sum paid in respect "of each such cause of action unless the court or a judge otherwise "order."

Now two points arise: first whether I ought to exercise my discretion under that rule; and, secondly, it is sought to make a payment in by one single payment by all the defendants, and it is said that that is not permissible under the rule. It is said that the causes of action here are several and not joint, and that in such events no good payment in may be made by all defendants together, because rule 4 (1) says: "(1) Money may be paid into "court under rule 1 by one or more of several defendants sued "jointly or, in the alternative, upon notice to the other defendant "or defendants"; and it is said that that rule expressly excludes

payment in by defendants sued severally. The point was then taken that the defendants can make a single payment in, and nothing can prevent them, and it is a matter which can be determined at the trial as to whether the payment in is a good one or not.

All the parties have argued that matter fully before me and I think, in the circumstances, it is my duty to express a view upon the power of defendants, sued severally, to join all together in making a payment into court.

Rule 1 (1) of Ord. 22 is in these terms: "In any action for "a debt or damages or in an Admiralty action the defendant may "at any time after appearance upon notice to the plaintiff pay "into court a sum of money in satisfaction of the claim or (where "several causes of action are joined in one action) in satisfaction "of one or more of the causes of action; provided that with "a defence setting up tender before action the sum of money "alleged to have been tendered must be brought into court." The word "defendant" there is in the singular, but Ord. 71, r. 2, provides: "In these rules, unless repugnant to the context, "the singular number shall include the plural, and the plural "number shall include the singular." While dealing with this point I am, of course, considering only a payment in in respect of one cause of action; prima facie, therefore, "defendant" includes the word "defendants," and there would appear to be nothing in so reading the rule which is repugnant to the context. There would seem to be no injustice to any party if all the defendants, sued jointly, severally, or in the alternative, make a payment in in respect of one cause of action; the plaintiff can only recover in the aggregate the damage he has suffered, and I can see nothing to prevent all the defendants sued from making one single payment in together. If the plaintiff thinks that that is insufficient he goes on with his action; if he thinks that it covers his cause of action he takes it out and his costs are paid.

Therefore in my judgment the rules permit a payment in by all the defendants, who are sued jointly, severally or, in the alternative, joining together. In my judgment r. 4 is only dealing with the situation where some only of the defendants make payment in, and then elaborate provisions are laid down as to giving notice to other defendants, and also with regard to costs.

I turn, then, to the point on rule 1 (2). Ought I to exercise my discretion and permit a payment in in respect of all the causes of action? Prima facie—and there is no doubt about this —a separate payment in ought to be made, and it is only in proper cases, where the court can properly exercise its discretion, that a payment in covering more than one cause of action ought to be allowed.

It was suggested by the applicants that damages really would be very much the same for the cause of action depending on breach of confidence as for the cause of action depending on copyright,

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and I was referred to two cases: *Exchange Telegraph Co. Ld.* v. *Gregory & Co.*[1] and *Fenning Film Service Ld.* v. *Wolverhampton, Walsall and District Cinemas Ld.*,[2] which were said to support that view. But I do not accept that. All that those cases decide is that damages are at large, and it seems to me that damages will not be the same in respect of (in substance) two causes of action, that is to say, the breach of confidence and the infringement of copyright. I say "in substance two" because, in *Tallent* v. *Coldwell*,[3] Farwell J. permitted a single payment in to cover the infringement of copyright and conversion under section 7 of the Copyright Act; and Mr. Shelley, for the plaintiff, does not desire to contend—at any rate in this court—that that was wrongly decided; so that he agrees that one payment in may be made for infringement and conversion, and the issue is as regards one payment in for breach of confidence and breach of copyright.

As I have said, it seems to me that damages for breach of confidence may be very different from damages for breach of copyright; Mr. Shelley urges, with some force, that for the purposes of the rule there is no real inter-relation of damages between the two and each case must be regarded upon its own, and therefore in justice to the plaintiff separate payments in ought to be made. He points out that damages for breach of confidence may well be a matter which will affect the reputation of the plaintiff, and he may be able to claim damages for breach of confidence which would not be available to him in an action for breach of copyright, although he does not concede that that is necessarily so.

It is quite true that these two causes of action are quite separate and, in a sense, quite distinct, and they may give rise to different quanta of damages; but they are, in my judgment, really inseparably bound up together, depending largely, though not entirely, on the same set of facts, and I ask myself this question: Is there any injustice to the plaintiff in ordering one payment in to cover both causes of action? I can see none. He must know what he expects to get out of the action, and I cannot see that he is prejudiced in any way. Then I ask myself: Is there any prejudice to the defendants if they are ordered to pay in, or if they are compelled to pay in, separate sums under the separate causes of action? I think there is, for this reason: damages for breach of confidence may be serious, for the plaintiff may say, "I wanted this document kept secret," and if that is his main case he will hardly recover a large sum for breach of copyright. On the other hand, he may say, "I wanted to publish "this document and it has become less attractive to publishers," and if that is his main case it would seem that his claim for breach of confidence must at any rate be very small.

[1] [1896] 1 Q.B. 147; 12 T.L.R. 18.
[2] [1914] 3 K.B. 1171.
[3] [1938] Ch. 653; 54 T.L.R. 564; [1938] 2 All E.R. 107.

The real truth is that the plaintiff knows which is his main claim; the defendants do not; and I think that there would be grave hardship upon the defendants, in those circumstances, if I ordered them to pay in separate sums for each cause of action.

Accordingly I propose to grant an order as asked.

Order accordingly.

Solicitors: *Theodore Goddard & Co.; Malcolm Slowe & Co.; Farrer & Co.*

J. L. D.

[CHANCERY DIVISION.]

* SMITH *v.* JONES.

[1952 S. 5761.]

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Feb. 18, 19, 22, 23.

Upjohn J.

Vendor and Purchaser—Purchaser for value without notice—Tenant in possession — Equities binding purchaser — Rectification — Sale at auction of farm occupied by tenant—Mutual mistake of vendors and tenant as to effect of repairing covenant — Claim by tenant against purchaser to rectify tenancy agreement—Whether purchaser affected by notice of equity to rectify—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 199 (1).

Landlord and Tenant. Rectification.

In 1946 a number of farms, part of an agricultural estate, were sold at auction. One of the farms was purchased by the defendant. He had knowledge that the farm was in the occupation of a tenant (the plaintiff). After the purchase of the farm by the defendant disputes arose between the plaintiff and the defendant, as each required repairs to be done while refusing to do them himself. Eventually the plaintiff brought an action claiming that his tenancy agreement should be rectified in such a way as to make the defendant liable for structural repairs. The defendant contended, inter alia, that, if a case for rectification could be established against the original lessors, he, as a bona fide purchaser for value without notice, was not bound by the plaintiff's equity to rectify:—

Held, that the doctrine that a purchaser was bound by the equities which a tenant in possession could enforce against the vendor did not extend to an equity of rectification; while it was the duty of the defendant purchaser properly to ascertain the terms under which the plaintiff tenant held the farm, he was under no duty to ascertain whether the document containing those terms set out accurately the respective rights of the original landlord and tenant, but was entitled to rely on the terms of the document, which spoke for itself.

Barnhart v. *Greenshields* (1853) 9 Moo.P.C. 18 considered.

ACTION.

In 1946 a number of farms, part of the Parmoor estate, Buckinghamshire, were sold at auction. One of the farms was purchased by the defendant. He had knowledge that the farm was in

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the occupation of a tenant (the plaintiff); before the sale he had inspected a copy of the plaintiff's tenancy agreement at the office of the auctioneers, and formed the opinion that under the terms of the repairing covenant the responsibility for doing repairs to the farmhouse and buildings was on the tenant.

For many years the estate management had used a standard printed form of tenancy agreement, and it had always been their belief and the belief of the tenants that under the repairing covenant the estate was responsible for repairs to buildings; they and the tenants had always acted accordingly, and the plaintiff, when he signed his agreement in 1939, was told that that was its effect.

After the purchase of the farm by the defendant disputes arose between the plaintiff and the defendant, as each required repairs to be done while refusing to do them himself. Eventually a case was stated for the opinion of a county court judge, under regulations made pursuant to the provisions of the Agricultural Holdings Act, 1948, which raised, inter alia, the question of the proper construction of the repairing covenant. The judge held that the plaintiff was liable for structural repairs, but suggested that there might be a case for rectification, and stayed all proceedings until that question was decided.

The plaintiff accordingly brought this action, claiming rectification of the tenancy agreement by providing that, while he was to keep the house, cottages and buildings in good order, the defendant was to keep the same in repair. At the hearing it was not disputed that the county court judge had been right in rejecting the extrinsic verbal evidence and in holding that the covenant, as amended, made the plaintiff responsible for repairs to the buildings. In answer to the claim for rectification, the defendant contended (1) that no right to rectification was made out on the evidence; (2) that, supposing that such a claim was made out, he was a bona fide purchaser for value and not bound by an equity to rectify; (3) that the plaintiff could not at such a late stage assert a claim for rectification. The case is reported on the second contention only.

J. L. Arnold for the plaintiff.
L. A. Blundell for the defendant.

Cases cited in argument not referred to in the judgment: *Jones* v. *Smith* [1]; *Reeves* v. *Pope*.[2]

Upjohn J. stated the facts; rejected the defendant's third contention; and, on the first contention, found that the plaintiff and the Parmoor estate intended to have an agreement in the common estate form, under which both parties mistakenly thought that on its true construction the responsibility for repairs

[1] (1843) 1 Ph. 244. [2] [1914] 2 K.B. 284.

fell on the landlord. On those facts he dismissed the claim for rectification and proceeded: Lastly, Mr. Arnold for the plaintiff argued that as the plaintiff was in actual occupation as tenant, the defendant was affected with notice of all his rights and all his equities, including an equity to rectify. On the view I have formed of the facts and law as to rectification, this point does not strictly arise, but as it has been fully argued, I think that I ought to express my views thereon.

In *Barnhart* v. *Greenshields*,[1] when the law is clearly and compendiously stated, the judgment of the Privy Council was delivered by Mr. Pemberton Leigh, afterwards Lord Kingsdown, who said[2]: "With respect to the effect of possession merely, we "take the law to be, that if there be a tenant in possession of "land, a purchaser is bound by all the equities which the tenant "could enforce against the vendor, and that the equity of the "tenant extends not only to interests connected with his tenancy, "as in *Taylor* v. *Stibbert*,[3] but also to interests under collateral "agreements, as in *Daniels* v. *Davison*,[4] *Allen* v. *Anthony*,[5] the "principle being the same in both classes of cases; namely, that "the possession of the tenant is notice that he has some interest "in the land, and that a purchaser having notice of that fact, is "bound, according to the ordinary rule, either to inquire what "that interest is, or to give effect to it, whatever it may be."

Then a little later on he cited the language of Lord Eldon in *Allen* v. *Anthony*[6]: "It is so far settled as not to be disputed, "that a person purchasing, where there is a tenant in possession, "if he neglects to inquire into the title, must take, subject to "such rights as the tenant may have."

On the other hand, Mr. Arnold has not produced any case which goes so far as to say that an equity of rectification is an equity which is enforceable against a purchaser. In my judgment it would be extending the doctrine of notice and the obligation to make inquiry far too much if the doctrine was intended to cover an equity of rectification. Of course the purchaser is bound by the rights of the tenant in occupation—that is quite clear. He is not entitled to assume—as was argued in the earlier cases, notably, I think, *Taylor* v. *Stibbert*[7]—that the tenant is in possession from year to year. He must look at the agreement and he is bound by the agreement, and if, as in *Daniels* v. *Davison*,[8] the tenant not only has a tenancy agreement but an option to purchase, he is also bound by that.

But, in my judgment, a purchaser is not only entitled but bound to assume, when he is looking at the agreement under which the tenant holds, that that agreement correctly states the relationship between the tenant and the landlord; and he is not

[1] (1853) 9 Moo.P.C. 18.
[2] Ibid. 32.
[3] (1794) 2 Ves.J. 437.
[4] (1809) 16 Ves.J. 249.
[5] (1816) 1 Mer. 282.
[6] Ibid. 284.
[7] 2 Ves.J. 437.
[8] 16 Ves.J. 249.

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bound to assume or to ask or make inquiry whether the tenant has any rights to rectify that contract.

Barnhart v. *Greenshields* [9] was followed in the Court of Appeal by the well-known case of *Hunt* v. *Luck*,[10] where the principle was again stated, but as Cozens-Hardy L.J. pointed out in argument, and Vaughan Williams L.J. pointed out at the beginning of his judgment, the real question for determination was the true construction of the Conveyancing Act, 1882; Farwell J. who heard the case at first instance [11] having dealt with the matter without reference to the statutory enactment. I have no doubt that that was because he treated the Act as merely declaratory of the existing law; but it is after all a matter of construction of the Act, although I have already expressed an opinion as though the matter rested solely upon decided cases.

The relevant section which re-enacts exactly, so far as relevant, the provisions of the Conveyancing Act, 1882, is to be found in section 199 (1) of the Law of Property Act, 1925, and it reads thus: "A purchaser shall not be prejudicially affected by "notice of (i) any instrument or matter capable of registration "under the provisions of the Land Charges Act, 1925, or any "enactment which it replaces, which is void or not enforceable "as against him under that Act or enactment, by reason of the "non-registration thereof; (ii) any other instrument or matter or "any fact or thing unless—(*a*) it is within his own knowledge, or "would have come to his knowledge if such inquiries and inspec-"tions had been made as ought reasonably to have been made "by him."

The question which I have to answer is this: What inspection and inquiries ought reasonably to have been made by the defendant of the tenant before the sale, so far as relevant to this question? I think the only relevant inquiry that he would have made would have been this: "May I see your tenancy agree-"ment? I want to see whether it corresponds with the copy "agreement I have seen in the auction rooms." That is the document which governed the rights of the parties.

He ought to have asked whether he had seen a correct copy, but he was under no obligation, in my view, to proceed further and say: "Does that correctly represent your rights?" In fact, if he had asked that question, the answer honestly but erroneously given would have been "Yes." Still less was he bound to take the tenant step by step through the document and ask how the tenant interpreted its provisions. He could not be so bound, and it would be most unwise for any intending purchaser to do so.

In my judgment the defendant is entitled and bound to rely on the terms of the document, and the document speaks for itself.

[9] 9 Moo.P.C. 18.
[10] [1902] 1 Ch. 428; 18 T.L.R. 265.
[11] [1901] 1 Ch. 45.

Accordingly, had I come to a contrary conclusion upon the claim for rectification, I should have found that this action was barred by the plea of bona fide purchaser of value without notice. In the circumstances, I must dismiss the action.

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Judgment for the defendant.

Solicitors: *Crawley, Arnold, Ellis & Ellis for Horwood & James, Aylesbury; Paisner & Co. for C. R. Thomas & Son, Maidenhead.*

F. R. D.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* EAST ANGLIAN TRUSTEE SAVINGS BANK.

1954 *July* 20.

Lord Goddard C.J., Cassels and Slade JJ.

Trade Dispute—Industrial Disputes Tribunal—Jurisdiction—Bank—Dispute between trustee savings banks and bank employees—Whether a dispute in "a trade or industry . . . or . . . undertaking"—"Undertaking"—"Trade"—Statutory control of expenditure—Whether increase of wage a necessary expense—Trustee Savings Banks Act, 1863 (26 *&* 27 *Vict. c.* 87), *ss.* 2, 6—*Emergency Powers (Defence) Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 62), *s.* 1 (4)—*Supplies and Services (Transitional Powers) Act,* 1945 (9 *&* 10 *Geo.* 6, *c.* 10), *ss.* 5 (2), 10—*Industrial Disputes Order,* 1951 (*S.I. No.* 1376 *of* 1951), *arts.* 1, 8.

Emergency Legislation—Statutory force—Inconsistent enactment. Trustee Savings Bank.

A wage dispute between a trustee savings bank certified under the Trustee Savings Banks Act, 1863, and members of the National Union of Bank Employees employed by the bank was referred by the Minister of Labour to the Industrial Disputes Tribunal under article 8 of the Industrial Disputes Order, 1951. On an application by the bank for an order prohibiting the tribunal from entering upon the reference on the ground that the dispute was not a dispute "in a trade or industry . . . or in an undertaking" within the meaning of article 1 and that the tribunal had no jurisdiction to entertain the reference:—

Held, that even if the business carried on by the trustee savings bank was on a different footing from the business carried on by an ordinary bank, which was a "trade," there could be no doubt that the bank carried on an "undertaking" within the meaning of article 1.

Held further (*per* Lord Goddard C.J. and Cassels J.), that if the tribunal were to make a wage award such award would not be inconsistent with the statutory provisions for the safeguarding of the depositors' interests controlling and regulating the expenditure of the bank, since to pay such an increased wage in order to obtain employees would be a necessary expense; and that, accordingly, the tribunal had jurisdiction to enter upon the reference.

Per Slade J. By virtue of section 1 (4) of the Emergency Powers (Defence) Act, 1939, I am precluded from considering whether there

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is anything in that special legislation which is inconsistent with the general legislation under which the Order of 1951 derives its force.

Per Lord Goddard C.J. The business carried on by the savings bank was not only an "undertaking" but was just as much a "trade" as that carried on by an ordinary commercial bank.

In re Bottomgate Industrial Co-operative Society (1891) 65 L.T.(N.S.) 712 applied.

Application for an order of prohibition.

On March 3, 1954, the Minister of Labour and National Service made a reference, under article 8[1] of the Industrial Disputes Order, 1951, to the Industrial Disputes Tribunal for settlement of a wage dispute between the East Anglian Trustee Savings Bank and members of the National Union of Bank Employees in the employment of the bank.

The East Anglian Trustee Savings Bank was a trustee savings bank, with a head office at Norwich, certified under the Trustee Savings Banks Act, 1863. Such banks are regulated by the Trustee Savings Banks Act, 1863 to 1929,[2] and are non-profit making. They differ from commercial banks in that, inter alia, current accounts are not kept but deposits, which may be of very small amounts, are recorded, and the depositors credited with the sums paid in and with monthly compound interest at the statutory rate of 2½ per cent. In order to make withdrawals depositors must

[1] Industrial Disputes Orders, 1951, article 1: "Where a dispute exists "in a trade or industry . . . or "in an undertaking and . . . is "reported to the Minister . . . that "dispute shall be dealt with in ac-"cordance with the . . . provisions "of this Order." Article 8: "Where "a dispute has been reported to the "Minister in accordance with this "order . . . the dispute shall, if not "otherwise settled, be referred to the "Tribunal for settlement."

[2] Trustee Savings Bank Act, 1863, s. 2: "If any number of persons "have formed . . . any society . . . for "the purpose of establishing . . . "any institution in the nature of a "bank to receive deposits of money "for the benefit of the persons deposit-"ing the same, to accumulate the pro-"duce of so much thereof as shall "not be required by the depositors ". . . at compound interest, and to "return the whole or any part of "such deposit and the produce there-"of to the depositors, . . . (deducting "out of such produce so much as shall "be required for the necessary ex-"penses attending the management "of such an institution), but deriving "no benefit whatsoever from any "such deposit or the produce thereof, "and shall be desirous of having the "benefit of the provisions of this Act, "such persons shall cause the rules ". . . established . . . for the manage-"ment of such institution to be "entered . . . in manner hereinafter "directed, and thereupon shall . . . "have the benefit of the provisions "contained in this Act:" S. 6: "No "savings bank . . . shall have the "benefit of this Act unless in the "rules and regulations for the "management thereof it shall be ex-"pressly provided—(1) That no per-"son . . . being treasurer, trustee, "or manager of such savings bank, "or having any control in the "management thereof, shall derive "any benefit from any deposit . . . "save only and except such salaries "and allowances or other necessary "expenses as shall according to such "rules and regulations be provided "for the charges of managing such "savings bank, and for remunera-"tion to officers employed in the "management thereof. . . ."

Savings Banks Act, 1891, s. 5: "(1) If . . . any question arises as to "what constitutes the necessary ex-"penses attending the management "of a trustee savings bank within "the meaning of section 2 of the "Trustee Savings Banks Act, 1863, ". . . the decision of the National Debt "Commissioners on the question shall "be conclusive."

bring their book to the bank and, if the amount to be withdrawn is more than a certain sum, must give notice in advance of withdrawal. The trustees act gratuitously, being paid only their expenses, and by section 15 of the Act of 1863 are required to transfer funds to the National Debt Commissioners for investment in the commissioners' names in the Bank of England funds. Weekly accounts are kept, subject to investigation by a committee. By section 4 the rules must be certified by the Registrar of Friendly Societies.

Rule 3 of the East Anglian Trustee Savings Bank provided, in compliance with section 6 (1) of the Act of 1863, that "No person being trustee, custodian, trustee, or manager of "the bank, or having any control in its management, shall derive "any benefit from any deposit . . . save only and except such "salaries and allowances or other necessary expenses as shall, "according to the rules, be provided for the charges of managing "the bank and for remuneration to officers employed in its "management. . ." By rule 8: "The finance committee . . . "shall have power . . . to appoint the paid officers. . . ." By rule 12: ". . . Every paid officer . . . shall hold office . . . on such "terms as regards salary, duties, holidays and other conditions "as [the committee] may from time to time specify with power "to vary the same. . . ."

The bank applied to the court for an order prohibiting the tribunal and the members of the National Union of Bank Employees in their employ from further proceeding in the settlement of the dispute on the grounds that the tribunal had no jurisdiction in respect of the reference or dispute because the jurisdiction conferred on it by regulation 58AA of the Defence (General) Regulations, 1939, and the Industrial Disputes Order, 1951, extended only to disputes in a trade or industry as defined in the regulation and order, and not in a business of the kind carried on by the bank.

F. W. Beney Q.C. and *Neville Faulks* for the bank.

Sir Reginald Manningham-Buller Q.C., S.-G., and *Walter Gumbel* for the tribunal.

Peter Pain for the National Union of Bank Employees.

The following cases were cited in argument: *National Association of Local Government Officers* v. *Bolton Corporation*,[3] and *In re Bottomgate Industrial Co-operative Society*.[4]

LORD GODDARD C.J. referred to article 1 of the Industrial Disputes Order, 1951, and continued: When leave was first given in this case to apply for an order of prohibition the only ground on which it was given, and the only ground put forward, was

[3] [1943] A.C. 166; 59 T.L.R. 1; [1942] 2 All E.R. 425.

[4] (1891) 65 L.T.(N.S.) 712.

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that there was some doubt whether the East Anglian Trustee Savings Bank, which is a bank formed under the Trustee Savings Banks Acts, 1863 to 1929, was a trade, industry or undertaking within the meaning of article 1 of the Industrial Disputes Order, 1951. I have not the least doubt that it is an undertaking. "Undertaking" is a word having the widest connotation and it seems to me to have been used deliberately in the Order. I have also no doubt that, ordinarily speaking, banking is a trade. I think that the ordinary banker carries on a trade and always has carried on a trade since banking was set up by the Lombards and the Goldsmiths in the City of London. The old bankers never referred to their clients; that was left to hairdressers and dressmakers. A banker in the proper way refers to his customer because he is carrying on the trade of a banker. When leave to apply was given in this case I did not think that there was much doubt so far as that was concerned, but I thought that it was worth hearing argument because it might be said that trustee savings banks such as the East Anglian Trustee Savings Bank, which are in the nature of savings banks and are more akin to the Post Office Savings Bank than to an ordinary bank, might be on a different footing. But even if it was on a different footing as to trade, the bank would, in my opinion, nevertheless be an undertaking. The trustees undertake the business of receiving moneys on deposit, and I cannot see how it can be said that that is not an "undertaking." Any doubt on that point so far as this court is concerned is put at rest by the decision in *In re Bottomgate Industrial Co-operative Society*.[1] The Industrial and Provident Societies Act prohibits societies or companies, or whatever is the right term, registered under those Acts from carrying on the business of banking; and in that case an industrial society registered under the Industrial and Provident Societies Act, 1862, was said to be carrying on the business of banking. The society received money on deposit and paid it out in very much the same way as a trustee savings bank receives money on deposit, and pays it out to their customers in accordance with their rules. A. L. Smith J. said that that was carrying on banking. Although the trustee savings bank does more than the Post Office savings bank, it does not carry on the business of banking in the same way as one of the Big Five banks in the sense of issuing cheque books to its customers and performing various services for them, but it nevertheless carries on the business of banking. A. L. Smith J. said[2]: "the business embarked on by the society "when it took loans on deposit was in reality a banking business "prohibited by the statute. It is not necessary, in our judgment, "in order to constitute a banking business prohibited by the "statute, that the society should carry on every part of a business "carried on by some bankers; it is sufficient to bring the business "within the prohibition, if the society carried on what is the

[1] (1891) 65 L.T.(N.S.) 712. [2] Ibid. 714.

" principal part of the business of a banker, viz., receiving money " on deposit, allowing the same to be drawn against as and when " the depositor desires, and paying interest on the amounts stand- " ing on deposit."

In my opinion, although perhaps it is not really necessary to say so as I am quite satisfied that this was an undertaking, the business conducted by the applicants was none the less a trade. It follows that, as there is admittedly a dispute in the sense that the bank clerks, or their trade union on their behalf, are claiming that they should have an increase in wages, there is no doubt that there is a dispute in a trade or industry or undertaking, and therefore, prima facie, the Minister could refer the matter to the tribunal.

At a somewhat late stage in this case another point emerged. It was said that, even so, these particular banks were governed by statute, and it could never have been intended, as the structure of the statutes which govern these banks shows, that a body like the Industrial Disputes Tribunal should be able to dictate or lay down standards of wages. I think the foundation of that argument is that section 2 of the Act of 1863 provides that an institution, to be entitled to the privileges and benefits of the Act, must be one in which the only income of the bank, and the only fund out of which its expenses must be found is the interest which can be obtained from the money which is deposited.

[His Lordship read section 2, and continued:] In other words, it must not be a profit-making business and the bank, instead of being able to make a profit out of the business, can only make the necessary expenses attending the management of such institution. One cannot run a bank without paying clerks, and obviously one necessary expense must be to pay the bank clerks.

[His Lordship read section 6 of the Act of 1863, and continued:] In other words, the management is to be voluntary, by philanthropic gentlemen or, I suppose ladies, who would give their time to managing the affairs of these banks, which were meant to promote thrift amongst the humbler members of the community; and section 6 shows that rules have to be made to carry out the intention of the Act, and to provide that they are to receive nothing. But clerks, of course, have to be paid, and accordingly we find in rule 12, which seems to me to have been made in order to comply with the Act, that every paid officer shall give his whole time to the service of the bank, and " shall " hold office during the pleasure of the committee on such terms " as regards salary, duties, holidays, and other conditions as they " may from time to time, specify with power to vary the same." The committee, just like any other employer, state the terms on which they are prepared to remunerate the bank clerks, and it is because the bank clerks are not satisfied with the remuneration which this bank is paying that they have applied for a reference to the Industrial Disputes Tribunal; and I confess that for myself I cannot see any answer to it.

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It is suggested here that because the necessary expenses of the bank, which must be paid out of the growing produce of the deposits, can be controlled by the Commissioners for the National Debt, the Commissioners for the National Debt would have power to say that an increased wage which the Industrial Disputes Tribunal might order would not be a necessary expense and that, therefore, in effect, a conflict of some sort between the Industrial Disputes Tribunal and the Commissioners for the National Debt might be set up. It is perfectly true that the Commissioners for the National Debt can call for a full return of the bank's expenses, and if they come to the conclusion that an expense is not necessary, they can disallow it. But obviously, wages must be a necessary expense; there is no doubt about that, and it seems to me that if the Industrial Disputes Tribunal, who, we must assume, act properly, order an increase, it would be impossible for the Commissioners for the National Debt to say that the increased wages were not a necessary expense, because the bank could only get employees by paying those increased wages. This court does not assume that a tribunal will act improperly or do something absurd, but were the tribunal to order that every bank clerk in the Norwich office of the bank was to receive £5,000 a year, that would be an unnecessary expense, but the answer would be that that was not giving them a genuine wage, it would be giving them a bribe, and any such decision as that could be controlled by this court. In this case one is concerned with a mere matter of referring to the tribunal what is the proper salary to pay to bank clerks having regard to the increased cost of living, or perhaps it is more true to say the decreased value of money, and of course the proper wage must be a necessary expense.

For these reasons, I can see no reason whatever for saying that the Industrial Disputes Tribunal have not power to hear this reference. I think that the only real point is whether or not the applicants are carrying on a trade, industry or undertaking and, for the reasons I have given, I have no doubt about that. If I thought that the provisions in the Trustee Savings Banks Acts which deal with the powers of the Commissioners for the National Debt put any real obstacle in the way of the matter being referred to the Industrial Disputes Tribunal, it might have been necessary to consider carefully whether section 1 (4) of the Emergency Powers Act, 1939, is still in force. I do not myself think that there is any doubt that it is still in force. One would naturally feel very loath to have to put in force or to rely, nine years after the end of the war, on a subsection of an Act passed in 1939 when war was imminent, which would apparently still allow a Government Department to obtain an Order in Council legislating in a manner which is inconsistent with an Act of Parliament. It is said that there is still power under that subsection to issue Orders in Council and regulations thereunder which may be inconsistent with Acts of Parliament. If that is so,

I should hope that very few are issued, in fact I should doubt whether any are issued. At any rate, I do not think that it is necessary to call that section in aid, and, for the reasons I have mentioned, in my opinion this application should be refused.

CASSELS J. I agree. The applicants are an undertaking within the meaning of the Industrial Disputes Order of 1951. There is a trade dispute. A mode of settlement is by arbitration before the Industrial Disputes Tribunal. The applicants invite this court to prohibit that tribunal from further proceedings, and I am satisfied that they are not entitled to the relief which they seek.

SLADE J. I agree that no order of prohibition should issue in this case, but I prefer to base my judgment on other grounds.

In the first place, I am satisfied that the activities of the East Anglian Trustee Savings Bank do constitute the carrying on of an "undertaking" within the meaning of article 1 of the Industrial Disputes Order, 1951. Ordinarily that would be an end of the matter because the Minister of Labour and National Service is not only permitted but is required under article 8 in the appropriate circumstances to refer any dispute to the Industrial Disputes Tribunal. But sometimes general legislation is not permitted in law to delegate from special legislation, and the East Anglian Trustee Savings Bank is a bank which is certified under and controlled by the Trustee Savings Banks Acts, 1863 to 1929. In the circumstances, however, for a reason I shall give, it becomes unnecessary to consider whether there was anything in that special legislation which is inconsistent with the powers conferred upon the Minister by the general legislation from which the Industrial Disputes Order, 1951, derives its force.

That order has effect by virtue of the Supplies and Services (Transitional Powers) Act of 1945, which is still in force. Section 5 (2) provides that: "If the principal Acts expire while "this Act is in force"—the principal Acts are defined by section 10 (2) to mean the Emergency Powers Defence Acts, 1939 to 1945, and the Emergency Powers Defence Act, 1939, did expire whilst the Act of 1945 was in force, and therefore, these words become operative—"(*a*) the provisions of those Acts"—that means, inter alia, the Act of 1939—"except the provisions "specified in the Second Schedule to this Act, shall, notwithstand-"ing their expiry for all other purposes, continue to apply (so far "as applicable) while this Act is in force to any Defence Regula-"tion having effect by virtue of this Act, any Order or other "instrument made under any such regulation and any scheme "of control contained in or authorized by any such regulation."

The Industrial Disputes Order, 1951, is made under the Act of 1945, and therefore the Act of 1939, notwithstanding its expiry for all other purposes, continues to apply to it. Section 1 (4) of the Act of 1939 provides that: "A Defence Regulation, and "any order, rule or byelaws duly made in pursuance of such a

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"regulation"—and the Industrial Disputes Order is made in pursuance of Defence Regulation 58AA which derives its force from the Act of 1945—"shall have effect notwithstanding anything "inconsistent therewith contained in any enactment other than "this Act, or in any instrument having effect by virtue of any "enactment other than this Act." By section 1 (2) of the Emergency Powers (Defence) Act, 1940, that refers to any enactment passed before 1939 which, of course, includes the Trustee Savings Banks Acts, 1863 to 1929. In the result, therefore, it seems to me that I am precluded from considering whether there is anything in the special legislation of 1863 to 1929 which is inconsistent with the general legislation under which the Industrial Disputes Order, 1951, derives its force. Had it been necessary for me to consider the special legislation, I should have wanted to be satisfied that it was consistent with the safeguards provided by the savings banks legislation for protecting the interests of the depositors for some outside body such as the Industrial Disputes Tribunal to have the power to substitute themselves for the body to which the task of deciding what constitutes necessary expenses to be incurred in the management of the activities of the savings banks has been entrusted under the Acts of 1863 to 1929. For the reasons I have given it becomes unnecessary to consider that point further, and in the result I agree that no order for prohibition should be made in this case.

Application dismissed.

Solicitors: *Butt & Bowyer for Daynes, Keefe & Co., Norwich; Solicitor, Ministry of Labour and National Service, Blatchfords.*

J. F. L.

[QUEEN'S BENCH DIVISION.]

* GRESHAM and Another v. LYON.

[1953 G. No. 230.]

1954 *Mar.* 25, 26; *July* 20.

McNair J.

Inn—Duty to guest—Loss of guests' goods—Luggage left in locked boot of car in hotel garage—Luggage stolen—Inn-keeper's liability.

The plaintiffs, who were guests at a hotel, left some luggage in the boot of their car, which they parked in the hotel's temporary garage. The garage was situated about 300 yards from the hotel and was open to the sky, being protected only by walls which were readily scalable. Notices were exhibited within the garage stating: ". . . Hotel guests garaging their cars here do so entirely at their "own risk and no responsibility is accepted for damage, theft, fire "or any other cause whatsoever." The luggage was stolen from the car by a thief who gained access to the yard by climbing over the

wall during the night. The plaintiffs claimed the value of the goods lost from the owner of the hotel on the basis of the innkeeper's absolute liability for goods of travellers received within the hospitium of the inn:—

Held, that although the garage was not adjacent to the hotel, it formed part of the hospitium of the inn as far as the motor-car was concerned, because an innkeeper was obliged to provide accommodation for his guest's car. Whether the garage could be regarded as part of the hospitium of the inn in relation to the luggage was primarily a question of fact to be determined on the evidence as to the physical attributes of the premises, the availability of any more suitable place for its reception and the existence or absence of any invitation so to use it; on the facts, and in view of the notices which negatived any implied invitation to leave luggage there, the garage was not part of the hospitium of the inn as far as the plaintiffs' luggage was concerned and accordingly the hotel owner was not liable for its loss.

Williams v. *Linnitt* [1951] 1 K.B. 565; [1951] 1 T.L.R. 94; [1951] 1 All E.R. 278 and *Watson* v. *People's Refreshment House Association Ld.* [1952] 1 K.B. 318; [1952] 1 T.L.R. 361; [1952] 1 All E.R. 289 considered.

Held, further, that the hotel owner could escape liability for the loss on the ground that it was due to the plaintiffs' own carelessness and failure to take reasonable care of the luggage.

ACTION.

The plaintiffs, Harry Gresham and his wife, having reserved accommodation for themselves and their car at the Hotel de France, Dover, owned by the defendant, Graham Lyon, arrived at the hotel about 7.30 p.m. on August 22, 1951, with their car. The male plaintiff was handed a card with his room number which contained certain printed information (which he did not read) including the following: "Temporary garage accommodation . . . "has been secured in Northampton Street. This is not entirely "weatherproof, but is under lock and key. No responsibility can "be accepted for vehicles, and parking outside the hotel is strictly "forbidden by the police." The male plaintiff then drove his car to the garage, which was situated about 300 yards from the hotel itself and which consisted of an old one-storey warehouse, which had been badly damaged by enemy action and remained only partially repaired, and a yard surrounded by brick walls about 10 or 12 feet high, but open to the sky except for the partial shelter provided by the damaged roof of the warehouse. The entrance to the yard for cars was by way of two large sliding doors marked on the outside with the words "Garage. Hotel de "France," and secured at night by a stout padlock. There was also a small side door bolted on the inside.

On the instruction of the garage attendant, the male plaintiff locked all the doors of the car and the boot, in which he left two large suitcases and a small handgrip. There were exhibited within the garage yard in conspicuous positions five notices in the following terms: "Important Notice: This overflow garage is not "weatherproof and no responsibility is accepted for damage due "to inclement conditions. Hotel guests garaging their cars here

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"do so entirely at their own risk and no responsibility is accepted "for damage, theft, fire or any other cause whatsoever." Later in the evening the sliding doors were padlocked and the small side door was left bolted on the inside. In the morning when the attendant returned, it was discovered that the two suitcases from the boot of the plaintiffs' car had disappeared with their contents. The padlock on the doors was intact, and the bolts on the side door had been drawn from the inside. The suitcases and their contents had been stolen by a thief who had gained access to the yard by climbing over the wall, and who left by the side door.

The plaintiffs claimed the agreed value of the goods lost, which was £250, from the defendant, on the basis of the innkeeper's absolute liability for goods of travellers received into the hospitium of the inn.

The defendant, while admitting that the Hotel de France was a "common inn" on the occasion in question, and that the plaintiffs were in law "travellers" and were received into the inn as guests, did not admit that either the motor-car or the luggage was received into the hospitium of the inn. He alleged that the overflow garage accommodation was only made available for guests to park their motor vehicles on the conditions of the notices there exhibited, and further or in the alternative contended that, if the overflow garage formed part of the hospitium of the inn at all, it was only part of the hospitium in relation to motor-cars and not in relation to luggage in the cars. Further, by way of substantive defence, he alleged that the loss of the goods was due to the negligence of the plaintiffs themselves in leaving their luggage in the car, when they well knew or ought to have known the physical condition of the garage, and in failing to pay any heed to the written notice that cars garaged there were so garaged at the owner's risk. No ground of limitation of liability under the Innkeepers' Liability Act, 1863, was alleged.

E. J. Branson for the plaintiffs.

Stephen Chapman (with him *S. Smith*) for the defendant.

The following cases were cited in argument: *Williams* v. *Linnitt*[1]; *Watson* v. *People's Refreshment House Association Ld.*[2]; *Shacklock* v. *Ethorpe Ld.*[3]; *Calye's Case*[4]; *Jones* v. *Tyler*[5]; *Turrill* v. *Crawley*[6]; *Gee, Walker & Slater Ld.* v. *Friary Hotel (Derby) Ld.*[7]; *Winkworth* v. *Raven*[8]; *Olley* v. *Marlborough Court Ld.*[9]

[1] [1951] 1 K.B. 565; [1951] 1 T.L.R. 94; [1951] 1 All E.R. 278.

[2] [1952] 1 K.B. 318; [1952] 1 T.L.R. 361; [1952] 1 All E.R. 289.

[3] 55 T.L.R. 895; [1939] 3 All E.R. 372.

[4] (1584) 8 Co.Rep. 32a.

[5] (1834) 1 Ad. & El. 522.

[6] (1849) 13 Q.B. 197.

[7] (1949) 66 T.L.R. (Pt. 1) 59.

[8] [1931] 1 K.B. 652; 47 T.L.R. 254.

[9] [1949] 1 K.B. 532; 65 T.L.R. 95; [1949] 1 All E.R. 127.

The trial was held at Maidstone Assizes; judgment was given in London.

Cur. adv. vult.

July 20. McNAIR J. read the following judgment: This case raised interesting questions as to the liability of innkeepers in relation to personal luggage left by guests in motor-cars left on or near the inn premises.

[His Lordship stated the facts and found that, although the male plaintiff had not seen the notices in the garage, all proper steps were taken to draw them to the attention of intending users of the garage, but that neither of the plaintiffs had been warned not to leave luggage in their car. His Lordship continued:] The first question which I have to decide is whether or not the garage in question formed part of the hospitium of the inn for any purpose. In my judgment it clearly did so far as the motor-car itself is concerned. It is clear on authority that today the keeper of a "common inn" is under obligation to provide accommodation, not only for the guest himself but for his motor-car, as he was in the olden days obliged to provide accommodation for the traveller's gig and horse and, if the innkeeper offers no other accommodation for his guests' motor-cars than such accommodation as was provided by the garage space here in question, there is no reason in law why such a garage space should not be treated as part of the hospitium notwithstanding that it is not contiguous with or adjacent to the inn premises proper. As far as the plaintiffs' motor-car is concerned, the garage space in question was the place where he, as a hotel guest, was invited to park his car, and for this facility a small charge was made. The judgments of Tucker and Asquith L.JJ. in *Williams* v. *Linnitt* [1] lead inevitably to the conclusion stated above.

It was argued, however, that, though the garage space might be regarded as part of the hospitium of the inn so far as the car itself was concerned, it could not be so regarded in relation to luggage left in the car. So far as I have been able to ascertain, this distinction has not been effectively drawn in any of the decided cases. There are, however, indications in certain of the recent decisions on this topic which seem to me to support this argument.

For example, in *Williams* v. *Linnitt*, Tucker L.J. said [2]: "The liability of the innkeeper, in my view, extends to the goods "of his guest which are placed by the guest in that part of the "premises in which such goods are usually taken in the inn." In *Watson* v. *People's Refreshment House Association Ld.*, Devlin J.[3] used the following language: "An innkeeper, as I have "said, is absolutely liable in respect of goods, whether they be

[1] [1951] 1 K.B. 565; [1951] 1 T.L.R. 94; [1951] 1 All E.R. 278.
[2] [1951] 1 K.B. 565, 576.
[3] [1952] 1 K.B. 318, 322; [1952] 1 T.L.R. 361; [1952] 1 All E.R. 289.

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"baggage or a conveyance, which he receives within the inn. In "the case of baggage there is very little difficulty about deter-"mining what receiving it within the inn means. It means, of "course, within the inn buildings." Though this expression of opinion was not strictly necessary for the decision in that case, it is an observation of weight. There was no evidence, or no evidence that satisfied me, that guests generally, or the male plaintiff in particular, were invited (as distinct from being permitted) to leave their luggage in their cars when using the garage space or that luggage was usually so left, though there was evidence, which I accept, that on occasions guests' heavy luggage was removed from cars and placed in a convenient place within the inn. The distinction between invitation and permission is properly drawn by Devlin J. in the case last cited.

In these circumstances, whether the garage space is properly to be regarded as part of the hospitium of the inn in relation to passenger luggage seems to me to be primarily a question of fact to be determined on the evidence as to the physical attributes of the premises in question, the availability of any other more suitable place for its reception and the existence or absence of any invitation so to use it. The evidence satisfied me that the garage space was open to the sky and protected only by walls which were readily scalable, that there was another convenient place for passengers' luggage within the inn itself, and that in the garage space itself there were exhibited conspicuous notices in the terms set out above. These notices seem to me to negative any implied invitation, though admittedly they have no contractual force if in fact the garage space was part of the hospitium of the inn in relation to the luggage, and there was no evidence of any express invitation.

Accordingly, in so far as it is a question of fact, I find, and so far as it is a question of law I hold, that the garage space was not part of the hospitium of the inn so far as concerns the plaintiffs' luggage, and, accordingly, the defendant was not under the absolute liability of an innkeeper in relation to these goods. To hold the contrary would, in my judgment, have the effect of extending the innkeepers' liability to a wholly unreasonable extent. Accordingly, the plaintiffs' claim fails.

There is, however, a second ground on which, in my judgment, the plaintiffs' claim fails. In *Shacklock* v. *Ethorpe Ld.*,[4] in the speech of Lord Macmillan the following language occurs[5]: "It "has always been the law, however, that the innkeeper can "escape liability if he can show that, as Erle, J., delivering the "judgment of the court in *Cashill* v. *Wright*[6] said, ' . . . the "' negligence of the guest occasions the loss in such a way as "' that the loss would not have happened if the guest had used "' the ordinary care that a prudent man may be reasonably

[4] 55 T.L.R. 895; [1939] 3 All E.R. 372.

[5] [1939] 3 All E.R. 372, 374.

[6] (1856) 6 E. & B. 891, 900.

"'expected to have taken under the circumstances.' The word "'negligence' is tending in modern legal usage to be restricted "to denoting the breach of a duty owed to some other person, "but it is not in this correlative sense that the word is used in "the present context. The innkeeper's defence is not based on "the breach of any duty owed to him by his guest, but simply "on the plea that the loss or theft of his guest's property was "due to the guest's own carelessness, his own failure to take "reasonable care of it."

In my judgment, the loss of the plaintiffs' luggage in the present case can properly be held to be due to the plaintiffs' own carelessness and failure to take reasonable care of their luggage. Being no doubt anxious to get away to a good start on the following morning, the plaintiffs took the chance of leaving the luggage in the boot of the car in a garage space which was open to the sky and completely unprotected against evilly disposed persons who might be minded to climb over the wall for the purpose of theft. They may have been misled by the fact that the owner of another car in the same garage space had left his luggage strapped on the back of his car. But they apparently relied on the security of the lock on the boot of the car, which common experience demonstrates to be no security at all against a determined thief. Accordingly, in my judgment the plaintiffs' claim fails on this ground also.

Judgment for the defendant.

Solicitors: *W. W. Box & Co.; L. Bingham & Co.*

C. J. E.

[PROBATE, ETC., DIVISION.]

* RAMSDEN v. RAMSDEN.

1954
June 22, 23.

Lord Merriman P. and Davies J.

Husband and Wife—Justices—Practice—Dismissal of case at close of complainant's evidence—Desirability of hearing both sides.

Justices, having heard evidence in support of a wife's charge of persistent cruelty, dismissed her complaint without calling upon the husband. They gave as their reason when she appealed that having regard to the lack of substance in the evidence she had failed to make out her case. They did not rule that, taking the evidence at its face value, nothing had been shown which could in law amount to persistent cruelty:—

Held, that while in the circumstances the decision of the justices had been right, and while justices were fully entitled to take such a course, it was usually better in such cases to hear both sides before coming to a decision, so as to avoid a subsequent contention that they had ruled as a matter of law that there had been no case to answer.

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Appeal by a wife from the dismissal by the Manchester County Justices sitting at Strangeways, Salford Hundred, on January 20, 1954, of her complaint of persistent cruelty.

The parties were married in August, 1953, when the wife was eighteen and the husband twenty. The wife left the husband on November 24, 1953. At the time of the marriage the wife was pregnant by the husband and her complaint before the justices was in the main based upon alleged excessive sexual demands, having regard, inter alia, to her pregnancy. She also gave evidence of alleged blows in the course of quarrels arising from disputes connected with demands for intercourse. There were further disputes over money, particularly money for clothes for the expected child, and there was one allegation of an attempted sodomitical practice. Her mother gave evidence in support of the complaint. The justices then stopped the case without calling on the other side.

The justices stated in their reasons that the wife's main complaint was about the alleged excessive sexual demands, and said that her evidence on that point did not satisfy them that the husband's conduct had been unreasonable; and they concluded: "With regard to the acts of physical cruelty, though these may "have taken place we do not consider they were of sufficient "persistence or of sufficient seriousness to cause any serious "consequences to the complainant's health, or to cause danger to "life or limb. . . We further are of opinion that having regard "to the short duration of the marriage, the youth of the parties ". . . and the lack of substance in the allegations, the complainant "has failed to make out her case."

W. F. N. Perry for the wife.
John Moylan for the husband.

Lord Merriman P. referred to the nature of the wife's complaint and the facts of the marriage and continued: After hearing the wife's evidence, and such evidence as her mother gave, the justices stopped the case without calling on the other side. It is important to ascertain exactly what that means, and it may quite plainly mean one of two things. It may involve a ruling made either by the justices, or possibly on a submission by the defendant, that taking the evidence at its face value nothing had been shown which could, in law, amount to persistent cruelty. It is not suggested that there was any submission on the part of the husband that there was no case to answer. If, therefore, there was such a ruling, it was made by the justices on their own initiative. Secondly, the decision may mean no more than this, that the justices heard the evidence put forward by the wife in support of allegations of persistent cruelty, and that they did not think there was any substance in it.

I think that it is clear from the statement of the reasons of the justices that it was the latter course which they took. They set out a very fair statement of their reasons, first of all realizing

quite accurately that the wife's main complaint was about the excessive sexual demands of her husband. [His Lordship referred to the justices' reasons set out above, and continued:]

It is quite plain on the face of their statement of reasons that the justices are not purporting to rule as a matter of law that the matters of which complaint was made could not, if established, amount to persistent cruelty. They are saying, literally and impliedly, throughout the whole of their reasons: "We think that "this case lacks substance, and do not want to hear any more "of it." It is said that they should not do this, that it is their duty to hear the case out if there is anything which could afford prima facie evidence in support of it. I think that that proposition is too wide. Although I cannot put my hand on any authority, Mr. Moylan is able from his own experience to support my recollection, that this court on more than one occasion has laid down, in similar circumstances, that justices, like anybody else, whether it be a judge or a jury, are perfectly entitled to say: "We "have had enough of this case, and we do not think anything of "it," without being said to have misdirected themselves in law. But at the same time, I am confident that we have coupled with that the advice that it is usually better to wait to hear both sides in these matrimonial cases before coming to a decided conclusion. I still think that that advice is sound, because, very often, if justices reach their decision out of hand on the complainant's case, the result is that it is contended before us, as on this appeal, that they are said to have ruled as a matter of law that there was no case to answer. It is liable to give rise to more difficulties than it avoids.

I repeat, however, that the justices have a perfect right, if they think fit, to say that there is nothing whatever in the case, and that they do not want to hear any more of it; and it would be quite wrong for this court, in my opinion, to lay down any rule to the contrary of that proposition. I am satisfied beyond any doubt that that is what the justices have done in the present case, and I can see no reason whatever from the adequate note before us why they should not have come to that conclusion. In those circumstances it seems to me that this appeal must fail.

DAVIES J. I entirely agree, and do not desire to add anything.

Appeal dismissed.

Solicitors: *Taylor, Jelf & Co. for Frank Douglas, Manchester; Vizard, Oldham, Crowder & Cash for Alan Ashcroft, Eccles.*

J. B. G.

[CHANCERY DIVISION.]

1954
June 29, 30;
July 1, 2, 3, 5, 6, 7, 9, 12, 13, 14.

Roxburgh J.

**In re* BANQUE DES MARCHANDS DE MOSCOU (KOUPETSCHESKY) (No. 2).

[No. 0097 of 1932.]

Company — Winding up — Foreign corporation — Russian bank — No branch in England—Assets in England—Dissolution of bank in Russia—Winding-up order in England—Claim against liquidator of English assets for debt due from bank—Claim based on orders by bank payable in England—Transaction illegal by Russian law—Debt situate in Russia—Not a debt provable in winding up—Companies Act, 1929 (19 *&* 20 *Geo.* 5, *c.* 23), *s.* 261.

Conflict of Laws—Chose in action or debt—Situs.

A Russian bank, incorporated in 1866 under the laws of the Russian Empire, carried on the business of banking in Moscow and elsewhere; it had no branch in England, but in December, 1917, it had a current account with the Midland Bank Ld. which was in credit. By December 14, 1917, the bank was dissolved under the laws affecting the nationalization of the private banks in Russia, in particular by a decree of that date and an edict known as Article 997.

On May 30, 1932, on the footing that the bank had been dissolved in Russia, an order was made by the English court under section 338 of the Companies Act, 1929, winding it up. Since then the liquidator in England had got in substantial assets.

Proof of a claim against these assets was lodged in respect of money credited to a claimant in Russia in 1917, the claim being based on two documents dated December 16, 1917, ordering the Midland Bank Ld. to pay him two sums of £10,000 and £2,000 respectively out of the assets held by that bank to the credit of the Russian bank. A third document dated December 17, 1917, was purported to support those claims.

It was accepted in evidence that by December 14, 1917, there was an effective system of control in Russia of all transactions relating to foreign exchange, and that these transactions would have been contrary to the applicable laws.

His proof was rejected by the liquidator, and the present applicant (as personal representative of the claimant who had since died) asked that the rejection should be set aside and the proof allowed in full:—

Held, that the proof should be rejected, since (i) the transaction which it was sought to uphold was illegal in its inception as it was contrary to the currency laws then in force in Russia; (ii) the Russian bank was dissolved before the date of the documents relied on to support the claim; but had they ever imposed any liability on the bank it was extinguished when the bank was dissolved which was before the winding up in England; (iii) as the bank resided only in Russia, on the authority of *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou*, December 14, 1931, unreported, this debt (even if leave might have been given to sue the bank for it out of the jurisdiction) was situate in Russia at the date of the dissolution, and such a debt was not among the debts which could be proved under section 261 of the Companies Act, 1929, in a winding-up.

In re Russian Bank for Foreign Trade [1933] Ch. 745; 49 T.L.R.

253; *In re Banque des Marchands de Moscou (Koupetschesky)* [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269, and *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou (Koupetschesky)* (unreported, December 14, 1931), applied.

ADJOURNED SUMMONS.

The following statement of facts is taken from the judgment: The Banque des Marchands de Moscou (Koupetschesky) (hereafter referred to as "the Russian bank") was incorporated in 1866, under the laws of the Russian Empire, to carry on the business of banking in Moscow and elsewhere. It never had a branch in England, but in December, 1917, it had a current account with the Midland Bank Ld. in London which was in credit. On May 30, 1932, Eve J., on the footing that the Russian bank had then been dissolved, made an order winding it up under section 338 of the Companies Act, 1929. Since then the liquidator had got in substantial assets.

On September 21, 1932, Alexei K. Ouchkoff, a Russian domiciled in France, lodged a proof in the liquidation in respect of the sums of £10,000 and £2,000, which was rejected by the liquidator. He had since died and his widow, the present applicant, also a Russian domiciled in France, as his personal representative, asked the court to set aside the rejection of the proof by the liquidator and to allow the proof in full.

The claim rested on three documents which came into existence in the circumstances stated by the applicant, Madame Ouchkoff, in her affidavit: "After my marriage to the claimant "we lived in Moscow, but prior to December 16, 1917, we had "decided to escape from Russia and eventually did in fact "succeed in doing so. Following our escape the claimant never "returned to Russia to the best of my knowledge and belief, and "he never had any intention of doing so. At all times from "the date when we both escaped it was his intention and mine "to acquire a domicile of choice in France. The claimant, with "my concurrence, intended to exchange his assets in Russia for "assets abroad. With this object in view, the claimant to my "knowledge obtained from the bank the two letter orders dated "December 16, 1917, and the letter dated December 17, 1917," these documents being exhibited to her affidavit. "It is within "my personal knowledge that the claimant delivered a large "quantity of gold to the bank at about the same time, and that "the claimant had a large account to his credit at the bank. It "was at all material times the intention of the claimant, and as I "verily believe of the bank, that the debts created and/or "evidenced by the said letter orders and letter should be paid in "England."

The first document was in English and headed "The Russian "Bank, Moscow, December 16, 1917," and then, in figures, "£10,000." Then there were these words: "The City of Midland "Bank [the Midland Bank was intended by that description],

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"London: Pay to order of Mr. A. K. Ouchkoff the sum of ten "thousand pounds debiting our account with you, Moscow "Merchants Bank Ld." There were two signatures to this document.

The second document was also dated December 16, 1917, also addressed to "The City of Midland Bank Ld., London," and the figure in this case was £2,000. The document read: "Pay "to order of Mr. A. K. Ouchkoff the sum of two thousand pounds "debiting our account with you. Yours truly, Moscow Mer-"chants Bank," and there were the two signatures. At the bottom of each document was the name of Mr. Ouchkoff as addressee.

These documents were not on any recognized cheque form. The third document which was in Russian was translated as follows: "The board of the Moscow Merchants Bank hereby "certifies that out of the foreign funds belonging to the bank "which are deposited abroad £2,000 belongs to Alexei Konstan-"tinovitch Ouchkoff. Instructions to pay this amount to him or "to his order will be made by the bank immediately on resump-"tion of normal communications between the bank and its foreign "correspondents. For the chairman," and there followed a signature and then the word "Directors," followed by two signatures and dated "December 17, 1917, Moscow."

Raymond Jennings Q.C. and *G. R. F. Morris* for the applicant.
J. B. Lindon Q.C. and *Raymond Walton* for the liquidator.

Case referred to in argument other than those set out in the judgment: *In re Azoff-Don Commercial Bank.*[1]

Roxburgh J. having stated the facts continued: The third document, that is to say, the one translated from the Russian, is not set up by the applicant now as evidence of a third debt but as a voucher to support her claims under the first and second documents. But as it refers to "foreign funds," and not to funds in England, still less to funds at the Midland Bank, it seems to me that it can have no effect as a charge on or appropriation of any of the Russian Bank's English assets and, therefore, as far as I can see, adds nothing to the first two documents, and I propose to say no more about that document.

My first conclusion is that the whole transaction was illegal in its inception as being a transaction carried out in Russia in breach of the Russian currency laws then in force. I should say that both of these laws were made during the regime of the Provisional Government; a fact which is not without importance in connexion with this matter. The first is article 734 and is called: "On the Prohibition of Money transfers abroad. An act "of the Provisional Government." The second is: "Ordinances

[1] [1954] 1 Ch. 315; [1954] 2 W.L.R. 654; [1954] 1 All E.R. 947.

"announced to the Ruling Senate by the Minister of Finance "concerning the approval of a statute for the settlement depart-"ment attached to the special office for credit matters." The first was signed on June 5, 1917, and the second seems to have been approved on July 23, 1917, but the precise date is not material.

I have listened attentively to the evidence of Dr. Dobrin and Dr. Fischmann on this point, and having done so I accept on this point the evidence of Dr. Dobrin and I reject that of Dr. Fischmann. Professor Bernatzky, who was formerly professor of political economy in the University of Petrograd and in the Petrograd Polytechnicum, and was minister of finance (and this is to my mind the important point) in the Russian Provisional Government—that is to say, the government which promulgated these two edicts having the force of law—has written a book on Russian public finance during the war. I do not think that he had any legal qualifications—at any rate, none are mentioned on the title page of this book—but this after all is perhaps just as much within the purview of a minister of finance as of any lawyer. In this book he says this: "An effective system of "control by the government of all transactions in foreign "exchange was thus introduced in Russia only on the eve of the "outbreak of civil war and of the complete collapse of her "political organisation."

The civil war had broken out before these documents had been executed, and if those two edicts were to be given the limited operation which Dr. Fischmann for no sufficient reason claimed for them, and if therefore the transaction which is the subject-matter of this claim, was not, as Dr. Fischmann contends, prohibited by them, then the system of control could not possibly have been described by anybody who knew anything about it as "effective," and I think that I am entitled to assume that the minister of finance in the Provisional Government which enacted those two edicts did know a good deal about it, probably a great deal more than any court in England ever will. I accept, therefore, on this matter, as I have already said, the evidence of Dr. Dobrin and not that of Dr. Fischmann.

However, assuming that I am wrong on this point, there seems to be an insuperable difficulty for the claimant at the other end of the transaction. By the operation of certain law-making edicts in Russia, and in particular a decree of the nationalization of banking passed on December 14, 1917, and article 997, which is described as "Instructions approved by the "People's Commissary of Finance on December 10, 1918, on "the method of nationalization of private banks," both of which are printed in a note to the case of *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse*,[1] the nationalization of the Russian bank took effect as from December 14, 1917. I may say in passing that both Russian legal

[1] [1923] 2 K.B. 674, 677.

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experts agreed that article 997, to which I have just referred, had the force of law in Russia. Dr. Fischmann did indeed attempt some recantation from, and qualification of, his earlier clear admissions, but having observed the circumstances and manner in which the partial recantation was made I cannot attach any weight to it. I hold on the evidence that article 997 had the force of law. There must, therefore, be doubt whether these documents, all dated after December 14, 1917, can ever have imposed any liability on the Russian bank, but, assuming that they did, that liability was under Russian law extinguished when the Russian bank was finally dissolved in Russia, if it had not been extinguished before. This was long before the commencement of the winding-up in England.

What, then, is the position regarding these claims here? I will assume, without deciding, that at the date of these documents the bank was under some antecedent liability to Ouchkoff and that, but for the dissolution of the bank, he could have sued the bank on the cheques on the footing that they had been presented, or that presentation had been excused and that they had been dishonoured or for so much of the antecedent debt as was evidenced thereby. These are large assumptions, but even so the position now, in my judgment, admits of little doubt. In *Russian and English Bank* v. *Baring Brothers & Co., Ld.*[2] Lord Atkin pointed out[3]: " . . . it is a necessary implication, that " the dissolved foreign company is to be wound up as though " it had not been dissolved, and therefore continued in exist- " ence." At first sight, this would seem to suggest that all debts without distinction of race would be provable, because section 261 of the Companies Act, 1929, which does not differ materially from section 316 of the Act of 1948, provides: " In every " winding up (subject in the case of insolvent companies to the " application in accordance with the provisions of this Act of the " law of bankruptcy) all debts payable on a contingency, and all " claims against the company, present or future, certain or " contingent, ascertained or sounding only in damages, shall be " admissible to proof against the company. . . ." and that section appears to be applicable to the winding up of a dissolved foreign company. But Lord Atkin was careful to avoid committing himself to this line of reasoning, because he said[4]: " But if the corporation does trade here, acquires assets here " and incurs debts here, we shall not accept its dissolution abroad " without a stipulation that if desirable it may be wound up here " so that its assets here shall be distributed amongst its creditors " (I do not stay to consider whether its English creditors or " creditors generally) and for the purpose of the winding-up it " shall be deemed not to have been dissolved," and Mr. Jennings, who steered his vessel with a high degree of seamanship, did not quite dare to explore that channel.

[2] [1936] A.C. 405; 52 T.L.R. 393; [1936] 1 All E.R. 505.

[3] [1936] A.C. 405, 427.

[4] Ibid. 428

Maugham J. in *In re Russian Bank for Foreign Trade,*[5] had already devised a means of escape from an application of section 261 of the Act of 1929 which would certainly be surprising because, after all, what is being administered here is not all the assets of the Russian Bank, but assets on which the liquidator can lay his hands, and which, broadly speaking, are English assets. It would, therefore, be surprising if debts which could, broadly speaking, be described as English debts, should find themselves in competition with Russian debts against assets which were broadly English assets and of necessity excluded the Russian assets. Maugham J., in carefully chosen words, considered this problem[6]: "There is, however, a real question in "dispute, and that is whether the debt to the petitioner"—this was a petition for winding up a dissolved foreign company—"was or was not locally situate in Russia at the date of the "decrees of 1917 and 1918 above referred to. If it was locally "situate in Russia, it seems to me that as the effect of the "legislation the debt is no longer due by the bank as a corpora-"tion, and that the only claim of the petitioner is against the "Soviet State. By the decree of December 1917, the assets and "liabilities of the bank within Soviet territory were taken over "by the People's Bank, and this in my opinion involves the "destruction of the original debt and a kind of statutory novation "(in some sense, perhaps, only a theoretical one) whereby the "State Bank became liable to discharge it. This legislation "must be taken to be effective as regards property situate in the "territory of the Soviet Republic (see *Princess Paley Olga* v. "*Weisz*[7]), in which it was held that the English courts will not "inquire into the legality of acts done by a recognized foreign "government against or in relation to its own subjects in respect "of property situate in its own territory. It seems to me to be "clear that the same principle must apply, whether the property "consists of chattels or of a debt regarded in this country as "having a local situation. If, then, it were to be established "that the debt of the petitioner was represented by a credit to "him in the Archangel branch of the bank [that was alleged in "this case], I should be of opinion that that debt had ceased to "exist. The petitioner, however, has sworn that if the Arch-"angel branch was credited with the proceeds of the goods sold "by the London branch on his instructions it was done without "his authority. The effect of the correspondence in relation to "the matter is not conclusive, and the evidence does not enable "me to express a final opinion on the claim of the petitioner to "be a creditor for a debt recoverable in London. If the debt was "primarily recoverable in London, I am of opinion that it was "not affected by the Soviet legislation, even though it was due "to a person who was a Russian subject at the date of the

[5] [1933] Ch. 745; 49 T.L.R. 253.
[6] [1933] Ch. 745, 766.
[7] [1929] 1 K.B. 718; 45 T.L.R. 365.

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"nationalization decrees. Its locality must be taken to be the "place where the debt was in the ordinary course recoverable." Maugham J. then cited certain authorities, and continued: "The "decrees in question could not according to our laws have the "effect of extinguishing the debt, if locally situate here, or of "transferring it to the Soviet Republic."

This reasoning does provide an escape from section 261. If a debt was locally situate in Russia at the material date, then the nationalization decree which took effect on the dissolution of the Russian Bank or earlier removed it altogether from the category of debts and liabilities provable, because it was not a debt at all at the time when the proof was sought to be admitted; but if the debt was not locally situate in Russia then the decrees have no extra territorial operation and, accordingly, whatever may have happened in Russia, the debt remains provable in an English liquidation.

This reasoning was in its inception embodied in what must, I think, be described as a dictum, but it has since been treated as a proper foundation for a judgment by Vaisey J. in *In re Banque des Marchands de Moscou* (*Koupetschesky*),[8] a case relating to this same bank, where Vaisey J., after reading most of the passage which I have cited, said[9]: "I agree that those statements are "obiter, but they seem to me to be founded on accurate principles, "and to control and govern the present case." Mr. Jennings invited me to desert Maugham J. and Vaisey J., and to strike out a new path for myself. It might well have been difficult for me to do so had I felt that I should like so to do, but Mr. Jennings' alternative proposition makes no appeal to me. What he asked me to do was to propound as law that if a creditor can show that it was the agreement and intention of the parties that he was to be paid out of the assets in England he should be paid out of the English assets but not otherwise. But, in my judgment, no escape from the universality of section 261 of the Companies Act, 1929, or from section 316, the corresponding section of the Companies Act, 1948, lies by this route, and, therefore, Mr. Jennings' proposition, for which no authority is available, does not commend itself to me on grounds of logic.

Mr. Jennings felt unable, or almost unable, to contend that the debt in this case was not situate in Russia in view of two passages in an unreported judgment of the Court of Appeal in *Deutsche Bank und Disconto Gesellschaft* v. *Banque des Marchands de Moscou*,[10] this same bank. Judgment was delivered on December 14, 1931, and it became necessary for the purposes of that appeal to discuss the situation of a debt. In the course of his judgment Greer L.J. said: "At the date when the "Treaty of Peace Order in Council came into operation, namely, "January 10, 1920"—and that was the material date in that

[8] [1952] 1 T.L.R. 739; [1952] 1 All E.R. 1269.

[9] [1952] 1 T.L.R. 739, 742.

[10] December 14, 1931 (Unreported).

appeal—" the defendants had no place of business in, and were " therefore not resident in, the United Kingdom, and I think it is " established by the decision of this court in *New York Life* " *Insurance Company* v. *Public Trustee*,[11] . . . that the debt " had not situs in this country."

It had occurred to me during the argument that perhaps it might be enough if the applicant could show that the case was one in which leave to serve the Russian Bank out of the jurisdiction might have been granted—it will be observed that no action could have been brought in England without such leave, because the bank had no branch in England and could not have been served here—but Romer L.J. who dealt with the situs of debts in greater detail, considered and rejected that argument. I agree with what he said, which was as follows: " As has often " been pointed out, a chose in action has not in strictness any " locality. But where, as in the present case, a simple contract " debt has to be treated as having some locality, it is deemed by " English law to be situated in the place where the debtor resides. " The reason for assigning this locality to a simple contract debt " was that the place where the debtor resides was in nearly every " case the place where it was recoverable. Even in earlier times, " it might, of course, occasionally have happened that judgment " could be obtained against a debtor in a country where he did not " reside. But it was probably thought desirable for the sake of " uniformity to adopt in all cases the test of residence rather " than the test of recoverability. However, whatever the reason " may have been, the rule was laid down, as I have stated it in " *Attorney-General* v. *Bouwens*,[12] . . . and was recognized by " this court as still being the rule in the case of *New York Life* " *Insurance Company* v. *Public Trustee*,[13] . . . The difficulty " in that case was that a corporation, unlike an individual, can " be residing in two places at one and the same time, a possibility " not within the contemplation of the authors of the rule, and it " became necessary to consider which of the two residences of the " insurance company, London or New York, was to be taken as " determining the locality of the debt due from it. As the debt " in question was, in terms of the contract creating it, payable " in this country, and in addition was recoverable here, its " locality was held to be English.

" In the present case the debt is payable in this country, but " the defendant bank was not residing here on January 10, 1920. " It was in May of the same year, but that will not help the " plaintiffs. The debt was also recoverable here on January 10, " 1920, had the plaintiffs been successful in obtaining leave to " serve the defendant bank out of the jurisdiction. But I know " of no authority for the proposition that a simple contract debt " is situate in this country at a time when the debtor is not

[11] [1924] 2 Ch. 101; 40 T.L.R. 430.
[12] (1838) 4 M. & W. 171.
[13] [1924] 2 Ch. 101, 115, 120.

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"resident here merely because he can be sued by putting into "operation the provisions of Order XI. It would be strange if it "were so. For it is always in the discretion of the court in "cases coming within the rule to give or refuse leave for service "out of the jurisdiction, a discretion depending upon the balance "of convenience. A debt due from a debtor resident out of the "jurisdiction cannot therefore be deemed to be in this country "until an application has been made for service of the writ out of "the jurisdiction and that application has been acceded to. If "leave be obtained, the question would then arise whether the "order granting leave brings the debt into this country for the "first time, or establishes its presence here as from some earlier "date. In the present case the plaintiffs obtained leave from "McCardie J. to serve the writ out of the jurisdiction in 1930. "Was the effect of that order to establish the English locality "of the debt as existing in January, 1920, or only in 1930?—but "I need not attempt to answer this question, for in my judgment "the fact that a simple contract debt can be recovered here from "a debtor out of the jurisdiction does not establish an English "locality for the debt, any more than it puts an end to the "debtor's absence beyond the seas for the purpose of the Statute "of Limitations."

This Russian bank, in my judgment, resided only in Russia; the situs of the alleged debts was in Russia; having formed a clear view on this point, it is unnecessary to consider the innumerable other points which otherwise would arise. The proof is rejected altogether.

Order accordingly.

Solicitors: *Holland & Co.; Slaughter & May.*

I. G. R. M.

[CHANCERY DIVISION.]

1954
July 20.

Vaisey J.

* *In re* G.'S APPLICATION FOR A COMMITTAL ORDER.

Contempt of Court—Committal order—Application by litigant in person—Such applicant not to be heard—R.S.C., Ord. 44, *r.* 2, *note.*

An application for committal on the ground of an alleged contempt of court cannot be made by a litigant in person.

Motion.

An applicant in person moved the court to commit the respondent for alleged contempt, but was stopped on the raising by the court of the preliminary question whether the applicant could so move.

S. Seuffert for the respondent. There appears to be no authority on the question whether a litigant in person can move to commit. There are, however, two authorities clearly establishing that he cannot move for a writ of attachment. The first is *Ex parte Fenn*,[1] in which Lord Denman C.J. held that only a member of the Bar could so move, the second *Ex parte Liebrand*,[2] apparently a decision of a Divisional Court, in which Lawrence J. followed the earlier case, Atkin J. concurring. The later case is given as authority for the statement at p. 807 of the Annual Practice, 1954, as a note to Order 44, r. 2, that "a motion for "attachment must be at the bar, it cannot be made by a com-"plainant in person." A motion to commit is in pari materia with a motion to attach and, accordingly, must likewise be at the bar. The applicant on the present proceedings cannot, therefore, be heard.

Vaisey J. It is a well-settled rule of this court that a party in person cannot move for a writ of attachment, which is precisely the same, in its nature, as moving for a committal order. The reason is that a motion to commit is, as Lord Denman C.J. in *Ex parte Fenn*[3] said of an application for an attachment, "in "the nature of a criminal information" and, as Lord Denman went on to say, "the court always requires that such a motion "should be made by a gentleman at the bar, in order that it may "have the sanction of that gentleman's name for the application. "To you, therefore, who apply in person, the court cannot grant "a rule for an attachment." In *Ex parte Liebrand*[4] the applicant appeared in person and moved for a rule nisi for a writ of attachment for contempt of court; and Lawrence J. said that "the court "would not hear an application of this sort by an applicant in "person."

The only difference between those two cases and this case is that the application here is for committal for contempt, but it is a difference without significance. In either case the application is not only, as Lord Denman C.J., in *Ex parte Fenn*,[5] said "in the "nature of a criminal information," but it is a report to the court of information on which the court is asked to uphold its own honour and protect its own dignity, and that is a matter on which the court may not be addressed by anyone except counsel at the bar. Accordingly, the applicant in the present case cannot be heard, and his motion must be dismissed.

Solicitors for the respondent: *Miller, Clayton & Co.*

K. R. A. H.

[1] (1834) 2 Dow.P.C. 527.
[2] [1914] W.N. 310.
[3] 2 Dow.P.C. 527.
[4] [1914] W.N. 310.
[5] 2 Dow.P.C. 527.

[QUEEN'S BENCH DIVISION.]

1954
July 22.

Lord Goddard C.J., Cassels and Slade JJ.

* REGINA *v.* INDUSTRIAL DISPUTES TRIBUNAL. *Ex parte* AMERICAN EXPRESS CO. INC.

PRACTICE NOTE.

Costs—Trade Dispute—Industrial Disputes Tribunal—Crown Practice—Practice—Prohibition—Application for order—Parties to be served—Minister and union separately represented—Whether both entitled to costs.

Trade Dispute.

On the refusal of an application for an order of prohibition to prohibit the Industrial Disputes Tribunal from entertaining a reference by the National Union of Bank Employees of a dispute between the applicants, the American Express Co. Inc., and their employees, counsel for the Minister of Labour and National Service and counsel for the union both asked for their costs.

David Renton Q.C. for the applicants.
Walter Gumbel for the Minister.
Peter Pain for the union.

LORD GODDARD C.J. said that both parties might have their costs, and continued: The court does not like having to give two sets of costs in these cases. It seems to me that if the Minister is satisfied that the trade union is going to be represented and argue the case, then the Minister ought not to be represented, or if the trade union is satisfied that the Minister is going to argue the case, as he generally has done, then the trade union need not be represented. The opinion of the court is that, in future, in matters of this sort, we shall not grant more than one set of costs. Next time that there is one of these applications we may consider who is to be served. The Minister may in some cases wish to be represented, even if he appears as amicus curiae, but I do not think that we ought to make employers, as a rule, pay two sets of costs. In the present case, as we have not given special directions and both the Minister and the union were properly served because it was sought to prevent them from continuing, they will have their costs, but we do not think that we ought to order it in the future. It is not necessary for parties to appear merely because they are served. I have no doubt that both the Minister and the union ought to be served, but as a general rule they might be able to settle who is going to argue the matter, and if the union are going to have the assistance of counsel, and the Minister is content to rely on counsel for the union, then no doubt the matter will be perfectly properly put before the court. It is very seldom that we have found it necessary to hear both counsel for the Minister and the union. I want it noted that in the future

the court will consider very carefully whether or not they will give two sets of costs.

Solicitors: *Stafford Clark & Co.; The Solicitor, Ministry of Labour and National Service; Blatchfords.*

C. J. E.

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REGINA
v.
INDUSTRIAL DISPUTES TRIBUNAL.
Ex parte
AMERICAN EXPRESS CO. INC.

[HOUSE OF LORDS]

* BEDDER . . . . . APPELLANT;

AND

DIRECTOR OF PUBLIC PROSECUTIONS . RESPONDENT.

H. L. (E.)*

1954
July 23, 30.

Criminal Law — Murder — Provocation — Woman jeering at accused's impotence—Whether disability to be taken into account.

In considering whether there has been sufficient provocation to reduce a killing from murder to manslaughter, the test to be applied throughout is the effect on a reasonable and normal man of the acts of provocation alleged; infirmity of body or affliction of mind in the accused is not a material factor to be considered. Accordingly, the disability of a man conscious of being physically impotent and therefore liable to be more readily excited if twitted on the subject is not a relevant consideration in assessing the provocation alleged to have been suffered by him in having been jeered at by a woman whom he has thereupon killed.

Mancini v. *Director of Public Prosecutions* [1942] A.C.1; 33 T.L.R. 25; [1941] 3 All E.R. 272, and *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588; 62 T.L.R. 466; [1946] 1 All E.R. 524, applied.

APPEAL from the Court of Criminal Appeal (Hilbery, Cassels and Havers JJ.).

This was an appeal by Henry Alec Bedder from the decision of the Court of Criminal Appeal on June 21, 1954, affirming his conviction at the Leicester Assizes on May 27, 1954, of the murder of Mrs. Doreen Mary Redding on March 12, 1954.

The facts are fully stated by Lord Simonds L.C.

A. P. Marshall Q.C. and *Oliver Kitson* for the appellant.

Sir Lionel Heald Att.-Gen., Richard Elwes Q.C. and *J. P. Stimson* for the Crown.

LORD SIMONDS L.C. Their Lordships agree with me in entertaining no doubt that this appeal should be dismissed. As, however, some questions of general principle have been raised on which the House may deem it proper to pronounce, I propose to move from the Woolsack the dismissal of the appeal while

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* *Present*: LORD SIMONDS L.C., LORD PORTER, LORD GODDARD, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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the House takes time to formulate such opinions on these general questions as it seems right to express.

The House dismissed the appeal.

July 30. Their Lordships delivered their reasons.

Lord Simonds L.C. My Lords, this appeal raises once more a question of importance in the criminal law. Your Lordships, I think, agree with me that, upon examination, the question appears to be amply covered by the highest authority, but the answer can usefully be re-stated.

The appellant, a youth of 18 years, was on May 27, 1954, convicted at Leicester Assizes of the murder of Doreen Mary Redding, a prostitute. He appealed to the Court of Criminal Appeal on the substantial ground of misdirection, claiming that the learned judge who tried the case had wrongly directed the jury upon the test of provocation and that, had they been rightly directed, they might have found him guilty not of murder but of manslaughter only. The Court of Criminal Appeal dismissed his appeal, holding that the jury had been rightly directed.

The relevant facts so far as they bear on the question of provocation can be shortly stated. The appellant has the misfortune to be sexually impotent, a fact which he naturally well knew and, according to his own evidence, had allowed to prey upon his mind. On the night of the crime he saw the prostitute with another man and when they had parted went and spoke to her and was led by her to a quiet court off a street in Leicester. There he attempted in vain to have intercourse with her, whereupon—and I summarise the evidence in the way most favourable to him—she jeered at him and attempted to get away. He tried still to hold her, and then she slapped him in the face and punched him in the stomach: he grabbed her shoulders and pushed her back from him whereas (I use his words), "She "kicked me in the privates. Whether it was her knee or foot, "I do not know. After that I do not know what happened till "she fell." She fell, because he had taken a knife from his pocket and stabbed her with it twice, the second blow inflicting a mortal injury.

It was in these circumstances that the appellant pleaded that there had been such provocation by the deceased as to reduce the crime from murder to manslaughter, and the question is whether the learned judge rightly directed the jury upon this issue. In my opinion, the summing up of the learned judge was impeccable. Adapting the language used in this House in *Mancini* v. *Director of Public Prosecutions*[1] and *Holmes* v. *Director of Public Prosecutions*,[2] to which I shall later refer, he thus directed the jury: "Provocation would arise if the "conduct of the deceased woman, Mrs. Redding, to the prisoner

[1] [1942] A.C. 1; 58 T.L.R. 25; [1941] 3 All E.R. 272.

[2] [1946] A.C. 588; 62 T.L.R. 466; [1946] 2 All E.R. 124.

"was such as would cause a reasonable person, and actually "caused the person, to lose his self-control suddenly and to drive "him into such passion and lack of self-control that he might "use violence of the degree and nature which the prisoner used "here. The provocation must be such as would reasonably "justify the violence used, the use of a knife." And a little later he addressed them thus: "The reasonable person, the "ordinary person, is the person you must consider when you are "considering the effect which any acts, any conduct, any words, "might have to justify the steps which were taken in response "thereto, so that an unusually excitable or pugnacious indivi-"dual, or a drunken one or a man who is sexually impotent is "not entitled to rely on provocation which would not have led an "ordinary person to have acted in the way which was in fact "carried out. There may be, members of the jury, infirmity "of mind and instability of character, but if it does not "amount to insanity, it is no defence. Likewise infirmity of "body or affliction of the mind of the assailant is not material "in testing whether there has been provocation by the deceased "to justify the violence used so as to reduce the act of killing "to manslaughter. They must be tested throughout this case "by the reactions of a reasonable man to the acts, or series of "acts, done by the deceased woman." Other passages may be found in his summing-up in which he takes as the test the reaction of the hypothetical reasonable man to the alleged provocation. In the Court of Criminal Appeal these directions were quoted and approved, and reference was made also to the recent case of *Reg.* v. *McCarthy*[3] where it was held that there is "no "distinction between a person who by temperament is unusually "excitable or pugnacious and one who is temporarily made excit-"able or pugnacious by self-induced intoxication." It appeared to that court, as it appears to me, that "no distinction is to be "made in the case of a person who, though it may not be a "matter of temperament, is physically impotent, is conscious "of that impotence, and therefore mentally liable to be more "excited unduly if he is 'twitted' or attacked on the subject of "that particular infirmity." The court thereupon approved and reiterated the proposition that the question for the jury was whether on the facts as they found them from the evidence the provocation was in fact enough to lead a reasonable person to do what the accused did.

My Lords, no other conclusion was open to the Court of Criminal Appeal nor is any other conclusion open to your Lordships in view of the recent cases in this House of *Mancini* v. *Director of Public Prosecutions*[4] and *Holmes* v. *Director of Public Prosecutions*.[5] The relevant part of the former decision is accurately stated in the headnote in these words: "The test to

[3] [1954] 2 W.L.R. 1044, 1049; [1954] 2 All E.R. 262.

[4] [1942] A.C.1.

[5] [1946] A.C. 588.

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"be applied is that of the effect of the provocation on a reasonable man, so that an unusually excitable or pugnacious person "is not entitled to rely on provocation which would not have "led an ordinary person to act as he did." And Lord Simon, in a speech in which all their Lordships concurred, referred with approved [6] to the decision of the Court of Criminal Appeal in *Rex* v. *Lesbini*.[7] It is worth recalling that in that case the court said [8]: "We agree with the judgment of Darling J. in *Rex* v. "*Alexander*[9] and with the principles enunciated in *Reg.* v. "*Welsh*,[10] where it is said that 'there must exist such an "'amount of provocation as would be excited by the circum-"'stances in the mind of a reasonable man, and so as to lead "'the jury to ascribe the act to the influence of that passion'." Finally, in *Holmes* v. *Director of Public Prosecutions*[11] Lord Simon in a speech in which my noble and learned friend Lord Porter and I as well as Lord Macmillan and Lord du Parcq concurred, after a prolonged hearing and an exhaustive examination of the relevant law used these words: "If, on the other hand, "the case is one in which the view might fairly be taken (*a*) that "a reasonable person, in consequence of the provocation "received, might be so rendered subject to passion or loss of "control as to be led to use the violence with fatal results, and "(*b*) that the accused was in fact acting under the stress of such "provocation, then it is for the jury to determine whether on "its view of the facts manslaughter or murder is the appropriate "verdict."

My Lords, in the face of this authority I am at a loss to know what other direction than that which he gave could properly have been given by the learned judge to the jury in the present case. The argument, as I understood it, for the appellant was that the jury, in considering the reaction of the hypothetical reasonable man to the acts of provocation, must not only place him in the circumstances in which the accused was placed but must also invest him with the personal physical peculiarities of the accused. Learned counsel, who argued the case for the appellant with great ability, did not, I think, venture to say that he should be invested with mental or temperamental qualities which distinguished him from the reasonable man, for this would have been directly in conflict with the passage from the recent decision of this House in *Mancini* v. *Director of Public Prosecutions*[12] which I have cited. But he urged that the reasonable man should be invested with the peculiar physical qualities of the accused, as in the present case with the characteristic of impotence, and the question should be asked what would be the reaction of the impotent reasonable man in the circumstances? For that proposition I know of no authority:

[6] [1942] A.C. 1, 9.
[7] [1914] 3 K.B. 1116.
[8] Ibid. 1120.
[9] (1913) 109 L.T. 745.
[10] (1869) 11 Cox C.C. 336, 338.
[11] [1946] A.C. 588, 597.
[12] [1942] A.C. 1.

nor can I see any reason in it. It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognize for that purpose some unusual physical characteristic, be it impotence or another. Moreover, the proposed distinction appears to me to ignore the fundamental fact that the temper of a man which leads him to react in such and such a way to provocation, is or may be itself conditioned by some physical defect. It is too subtle a refinement for my mind or, I think, for that of a jury to grasp that the temper may be ignored but the physical defect taken into account.

It was urged upon your Lordships that the hypothetical reasonable man must be confronted with all the same circumstances as the accused and that this could not be fairly done unless he was also invested with the peculiar characteristics of the accused. But this makes nonsense of the test. Its purpose is to invite the jury to consider the act of the accused by reference to a certain standard or norm of conduct and with this object the "reasonable" or the "average" or the "normal" man is invoked. If the reasonable man is then deprived in whole or in part of his reason or the normal man endowed with abnormal characteristics, the test ceases to have any value. This is precisely the consideration which led this House in *Mancini's* case [13] to say that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In my opinion then the Court of Criminal Appeal was right in approving the direction given to the jury by the learned judge and this appeal must fail.

My noble and learned friend, LORD GODDARD, has authorized me to say that he has read, and concurs in, this opinion.

LORD PORTER: My Lords, I concur.

LORD TUCKER: My Lords, I also concur.

LORD ASQUITH OF BISHOPSTONE: My Lords, I also concur.

Appeal dismissed.

Solicitors: *C. D. Geach, Leicester; Director of Public Prosecutions.*

[13] Ibid.

[QUEEN'S BENCH DIVISION.]

1954
July 27.

Lord Goddard C.J., Cassels and Slade JJ.

* AICHROTH *v.* COTTEE.

Road Traffic—Disqualification—Driving while disqualified—Sentence of imprisonment—"Special circumstances" justifying imposition of fine—Sudden emergency—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 7 (4).

"*Special circumstances.*"

At 5 a.m. on June 22, 1953, the appellant, the owner of a bakery at Hampstead, was informed by telephone by the bakery foreman at his home in West Norwood that the dough-mixing machinery had broken down. The appellant had in his possession the keys of the tool store in which the tools needed for repairing the machine were kept. Although disqualified from holding a driving licence the appellant, as no taxis were available and as he was unable to contact his driver, drove his car from his home to the bakery. He was convicted by magistrates of driving a car while disqualified and sentenced to three months' imprisonment. He appealed against sentence on the grounds that the circumstances were such as could amount in law to "special circumstances" within the meaning of section 7 (4) of the Road Traffic Act, 1930, so justifying the court in not imposing a sentence of imprisonment. The appeals committee, being of the opinion that the circumstances were special to the offender and not special to the case, considered that it was not open to them to hold that there were special circumstances and dismissed the appeal. On appeal, by case stated:—

Held, allowing the appeal and remitting the case to the appeals committee, that a sudden emergency if serious enough and provided that it cannot be dealt with in any other way, can amount to a "special circumstance" within the meaning of section 7 (4); and that it was open to the appeals committee, on the facts found, to consider whether there were special circumstances.

Whittall v. *Kirby* [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552 applied.

CASE STATED.

The appellant, Gerald Paul Aichroth, was convicted at Hampstead magistrates' court on July 8, 1953, for driving a motor-vehicle on a road while disqualified from holding a licence. He was sentenced to three months' imprisonment from which he appealed to the appeals committee of the County of London Sessions.

At the hearing of the appeal on September 8, 1953, the following facts were proved or admitted. On June 9, 1953, the appellant had been convicted at the Marylebone magistrates' court of careless driving and disqualified from driving a motor-vehicle for three months. On Monday, June 22, 1953, he drove his motor-vehicle from his home at West Norwood to his bakery business at Hampstead, while still disqualified. At about 5 o'clock in the morning on that day the appellant was told by his foreman on the

[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

telephone that the dough-mixing machine at the bakery had broken down. The keys of the store in the bakery in which the tools required to repair the machine were kept were in the appellant's possession. If the dough-mixing machine were not repaired the material would be wasted and the Monday morning supply of bread for the bakery's five thousand retail and five hundred wholesale customers would have been spoilt, so causing the bakery to lose its customers and goodwill. The driver regularly employed by the appellant since his disqualification had no telephone and lived four miles away from the appellant. There were no taxis available but the appellant made no inquiry as to any car hire services which might have been available.

It was contended by the appellant that the circumstances could in law amount to special circumstances within section 7 (4) of the Road Traffic Act, 1930,[1] justifying the court in not passing a sentence of imprisonment. The respondent contended that the circumstances did not in law amount to special circumstances within the section.

The appeals committee, being of opinion that the circumstances were in law special to the offender and not special to the case, considered that it was not open to it to hold that the circumstances were special circumstances justifying consideration of the view that a fine would be an adequate punishment for the offence. They dismissed the appeal and stated a case for the opinion of the court whether upon the facts found they came to a correct determination and decision in point of law.

Edward Clarke for the appellant.
Paul Wrightson for the respondent.

The cases cited in argument are referred to in the judgment.

LORD GODDARD C.J. This is a case stated by the appeals committee of the London Sessions before whom the appellant was summoned for driving a car while disqualified from holding a licence. The result of that very serious offence is that, unless special circumstances can be found which would lead the court to decide that a fine would be an adequate punishment, they must impose a sentence of imprisonment.

The Hampstead magistrates had imposed a sentence of three months' imprisonment and quarter sessions held that, as a matter of law, there could not be special circumstances authorizing them

[1] Road Traffic Act, 1930, s. 7 (4): "If any person who under the provisions of this Part of this Act is disqualified for holding or obtaining a licence applies for or obtains a licence while he is so disqualified, or if any such person while he is so disqualified drives a motor vehicle, ... on a road, that person shall be liable on summary conviction to imprisonment for a term not exceeding six months or if the court think that, having regard to the special circumstances of the case, a fine would be an adequate punishment for the offence, to a fine not exceeding fifty pounds. . . ."

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Lord Goddard C.J.

to impose a fine. The question which we have to consider is not whether there were special circumstances, but whether or not, on the facts stated by the magistrates, it was open to them to consider whether there were special circumstances. [His Lordship stated the facts, and continued:]

In *Lines* v. *Hersom*[1] this court held that the words "special "circumstances" in section 7 of the Road Traffic Act, 1930, and the words "special reasons" which appear in other sections in the statute justify the magistrates in taking a certain course. There is no difference in substance between the two expressions and it is very difficult to find any satisfactory distinction; although, if there were any circumstances rather more in the defendant's favour, one circumstance to be taken into account would be his own particular circumstances; but I think it is desirable to adhere to the reasons given in the judgment and to the decision of the court in *Lines* v. *Hersom*,[1] that is, that the two expressions are the same.

In *Whittall* v. *Kirby*,[2] in an attempt to lay down what could be regarded as "special circumstances," we said, first, that they were "special" as opposed to "general"; that is an antithesis, and therefore circumstances common to a large number of people such as, for instance, the circumstance that the defendant was a first offender could not be a special reason. In an endeavour, for reasons which we gave, to lay down some guidance to courts, we said that the circumstances must be special to the offence and not to the offender, but we recognized that however much one might try to give guidance or lay down matters of principle in such a matter, there must be border-line cases, and it must be very difficult in certain circumstances to draw the line. In *Whittall* v. *Kirby*,[2] I quoted *Rex* v. *Crossan*,[3] a decision of the King's Bench Division in Northern Ireland, and said[4]: "In that case the court adopted a test that I had ventured to "use in an address that I gave to the magistrates assembled at "the summer assizes for Essex in 1937. I suggested that the "reasons must be special to the offence, and not to the offender "and the court in adopting what I had said used these words: "'A "special reason" within the exception is one which is "'special to the facts of the particular case, that is, special to "'the facts which constitute the offence. It is, in other words, "'a mitigating or extenuating circumstance, not amounting in "'law to a defence to the charge, yet directly connected with "'the commission of the offence, and one which the court ought "'properly to take into consideration when imposing punishment. "'A circumstance peculiar to the offender as distinguished from "'the offence is not a "special reason" within the exception.'" I then continued: "I respectfully and entirely agree with and

[1] [1951] 2 K.B. 682; [1951] 2 T.L.R. 481; [1951] 2 All E.R. 650.

[2] [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552.

[3] [1939] N.I. 106.

[4] [1947] K.B. 194, 201.

"adopt this passage. While it is impossible to enumerate or "define everything that can amount to a special reason, one may "give as an illustration a driver exceeding the speed limit because "he has suddenly been called to attend a dying relative or a "doctor going to an urgent call. It is difficult indeed to "visualize any special reason in the case of dangerous driving, "except the one actually mentioned in the section itself, namely, "the lapse of time from the date of a previous conviction." I then considered the effect of driving under the influence of drink, and said that it was difficult indeed to find any excuse there. In that case the court gave as illustrations the case of a man going to attend a dying relative or a doctor going to an urgent call, and I think a reasonable deduction from that is that the court meant to lay down that a sudden emergency, provided it is serious enough and provided that it cannot be reasonably dealt with in any other way, can amount to a special circumstance or special reason, to use the actual expression which had to be considered in *Whittall* v. *Kirby*.[5]

In the present case, the emergency was that the dough-mixing machine apparently needed—and this will be a matter for the magistrates to consider—some special tools which were locked up. There is nothing prima facie unreasonable in a man locking up his tools. The appellant had the keys. We intend to send the case back to the appeals committee and it will be for them to consider whether it was essential, in view of what had happened, for the appellant to obtain the keys.

The appeals committee also found that there were no taxis available and that "the appellant made no inquiry as to any car "hire services being available." Whether there were likely to be any car hire services available at West Norwood as distinct from the West End of London is questionable; I should have thought it unlikely that you would find them in West Norwood, but that, again, is a matter for the magistrates to consider. They must also consider whether it would make any difference if public transport was available because public transport starts early in London. Those are all matters which the magistrates can take into account if they are of opinion that there was a sudden emergency, and that this was a bona fide case of a man trying to meet it. As Slade J. pointed out in argument, it was said in the present case that if the dough-mixing machine were not put in order it would not only waste material, but would prevent the supply of bread to the bakery's five thousand retail customers and five hundred wholesale customers. I do not know how many retail customers five hundred wholesale customers represent, but the bakery itself seems to have had five thousand, so it looks—the court says no more than this—as though there was a sudden emergency; and *Whittall* v. *Kirby*[5] has left it open to the court to say that there was a sudden emergency. The mere fact, however,

[5] [1947] K.B. 194.

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that there is a sudden emergency will not be enough if it is shown that there are other reasonable methods of meeting it. If, on the other hand, the magistrates think that there was a sudden emergency and they are satisfied about the fact of the dough being spoilt and the results, and if they think that the appellant, by doing what he did, was using the only method open to him that night or early morning, we think that they would be entitled to say that those matters were special to the offence and not to the offender.

In our opinion, therefore, the appeals committee did not come to a correct determination, and it would be open to them—they are not bound—to hold that there were in the present case special circumstances.

Cassels J. I agree.

Slade J. I agree.

Appeal allowed.
Case remitted.

Solicitors: *Wontner & Sons; Solicitor, Metropolitan Police.*

[courts-martial appeal court.]

C.-M. A. C.

1954
July 19, 20.

Lord Goddard C.J., Cassels and Slade JJ.

* REGINA *v.* HADFIELD.

Military Law—Court-martial—Jurisdiction—Sergeant in regular forces—Completion of colour service—Not transferred to reserve—Whether subject to military law—Army Act (as re-enacted and amended) (44 & 45 *Vict. c.* 58), *s.* 90 (1), (3), (4).

A sergeant in the regular army who enlisted on June 10, 1948, for five years with the colours and seven with the reserve, was arrested on June 17, 1953, while still on active service in the Middle East on charges of conspiracy to steal and stealing Government property; and he was later tried by court-martial and convicted on some of the charges:—

Held, that the words of section 90 (1), (3) and (4) of the Army Act could not be construed to mean that a regular soldier ceased to be subject to military law the moment he became entitled to be transferred to the reserve, and, as the appellant had not in fact been transferred at the time of his arrest and court-martial, he was still subject to military law and therefore the court-martial had jurisdiction to try him.

Appeal against conviction.

The appellant, George Hadfield, a sergeant in the Royal Army Service Corps, was convicted by general court-martial held at Moascar, Suez Canal Zone, in November, 1953, of conspiracy to

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[Reported by Mrs. E. M. Wellwood, Barrister-at-Law.]

steal and stealing Government property. He had enlisted on June 10, 1948, for five years' service with the colours and seven years with the reserve. On June 17, 1953, while he was still serving in the Middle East he was arrested; and in November, 1953, he was tried by court-martial on a charge sheet containing 26 charges laid under section 41 of the Army Act alleging conspiracy to steal and/or receive, stealing and receiving stolen goods. He was acquitted on the charges of receiving and one charge of stealing, but convicted of the remaining fifteen charges and sentenced to 10 years' imprisonment. The findings and the sentence were confirmed. The conviction on one of the charges was subsequently quashed by the Secretary of State for War and Hadfield appealed, with leave of the court, against his convictions on the other 14 counts, contending, inter alia, that the court-martial had no jurisdiction to try him on the charges preferred against him or on any charges as the provisions of section 90 and of the proviso to section 158 (1) of the Army Act [1] had not been complied with.

Norman Skelhorn Q.C. and *Norman Brodrick* for the appellant.

Garth Moore for the Crown.

LORD GODDARD C.J.: The first point taken by Mr. Skelhorn is that the appellant was not subject to military law, the fact being that he was enlisted on June 10, 1948 for 5 years with the colours and 7 years on the reserve. His colour service thereupon terminated, so it is said, on June 10, 1953. He was arrested on June 17, 1953, for these offences while still in Egypt and still apparently drawing pay as a sergeant, he not having at that time

[1] Army Act (as re-enacted and amended) s. 90: "(1) Save as otherwise provided by this Act or the Acts relating to the reserve forces, every soldier of the regular forces, upon becoming entitled to be discharged, shall be discharged with all convenient speed, but until so discharged shall be subject to this Act as a soldier of the regular forces.

"(3) Every soldier of the regular forces, upon falling to be transferred to the reserve, shall be transferred to the reserve, but until so transferred shall be subject to this Act as a soldier of the regular forces.

"(4) Where a soldier of the regular forces, when falling to be transferred to the reserve, is serving out of the United Kingdom, he shall be sent to the United Kingdom free of expense with all convenient speed, and on his arrival shall be transferred to the reserve. . . ."

S. 158: "(1) Where an offence under this Act has been committed by any person while subject to military law, such person may be taken into and kept in military custody, and tried and punished for such offence, although he . . . has ceased to be subject to military law in like manner as he might have been taken into and kept in military custody, tried or punished, if he . . . had continued so subject:

"Provided that where a person has since the commission of an offence ceased to be subject to military law, he shall not be tried for such offence . . . unless his trial commences within three months after he had ceased to be subject to military law, or unless the offence was committed outside the United Kingdom and is an offence which when committed in England is punishable by the law of England, and the Attorney-General consents to the trial: . . ."

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been sent back to the United Kingdom. [His Lordship read section 90 (1) (3) and (4) of the Army Act and continued:]

We are asked to say that this man ought to have been transferred to the reserve, and that as he had not been so transferred but was still in Egypt serving with his unit, he cannot be subject to military law. That seems to me to ignore the words "until so transferred shall be subject to this Act as a soldier of "the regular forces" in section 90 (3). It seems to me to be impossible to read those subsections as meaning that the moment a man's turn arrives for him to be entitled to be transferred to the reserve he ceases to be subject to military law. That would seem to be exactly contrary to the words. He ceases to be subject to military law when he is transferred, but not until then. In the present case the appellant had not been transferred to the reserve at the time he was arrested or when he was brought before the court-martial, and it is therefore quite unnecessary to consider the provisions of sections 158 or 87, to which we have been referred. In my opinion, the court-martial had jurisdiction, and on that point the appeal fails. [His Lordship then considered the question of misdirection, said that the court could find no fault with the judge-advocate's summing up, and dismissed the appeal.]

Appeal dismissed.

Solicitors: *Hunt & Hunt for Kingswell & Berney, Gosport; Director of Army Legal Services.*

[QUEEN'S BENCH DIVISION.]

1954
July 23, 26, 27.

Pilcher J.

* CRAXFORDS (RAMSGATE) LD. *v.* WILLIAMS AND STEER MANUFACTURING CO. LD.

Sale of Goods—Memorandum in writing—Defence—Repeal of section 4 *of Sale of Goods Act,* 1893—*Defence pleading section* 4 *delivered before the repeal—Whether a prior vested right in litigation—Whether operation of section* 4 *procedural—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 4—*Law Reform (Enforcement of Contracts) Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 34), *s.* 2.

Since the coming into operation on June 4, 1954, of the Law Reform (Enforcement of Contracts) Act, 1954, defences based upon section 4 of the Sale of Goods Act, 1893, can no longer be relied upon in an action on a contract for the sale of goods to which they applied, and this is so even though the writ in the action was issued and a defence pleading section 4 delivered before the coming into operation of the Act of 1954.

Action.

On December 9, 1953, the defendants gave to the plaintiffs a written order for the supply of 1,001 sets of plastic mouldings forming the component parts of dolls at 2s. a set. The plaintiffs accepted the order and themselves ordered material to

carry it out. On December 21, 1953, the defendants wrote to the plaintiffs cancelling their order. On January 11, 1954, the plaintiffs issued a writ claiming damages for breach of the contract of December 9, 1953. By their defence, delivered on February 3, 1954, the defendants pleaded that if (which they denied) they had contracted with the plaintiffs as alleged in the statement of claim, or at all, they would rely upon section 4 of the Sale of Goods Act, 1893, "per non-compliance with which such contract is unenforce-"able," and at the trial they sought to contend that the written order which they had given to the plaintiff was insufficient to satisfy section 4 in that it contained no reference to an essential term of the contract, namely, the material of which the goods were to be made.

The plaintiffs contended that, as section 4 had been repealed by section 2 [1] of the Law Reform (Enforcement of Contracts) Act, 1954, which came into operation on June 4, 1954, the defendants could not set up section 4 as a defence.

E. Ryder Richardson Q.C. and *Horatio Vester* for the plaintiffs.

Leonard Caplan Q.C., *Neil Lawson* and *Anthony Bulger* for the defendants.

The following cases were cited in argument on the issue relevant to this report: *Hitchcock* v. *Way* [2]; *In re Joseph Suche & Co. Ld.* [3]; *In re Athlumney, Ex parte Wilson* [4]; *Hutchinson* v. *Jauncey* [5]; *Maddison* v. *Alderson* [6] and *Taylor* v. *Great Eastern Railway Co.* [7]

PILCHER J. found, inter alia, the facts stated above, and continued: That brings me to the questions of law which arise on the defence raised under section 4 of the Sale of Goods Act, 1893. The Law Reform (Enforcement of Contracts) Act, 1954, which came into force on June 4, 1954, provides by section 2: "Section 4 of the Sale of Goods Act, 1893, is hereby repealed in "relation to any contract, whether made before or after the "commencement of this Act. I think that it is conceded that if a party to litigation has acquired a vested right or interest in an action, such right or interest will not be destroyed by a subsequent statutory enactment unless such enactment specifically so provides. The authority for that proposition is *Hitchcock* v. *Way*.[1] It is submitted here by the defendants that they had before the passing of the new Act what I think they called a "vested defence" to this action, which was an action in being before the new Act was passed, and it is argued on their

[1] Law Reform (Enforcement of Contracts) Act, 1954, s. 2: "Section "4 of the Sale of Goods Act, 1893, "is hereby repealed in relation to any "contract, whether made before or "after the commencement of this "Act."

[2] (1837) 6 Ad. & El. 943.

[3] (1875) 1 Ch.D. 48.

[4] [1898] 2 Q.B. 547.

[5] [1950] 1 Q.B. 574; 66 T.L.R. (Pt. 1) 195; [1950] 1 All E.R. 165.

[6] (1883) 8 App.Cas. 467.

[7] [1901] 1 K.B. 774; 17 T.L.R. 394.

[1] (1837) 6 Ad. & El. 943.

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behalf that such vested right to rely upon the defence afforded by section 4 of the Sale of Goods Act can only be taken away by express words in the new enactment.

Whilst the new Act provides that section 4 of the Sale of Goods Act is repealed in relation to any contract made before as well as after the passing of the Act, it does not in terms save any right which may have become vested in the litigant before the passing of the Act. Section 4 provided, the material words of which I will read (I hope for the last time): "(1) A contract for "the sale of any goods of the value of £10 or upwards shall "not be enforceable by action unless the buyer shall accept "part of the goods so sold, and actually receive the same, or give "something in earnest to bind the contract, or in part payment, "or unless some note or memorandum in writing of the contract "be made and signed by the party to be charged or his agent in "that behalf."

The plaintiffs submit that section 4 is a procedural section and constitutes, and constitutes only, a fetter on the power of the court to grant a remedy. It is submitted (and I think that it is not really in dispute) that if it is right to regard the provisions of section 4 as procedural then the court will only look at the law as it stands at the time when the case comes before it. It is to be borne in mind, I think, that section 4 does not affect the legal rights of the parties. It does not affect the passing of property under a contract which would be subject to its terms. If a party desires to rely upon the section that party has to plead it and plead it with some particularity. It is not a substantive provision of the law in the sense that the court itself will take judicial notice of the fact that a provision of the section has not been complied with, unless the point is raised by one of the parties. The section, in effect, provides that contracts which are covered by it shall be proved in a certain fashion and that unless they are proved in that fashion the court will not enforce them.

I do not propose to repeat the careful arguments which were addressed by either side to me on this particular point, but I am satisfied that the plaintiffs' argument is right and that section 4 is a procedural section in the sense that I have indicated. It seems to me difficult to suppose that, because this action was begun before the passing of the new Act and the defendants put in a defence relying upon section 4 before the passing of the Act, they thereby acquired a vested right to rely upon defences open to them under the section. Such defences, as I have pointed out, raise questions of the evidence which is available at the trial of the action to support the contract which is being set up; and it is in the light of the evidence which is available that the court will arrive at a determination whether or not a contract for the sale of goods of the value of £10 or upwards can be enforced. The new Act applies to contracts made before it was passed and I have come to the conclusion that defences based upon section 4 in

regard to such contracts can no longer be relied upon. That is sufficient to dispose of the case. The result is that the plaintiffs succeed and are entitled to judgment for a sum to be assessed by a master, if not agreed; and there will be judgment for the plaintiffs with costs.

Judgment for the plaintiffs.

Solicitors: *Ernest C. Randall; Tyrrell Lewis & Co.*

J. F. L.

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CRAXFORDS (RAMSGATE) LD. *v.* WILLIAMS AND STEER MANUFACTURING CO. LD.

[CHANCERY DIVISION.]

In re PORTER (C. E.) A BANKRUPT. *Ex parte* THE BOARD OF TRADE *v.* OLLARD, OLLARD & SESSIONS.

1954 *July* 19.

Danckwerts J.

[King's Lynn No. 3 of 1951.]

Bankruptcy — Costs — Taxation — County court — Adjudication on debtor's petition — Non-summary case — Assets certified likely to realize less than £200—Items and amounts allowable—Bankruptcy Rules, 1952 (*S.I.* 1952, *No.* 2113 (*L.* 14)), *rr.* 100 (1), 114 (1); *Appendix II, Parts I, IV.*

A petitioning debtor's assets were certified as likely to realize £100 but not £200. The court did not order that his estate be administered in a summary manner. His solicitors carried in their bill of costs and the county court registrar dealt with the matter on the footing that, as it was a non-summary case, items 3 to 11 of Part I and item 1 of Part IV of Appendix II to the Bankruptcy Rules, 1952, applied; and he allowed the full costs under Appendix II of an ordinary debtor's petition (including disbursements and payment for allocatur), applying items 3 to 11 of Part I of the appendix (which were headed "non-summary cases") and item 1 of Part IV, and not applying items 1 and 2 of Part I (which were headed "summary cases"). The Board of Trade, who had the duty of auditing trustees' accounts in which were items for the payment of taxed costs, agreed with the registrar's applying the items which he did, but not with his allowing full costs under Appendix II of an ordinary debtor's petition; they contended that, in accordance with the proviso to rule 100 (1) of the Bankruptcy Rules, 1952, only three-fifths of the costs ought to be allowed. The registrar considered the proviso inapplicable, but was willing to tax as suggested if it could be shown to accord with the practice so to do. In the Taxing Office, however, the practice where the assets did not exceed £200 was to apply items 1 (*b*) and 2 (*b*) of Part I of Appendix II as if the case were a summary case.

On a review of this taxation, the taxing master applied this practice, disallowing items 3 to 11 of Part I and item 1 of Part IV which the registrar had allowed. The Board of Trade objected to his so doing, and moved the court to review both the registrar's and the taxing master's taxations and to uphold its objections:—

Held, that, as a summary order had not been made, items 1 and 2 of Part I did not apply. The proviso to rule 100 (1) applied, with the result that the proper course, which neither the registrar nor the taxing master had taken, was, after making the 50 per cent.

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increase allowed under rule 100 (2), to allow three-fifths of items 3 to 11 of Part I and of item 1 of Part IV of Appendix II.

Motion.

This motion, raising matters under section 129 of the Bankruptcy Act, 1914 and under the Bankruptcy Rules, 1952,[1] which came into operation on January 1, 1953, was launched following the bankruptcy taxing master's review, under rule 114 of those

[1] Bankruptcy Rules, 1952: "... "Taxations in county court ..., "r. 100 (1): The scale of costs and "allowances and the directions con- "tained in Appendix II and Appendix "III to these rules shall, subject to "these rules, apply to the taxation "and allowance of costs and charges "in proceedings under the Act and "these rules: Provided that, subject "to the provisions of Part I of Appen- "dix II, where the estimated assets "of the debtor do not exceed the sum "of £300 and costs are payable out "of the estate, not more than three- "fifths of the amounts stated in or "applied by the scale of costs in "Appendix II may be allowed in any "proceedings under the Act in respect "of solicitors' costs, disbursements "being added. (2): The total of the "amounts allowed in accordance with "the provisions of Appendix II for "solicitors' costs and charges (as dis- "tinct from disbursements) shall be "increased by 50 per cent. in respect "of bills taxed after the coming into "operation of these rules."

Rule 114 (1): "Where any costs, "charges, fees, or disbursements "which are chargeable against the "debtor's estate have been taxed by a "registrar of a county court, the "Board of Trade may require the "taxation to be reviewed by a bank- "ruptcy taxing master in person."

Appendix II: "Scale of Solicitors' "Costs. Part I. Petitioning "Debtor's Solicitor's Bill of Costs. "*Summary Cases under s.* 129. *Item* "*No.* 1. Instructions for petition, "search for prior petition, drawing "and attesting petition, attending "presentation and hearing thereof, "attending official receiver with "deposit, on giving him all necessary "information after order made, and "upon preliminary examination of "debtor, attending public examina- "tion, drawing bill of costs, obtain- "ing appointment to tax, and copy "notice of and attendance at taxation "(exclusive of court fees and other "proper disbursements) ... (*b*) where "the assets are certified as likely to "realize £100 but not to exceed £200 "...£4 0s. 0d.

"*Item No.* 2: Preparing order of "adjudication on application of "debtor under rule 217 ... (*b*) where "the assets are certified as likely to "realize £100 but not to exceed "£200...13s. 4d.

"*Notes to items* 1 *and* 2:—*Note* 1— "Items 1 and 2 are not to be subject "to reduction under rule 100. *Note* "2. Where the assets are certified "by the official receiver as likely to "realize more than £200 but not to "exceed £300, three-fifths of the fol- "lowing charges shall be allowed in "accordance with the provisions of "rule 100."

"*Non-Summary Cases. Item No.* "3: Instructions for petition:— "Where the assets are certified—(*a*) "as not likely to realize more than "£500 £3 3s. 0d. ... *Note* 3. If the "assets realize a sum in excess of or "less than the value certified by the "official receiver, the amount of the "costs may be recalculated on the "sums actually realized and— ... "(*b*) where there is a decrease in the "amount, the difference, if paid, shall "be repaid to the trustee. *Item No.* "4: Search for prior petition 6s. 8d. "*Item No.* 5: Drawing and attest- "ing petition 13s. 4d. *Item No.* 6: "Attending official receiver with "deposit 6s. 8d. *Item No.* 7: "Attending presentation and hearing "of petition 10s. ... *Item No.* 8: "Drawing receiving order and copy "and attending passing 10s. *Item* "*No.* 9: Preparing order of adjudi- "cation on application by debtor "under rule 217 £1 0s. 0d. *Item No.* "10: Attending official receiver on "receiving order being made and "giving him all necessary information "13s. 4d. *Item No.* 11: Letters, "messengers, etc. 6s.

"Part IV. Taxation of Petitioner's "Costs. *Item No.* 1: On a debtor's "petition, drawing bill of costs and "copy, and notice of and attendance "at taxation 15s. *Note.* — No "charges other than those included "under Parts I to III of this scale "may be allowed."

rules, of the taxation of the petitioning debtor's bill of costs by the registrar of the King's Lynn County Court.

On April 9, 1951, the bankrupt was adjudicated on his own petition. As a trustee in the bankruptcy was appointed, the case was not dealt with under section 129 of the Bankruptcy Act, 1914, which enables the court, if satisfied that the debtor's assets are unlikely to exceed £300, to order that his estate be administered in a summary manner. On October 2, 1952, the trustee in the bankruptcy certified in writing that the bankrupt's assets were likely to exceed £100 but not £200. In fact they realized £162. The respondents acted as the bankrupt's solicitors for the presentation of his petition and on October 30, 1952, carried in their bill of costs in respect thereof for taxation. The registrar of King's Lynn County Court dealt with the matter on the basis that, as the case was a non-summary case, items 3 to 11 of Part I and item 1 of Part IV of Appendix II to the Bankruptcy Rules, 1952, were applicable. With that the Board of Trade agreed, but disagreed with the registrar's allowing the costs at £22 18s., i.e., full costs under Appendix II of an ordinary debtor's petition (including disbursements and payment for allocatur), contending that under rule 100 only three-fifths of those costs ought to be allowed, in accordance with the proviso to subrule (1). The registrar considered that the proviso did not apply to the case, but was willing to deal with the taxation as suggested if that was in accordance with the practice. In fact, however, the practice in the High Court Taxing Office in non-summary cases where the assets did not exceed £200 was to apply items 1 (*b*) and 2 (*b*) of Part I of Appendix II as if the matter were a summary case: see Butterworth's "Costs," p. 537n. On March 19, 1954, application was accordingly made for review of the taxation, the Board of Trade objecting to the registrar's taxation on the ground that the amount allowed by him was excessive. On May 20, 1954, the matter was argued before Master Gibbon, Chief Bankruptcy Taxing Master, who on June 2, 1954, gave his answers in writing. He stated therein that in the High Court the practice had always been to read Appendix II as a continuing scale and therefore, in a case such as the present, where the assets were so small, to pay strict attention to the trustee's certificate of value and to allow the amounts set out in items 1 and 2. That, he stated, was the only way in which to give strict regard to the certificate of value, and to ensure the carrying out of the main object of the rules, namely, to prevent the incurring of large costs where there was only a small estate to distribute. He reviewed the bill and allowed it at £4 13s. 4d., applying items 1 and 2 of Part I of Appendix II and disallowing all other items in the bill. To the £4 13s. 4d. he added the 50 per cent. increase of £2 6s. 8d., making a total of £7 0s. 0d.

The Board of Trade took the view that the registrar's taxation and the taxing master's review were erroneous in principle in that (a) the registrar, while correctly applying items 3

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to 11 of Part I and item 1 of Part IV of Appendix II, wrongly allowed a sum in excess of three-fifths of the amounts stated in the Appendix contrary to the proviso to rule 100 (1); (b) the taxing master wrongly applied items 1 and 2 of Part I as if the case were a summary case under section 129, which it was not, and wrongly disallowed all other items in the bill. In the opinion of the Board of Trade, the correct principle of taxation in the case of a debtor's petition where the assets did not exceed £300 was to tax under items 3 to 11 of Part I and item 1 of Part IV and to take three-fifths of the resulting total. Had that principle been applied to the bill in the present case, the profit costs in all would have amounted to £12 6s. 0d., three-fifths of which was £7 7s. 7d. Items 3 to 11 of Part I and item 1 of Part IV of Appendix II as allowed on taxation by the registrar, amounted to £12 6s. 0d., so that the Board of Trade, if its view was correct, could ask the debtor's solicitors to refund two-fifths of that amount, i.e., £4 18s. 5d. Although the amount involved was small, the matter was important from an administrative point of view, as it was the Board of Trade's duty to audit the accounts of trustees in which items for the payment of taxed costs appeared. Accordingly, on July 19, 1954, the Board of Trade asked by this motion for an order that the taxation made by the registrar and reviewed by the taxing master might be reviewed by the court, and that the objections made to it by the Board of Trade might be allowed. The respondent solicitors did not appear, and the Board of Trade did not claim any relief against them and conceded their right to an allocatur in respect of their profit costs of £7 7s. 7d.

Muir Hunter for the Board of Trade.

Danckwerts J. This is an application to review a taxation, which comes before me from a county court case, in which the county court registrar has taxed the costs of the petitioning debtor's solicitors in a particular way and on appeal the taxing master has taken a different view. It seems to me that the original taxation taxed the items correctly, but that there should have been a deduction, which was not made, and that the review taken subsequently by the taxing master was not in accordance with the rules which regulate this matter.

The rule which applies is rule 100 of the Bankruptcy Rules, 1952. It provides: "(1) The scales of costs and allowances and "the directions contained in Appendix II and Appendix III to "these rules shall, subject to these rules, apply to the taxation "and allowance of costs and charges in proceedings under the "Act and these rules: Provided that, subject to the provisions "of Part I of Appendix II, where the estimated assets of the "debtor do not exceed the sum of £300 and costs are payable "out of the estate, not more than three-fifths of the amounts "stated in or applied by the scale of costs in Appendix II may be

"allowed in any proceedings under the Act in respect of solicitors' "costs, disbursements being added."

Items Nos. 1 and 2 of Part I of Appendix II, to which the proviso is made subject, deal only with summary cases under section 129 of the Act in which certain fixed amounts are provided for. This is not a case of that kind; in the present case the assets were certified as likely to exceed £100 and not likely to realize £200, and in fact they realized £162. Therefore, it is quite true that a summary order, if it had been made, would have brought in items numbers 1 and 2 of Part I; but in fact a summary order was not made, and consequently, as it seems to me, items numbers 1 and 2 of Part I of Appendix II of the rules have no application whatever.

The result of that is, in my view, that the proviso applies, and that the amount of the items and the amounts in which they are to be taxed originally are to be found in items numbers 3 to 11 of Appendix II. First, there is the item "Instructions for "petition" and then there are a number of other items set out, with an appropriate fee against each, which are the amounts primarily to be applied in the present case. Item number 3 commences: "Instructions for petition: Where the assets are certi-"fied—(*a*) As not likely to realize more than £500." It seems to me, as this is not a summary case and as this item is headed "Non-Summary Cases," that this is the provision which must be applied, and that consequently £3 3s. was the appropriate sum to be allowed in respect of the instructions for petition. So, as one goes down the other items to number 11, one finds items for search for prior petition, drawing and attesting petition, and so on.

Having reached the amount of the items in that way, it seems to me that the proviso contained in rule 100 must be applied; and consequently, having added together those sums and increased the amount by 50 per cent. allowable under subrule (2) of rule 100, one must apply the proviso by allowing not more than three-fifths of the amounts stated in Appendix II. In other words, they are reducible in that way, but in fact what is done is to deduct two-fifths from the total.

Consequently, neither of the methods applied previously in this case was correct, and the correct amount to be allowed for the costs is that which will be reached by adopting the method which I have just indicated, and the amount reached in that way is £7 7s. 7d. Accordingly I make an order to that effect. The matter is one of principle, and the Board of Trade wished to have a direction for future cases. In the circumstances very properly the Board, as it is carrying out a public duty, does not ask for its costs.

Order accordingly.

Solicitors: *Solicitor, Board of Trade.*

K. R. A. H.

[CENTRAL CRIMINAL COURT.]

C. C. C.

1954
July 2.

Stable J.

* REGINA *v.* MARTIN SECKER & WARBURG LD.

Criminal Law—Obscene libel—Contemporary novel—Test of obscenity—Tending to corrupt and deprave by present-day standards.

In considering whether a book, of which the subject-matter is the relationship of the sexes, constitutes an obscene libel, the jury must have regard to the proper functions of a contemporary novel, namely: to hold up a mirror to the society of its own day and place, to present a picture and a record of that society, its manners, customs, attitudes and thought for the information both of its own generation and of posterity, for the benefit, that is, of other societies separated from it in space or in time. In applying the test of obscenity laid down in *Reg.* v. *Hicklin* (1868) L.R. 3 Q.B. 360, 371, the task of the jury is to decide whether they think that the tendency of the book is to deprave and corrupt those whose minds were, at the time of the alleged offence, open to such immoral influences and into whose hands the book might then fall.

Trial on indictment.

Martin Secker Warburg Ld., publishers, of John Street, London, W.C., Frederic John Warburg, a director of that firm, and the Camelot Press Ld., of Stanley Road, Southampton, printers, were charged on indictment with publishing an obscene libel, namely, a novel called "The Philanderer," by Stanley Kauffman. All the defendants pleaded Not Guilty.

Mervyn Griffith-Jones for the Crown.
Rodger Winn for Frederic John Warburg.
Maxwell Turner for the defendant companies.

Stable J. Members of the jury, the charge against the accused is one of publishing what is called an obscene libel, and everybody agrees here that they all stand or fall together. The verdict that you will give is a matter of the utmost consequence, not only to the accused but also to the community in general. It is of great importance in relation to the future of the novel in the civilized world and the future generations who can only derive their knowledge of how we lived, thought and acted from the contemporary literature of the particular age in which they are interested. Your verdict will have a great bearing upon where the line is drawn between liberty and that freedom to read and think as the spirit moves us, on the one hand, and, on the other, a licence that is an affront to the society of which each of us is a member. The discharge of this important duty rests fairly and squarely on your shoulders. It is not what I think about this book; it is the conclusion that you come to, and you represent that vast diversity of minds and ages which is the reading public of the

[Reported by Niul Hogg, Esq., Barrister-at-Law.]

English-speaking world. You and you alone must decide this case and if, in the course of this summing-up, I express my opinion about the matter, you are entitled to ignore it. The burden of proof in this, as in all criminal cases, rests on the prosecution from start to finish. You, in arriving at your verdict, must arrive at a unanimous verdict. If you can all agree, so much the better, but if there is any one of you, or more, who honestly cannot share the view of the others, then it is your duty so to say.

The test of obscenity to be applied today is extracted from a decision of 1868; it is this [1]: " . . . whether the tendency of the " matter charged as obscenity is to deprave and corrupt those " whose mind are open to such immoral influences, and into whose " hands a publication of this sort may fall." Because this test was laid down in 1868, that does not mean that you have to consider whether this book is an obscene book by the standards of nearly a century ago. Your task is to decide whether you think that the tendency of the book is to deprave those whose minds today are open to such immoral influences and into whose hands the book may fall in this year, or last year when it was published in this country. Considering the curious change of approach from one age to another, it is not uninteresting to observe that in the course of the argument of the case in 1868 the rhetorical question was asked [2]: " What can be more obscene than many pictures " publicly exhibited, as the Venus in the Dulwich Gallery?" There are some who think with reverence that man is fashioned in the image of God, and you know that babies are not born in this world, be they of either sex, dressed up in a frock-coat or an equivalent feminine garment.

We are not sitting here as judges of taste. We are not here to say whether we like a book of this kind. We are not here to say whether we think it would be a good thing if books like this were never written. You are here trying a criminal charge and in a criminal court you cannot find a verdict of " Guilty " against the accused unless, on the evidence that you have heard, you and each one of you are fully satisfied that the charge against the accused person has been proved.

Remember the charge is a charge that the tendency of the book is to corrupt and deprave. The charge is not that the tendency of the book is either to shock or to disgust. That is not a criminal offence. Then you say: " Well, corrupt or " deprave whom?" and again the test: those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall. What, exactly, does that mean? Are we to take our literary standards as being the level of something that is suitable for a fourteen-year-old school girl? Or do we go even further back than that, and are we to be reduced to the sort of books that one reads as a child in the nursery? The answer to that is: Of course not. A mass of literature, great literature,

[1] *R.* v. *Hicklin*, L.R. 3 Q.B. 360, 371. [2] Ibid.

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from many angles is wholly unsuitable for reading by the adolescent, but that does not mean that the publisher is guilty of a criminal offence for making those works available to the general public.

You have heard a good deal about the putting of ideas into young heads. But is it really books that put ideas into young heads, or is it nature? When a child, be it a boy or a girl, passing from a state of blissful ignorance, reaches that most perilous part of life's journey which we call "adolescence," and finds itself traversing an unknown country without a map, without a compass, and sometimes, I am afraid, from a bad home, without a guide, it is this natural change from childhood to maturity that puts ideas into its young head. It is the business of parents and teachers and the environment of society, so far as is possible, to see that those ideas are wisely and naturally directed to the ultimate fulfilment of a balanced individual life.

This is a book which obviously and admittedly is absorbed with sex, the relationship between the male and the female of the human species. I, personally, approach that great mystery with profound interest and at the same time a very deep sense of reverence. It is not our fault that but for the love of men and women and the act of sex, the human race would have ceased to exist thousands of years ago. It is not our fault that the moment in, shall we say, an over-civilized world—if "civilized" is an appropriate word—sex ceases to be one of the great motive forces in human life, the human race will cease to exist. It is the essential condition of the survival and development of the human race, for whatever ultimate purpose it has been brought into this world. Speaking, as I am sure I do, to a representative group of people, nine men and three women, each one of you, I am sure, is of good will and anxious that in the solution of this great mystery today we should achieve some conception which will lead to great personal happiness between individuals of the opposite sex in millions of homes throughout this island, which, after all, is the only possible foundation upon which one could build a vigorous, a strong and a useful nation.

Rome and Greece, it is not uninteresting to reflect, elevated human love to a cult, if not a religion, but when we reach the Middle Ages we find an entirely different approach. The priesthood was compelled to be sexless, and a particular qualitative holiness was attached to the monks and the nuns who dedicated themselves to cloisters and sheltered lives. You may think that it is lucky that they were not all quite as holy as that because otherwise, if they had been, we should none of us have been here today.

When you approach this matter which—let us face it—throughout the ages has been one of absorbing interest to men and women, you get these two schools of thought which are poles

apart, and in between those two extremes you have a wide variety of opinion. At one extreme you get the conception, I venture to think, of the mediaeval church, that sex is sin; that the whole thing is dirty; that it was a mistake from beginning to end (and, if it was, it was the great creator of life who made the mistake and not you or I); that the less that is said about this wholly distasteful topic the better; let it be covered up and let us pretend that it does not exist. In referring to the arrival of a particular day, reference is made to "the happy event on Monday" instead of saying "a baby was born on Monday"—it means exactly the same thing—and in speech and behaviour the utmost degree of reticence is observed. I suppose the high tide was obtained in the Victorian era, possibly as a reaction against the coarseness of the Georges and the rather libertine attitude of the Regency, when I understand that in some houses legs of tables were actually draped and rather stricter females never referred as such to gentlemen's legs but called them their "understandings."

At the other extreme you get the line of thought which says that nothing but mischief results from this policy of secrecy and covering up, that the whole thing is just as much a part of God's universe as anything else and the proper approach to the matter is one of frankness, plain speaking and the avoidance of any sort of pretence. Somewhere between those two poles the average, decent, well-meaning man or woman takes his or her stand.

The book that you have to consider is, as you know, in the form of a novel, and I venture to suggest for your consideration the question: what are the functions of the novel? I am not talking about historical novels when people write a story of some past age. I am talking about the contemporary novelist. By "the contemporary novelist" I mean the novelist who writes about his contemporaries, who holds up a mirror to the society of his own day, and the value of the novel is not merely to entertain the contemporaries of the novel; it stands as a record or a picture of the society when it was written. Those of us who enjoy the great Victorian novelists get such understanding as we have of that great age from chroniclers such as Thackeray, Dickens, Trollope and many others. And where should we be today if the literature of Greece, Rome and the other civilizations portrayed, not how people really thought and behaved, but how they did not think and how they did not speak and how they did not behave? The only real guidance we get about how people thought and behaved over the ages is in their contemporary literature.

It is equally important that we should have an understanding of how life is lived and how the human mind is working in those parts of the world which, although not separated from us in point of time, are separated from us in point of space. At a time like

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today, when ideas and creeds and processes of thought seem, to some extent, to be in the melting pot, this is more than ever necessary, for people are bewildered and puzzled to know in what direction humanity is headed. If we are to understand how life, for example, is lived in the United States, France, Germany, or elsewhere, the contemporary novels of those nations may afford us some guide, and to those of us who have not the time or the opportunity or the money or the inclination to travel, it may even be the only guide. This is an American novel written by an American, published originally in New York and purporting to depict the lives of people living today in New York, to portray their speech and their attitude in general towards this particular aspect of life. If we are going to read novels about how things go on in New York, it would not be of much assistance, would it, if, contrary to the fact, we were led to suppose that in New York no unmarried woman of teenage has disabused her mind of the idea that babies are brought by storks or are sometimes found in cabbage plots or under gooseberry bushes?

You may think that this is a very crude work; but that it is not, perhaps, altogether an exaggerated picture of the approach that is being made in America towards this great problem of sex. You may think that if this does reflect the approach on that side of the Atlantic towards this great question, it is just as well that we should know it and that we must not close our eyes or our minds to the truth because it might conceivably corrupt or deprave any somewhat puerile young mind.

You may agree that it is a good book, or a bad book, or a moderate book. It is at least a book. It is the creation of a human mind and it depicts the people created in their particular environment. If you look at the front page, you will see the text. It is taken from a Victorian poet, Browning: "What of soul was "left, I wonder, when the kissing had to stop?" and I suppose men and woman of all ages have wondered that.

The theme of this book is the story of the rather attractive young man who is absolutely obsessed with his desire for women. It is not presented as an admirable thing, or a thing to be copied. It is not presented as a thing that brought him happiness or any sort of permanent satisfaction, and throughout the book you hear the note of impending disaster. He is like the drunkard who cannot keep away from drink although he knows where it will land him in the end.

The author traces the moral thought of this man back to his childhood where the unhappy relations between his mother and his father left a sort of permanent bruise on his personality. He describes the pitfalls of slyness and filth into which the unhappy adolescent stumbles, without knowledge or experience, without the map and the compass and without the guiding hand

of a wise parent or the example of a well-ordered, decent, home. You will have to consider whether the author was pursuing an honest purpose and an honest thread of thought, or whether that was all just a bit of camouflage to render the crudity, the sex of the book, sufficiently wrapped up to pass the critical standard of the Director of Public Prosecutions. So far as his amatory adventures are concerned, the book does, with candour or, if you prefer it, crudity, deal with the realities of human love and intercourse. There is no getting away from that, and the Crown say: "Well, that is sheer filth." Is the act of sexual passion sheer filth? It may be an error of taste to write about it. It may be a matter in which some, perhaps old-fashioned, people would prefer that reticence continued to be observed as it was yesterday. But is it sheer filth? That is a matter which you have to consider and ultimately to decide.

I do not suppose there is a decent man or woman in this court who does not whole-heartedly believe that pornography, the filthy bawdy muck that is just filth for filth's sake, ought to be stamped out and suppressed. Such books are not literature. They have got no message; they have got no inspiration; they have got no thought. They have got nothing. They are just filth and ought to be stamped out. But in our desire for a healthy society, if we drive the criminal law too far, further than it ought to go, is there not a risk that there will be a revolt, a demand for a change in the law, and that the pendulum may swing too far the other way and allow to creep in things that at the moment we can exclude and keep out?

That is all I have to say to you. Remember what I said when I began. You are dealing with a criminal charge. This is not a question or a case of what you think is a desirable book to read. It is a criminal charge of publishing a work with a tendency to corrupt and deprave those to whom it may fall. Before you can return a verdict of "Guilty" on that charge you have to be satisfied, and each one of you has to be satisfied, that that charge has been proved. If is it anything short of that the accused are entitled to a verdict at your hands of "Not Guilty."

Verdict: Not Guilty.

Solicitors: *Director of Public Prosecutions; Oswald Hickson, Collier & Co.*

[CHANCERY DIVISION.]

1954
July 19.

Danckwerts J.

* *In re* BAKER, a Bankrupt.
Ex parte EASTBOURNE WATERWORKS CO.
v.
OFFICIAL RECEIVER.

[No. 2 of 1954 in the Tunbridge Wells County Court in Bankruptcy.]

Bankruptcy—Rating—Water rate—Whether payable in priority to other debts—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 33 (1) (*a*).

A rate payable to a waterworks company in respect of the supply of water to an occupier is not comprised in the expression "all "parochial or other local rates" in section 33 (1) (*a*) of the Bankruptcy Act, 1914, and therefore is not, in the distribution of the property of a bankrupt, included in the debts payable in priority to all other debts.

Dicta of Lord Alverstone C.J. and Henn Collins M.R. in *Northampton Corporation* v. *Ellen* [1904] 1 K.B. 299, 313, 315; 20 T.L.R. 168, applied.

Special case stated by His Honour Judge F. K. Glazebrook. judge of the Tunbridge Wells county court, for the opinion of the High Court on the question of law therein submitted pursuant to section 100 (3) of the Bankruptcy Act, 1914.

The case stated set out the following facts: In the motion the applicant company claimed a declaration that certain sums due to it from the bankrupt for the supply of water were payable in priority.

On February 10, 1954, a receiving order was made against the bankrupt in the Tunbridge Wells county court on a creditor's petition, and on February 28, 1954, he was adjudicated bankrupt. On the adjudication the official receiver, the respondent to the motion, became and remained trustee ex officio of the property of the bankrupt. The applicant company (hereinafter called "the "company") was incorporated by the Eastbourne Waterworks Act, 1859, to acquire the undertaking of the Eastbourne Waterworks Company, Ld. The company carried on the undertaking of the supply of water in the town of Eastbourne and certain adjacent areas. The company's powers were regulated by the Eastbourne Waterworks Acts, 1859 to 1921, together with the Eastbourne Waterworks Order, 1948, under which the company acquired the Hailsham Water Company's undertaking.

The company was a creditor of the bankrupt in respect of the sum of £5 13s. 9d., being the aggregate of the "water rates" payable by the bankrupt in respect of the period December 25, 1952, to February 10, 1954, for the supply by the company of water to certain premises belonging to the bankrupt and known as 88 and 89, Beachlands Estate, Pevensey, in the county of

Sussex, and for the period June 24, 1952, to January 14, 1953, for the supply by the company of water to certain other property belonging to the bankrupt and known as 100, Beachlands Estate, Pevensey, for which sum of £5 13s. 9d. the company filed its proof of debt, sworn on March 1, 1954. It was not disputed that that sum represented a proper charge for the supply of water by the company, the imposition of which was authorized by the provisions of the relevant Acts and in particular section 3 of the Act of 1921. The company claimed that that "water rate" fell within the category of "all parochial or other local rates" appearing in section 33 (1) (*a*) of the Bankruptcy Act, 1914,[1] and that, accordingly, so much of that "water rate" as was due from the bankrupt at the date of the receiving order and had become due and payable within twelve months next before that time was payable in priority. The official receiver rejected the company's claim to priority in respect of the water rate. It was agreed that, of the water rates payable on the premises, £1 13s. 8d. had become due and payable on 88, Beachlands Estate, and £2 9s. on 89, Beachlands Estate, on demand dated January 16, 1954, based on a proportion of the rateable value of those premises.

Both parties wished to have determined in the first instance in the High Court the question raised by the motion and the county court judge stated this case accordingly. The question was: whether the aforesaid sums of £1 13s. 8d and £2 9s. due to the company, being "water rates," were comprehended within the term "all parochial or other local rates" under section 33 (1) (*a*) of the Bankruptcy Act, 1914, and, as such, were entitled to be paid in priority.

G. C. Dunbar for the company.
Muir Hunter for the official receiver.

The following cases, in addition to those referred to in the judgment, were cited in argument: *Ex parte Harrison*[2]; *In re An Arranging Debtor.*[3]

DANCKWERTS J. This case raises the question, which, I think, has not hitherto been directly decided by any court except possibly a county court, whether a sum of money due to a waterworks company in respect of the supply of water is to be treated as a preferential debt in bankruptcy by reason of section 33 (1) of the Bankruptcy Act, 1914.

[1] Bankruptcy Act, 1914, s. 33: "(1) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts— "(*a*) All parochial or other local rates due from the bankrupt at the date of the receiving order, and having become due and payable within twelve months next before that time, and all assessed taxes, land tax, property or income tax, assessed on the bankrupt up to April 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

[2] (1884) 13 Q.B.D. 753.

[3] [1921] 2 Ir.R. 1.

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[His Lordship read the subsection and continued as follows:] The company was formed under the Eastbourne Waterworks Act, 1859, and has powers conferred by a number of other statutes, and its local Act or special Act incorporates the provisions of the Waterworks Clauses Act, 1847. It is no doubt true that it will be found in those Acts that the company is entitled to charge for supply of water what in those Acts is called "the rate," and the rate is to be ascertained, in certain circumstances at any rate, by reference to the rateable value of the property of the occupier who is supplied with water. On the other hand, the question arises whether the money payable in respect of the supply of water is a rate of the kind referred to in section 33 (1) (*a*) of the Bankruptcy Act, 1914.

I have been referred to a number of authorities, but very few, if any, of them touch the point which I have to decide. In *In re Mannesmann Tube Co. Ld.*,[1] it is perfectly plain that it was assumed that a sum payable for the supply of water, and therefore commonly termed "a water rate," was a preferential debt in bankruptcy, and the only point in the case was the date relevant for the purpose of the preference. The debt was assumed to be preferential and the point was apparently not argued.

I was referred to a number of cases of landlord and tenant in which the point was argued on covenants to pay rates, taxes, impositions and the like under the special terms of the covenant contained in the lease. Such cases included *Direct Spanish Telegraph Co. Ld.* v. *Shepherd*,[2] *Badcock and Another* v. *Hunt*,[3] and *Bourne & Tant* v. *Salmon & Gluckstein Ld.*[4] However, none of those cases, I think, really touches the question which I have to decide, which depends, not on a covenant in a lease, but on a statute giving a preference to particular kinds of creditors.

The nearest case, in a sense, is *In re Ellwood*,[5] in which it was held that what is called a drainage rate, chargeable by a drainage board, was a preferential payment for the purpose of bankruptcy. On the other hand, the argument in that case against preference was put on the ejusdem generis rule, and I am satisfied, as the court was in that case, that section 33 has nothing to do with that rule. On the other hand, the drainage rate, as has been pointed out by Mr. Muir Hunter, is a rate which the local inhabitants in the district cannot avoid; they cannot say, "we will not have "drainage" or "we will not contribute towards it." If they are in a district which is liable to flooding, they will have to pay. It is not like a public water supply which, though it may for practical purposes be a necessity, is something which need not be taken involuntarily.

In re Flack,[6] to which I was also referred, also is to be distinguished from the present case, because there the supply of water

[1] [1901] 2 Ch. 93.
[2] (1884) 13 Q.B.D. 202.
[3] (1888) 22 Q.B.D. 145; 5 T.L.R. 148.
[4] [1907] 1 Ch. 616.
[5] [1927] 1 Ch. 455.
[6] [1900] 2 Q.B. 32.

was by means of a meter, and did not involve payment by reference to the rateable value of the property.

In my view, the matter was put most accurately in *Northampton Corporation* v. *Ellen*,[7] which, it is true, was not a decision on the point which I have to decide. The question there was whether the charge to the consumers in respect of water supplied had to be at the same rate for everybody. I would refer to the observations of Lord Alverstone C.J. where he said[8]: "In my "opinion it is not correct to speak of this corporation as rating "in respect of water supply. There may be cases in which that "expression could properly be used with regard to a corporation; "but in the present case I think they do not rate in respect of "water supply in the proper sense of the words, but merely charge "a sum, the amount of which is ascertained by reference to a "percentage upon the rateable value of the house, and I do not "think that section 36 gives rise to any implication that they "must charge all consumers at an equal rate in the pound."

Henn Collins M.R. said[9]: "The only expression in it which "gives any countenance to that suggestion"—that is, the equality argument—"is that the charge is spoken of as a 'water rate.' "I do not think that it is a necessary implication from that "expression that the charge must be at an equal rate on all "consumers. The basis upon which that implication is suggested "is the supposed analogy to a poor rate. But there is no such "analogy. The original statute of Elizabeth, from which "the poor-rate derives its origin, no doubt contains no "provision for equality in rating, but, having regard to the "nature of the charge, the reason for its imposition, and the "persons on whom it is imposed, it is obvious that the "very essence of the thing involved that the charge on all "the ratepayers should be at an equal rate. It is an imposition "upon citizens of a duty to the community in proportion to "their means, and the character of the duty necessarily involves "equality in rating. There is no analogy between such a rate and "a charge to be made for a marketable commodity, such as water, "which a company is under an obligation to sell, and householders "needing it have a right to buy for their individual consumption." That, to my mind, makes a right distinction in regard to these matters.

So far I have not referred in terms to the definitions contained in the respective statutes. With regard to the Waterworks Clauses Act, the definition of a "water rate," so called in section 3 is: "The expression 'water rate' shall include any rent, "reward, or payment to be made to the undertakers for a supply "of water." In other words, it is a payment to be made for a supply of a commodity, as pointed out by Lord Collins.

[7] [1904] 1 K.B. 299; 20 T.L.R. 168.

[8] [1904] 1 K.B. 299, 313.

[9] Ibid. 315.

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Next, coming to rating, the statute which is, I think, typical of the various rating Acts, namely, the Rating and Valuation Act, 1925, by section 68, defines "rate" in this way: "'Rate' means "a rate the proceeds of which are applicable to local purposes of a "public nature and which is leviable on the basis of an assessment "in respect of the yearly value of property, and includes any "sum which, though obtained in the first instance by a precept, "certificate or other instrument requiring payment from some "authority or officer, is or can be ultimately raised out of a rate as "before defined, but does not include: (*a*) any rate which is "assessed under any commission of sewers, or in respect of any "drainage, wall, embankment, or other work for the benefit of "the land; or (*b*) any rate of the description commonly known as "a church rate, a tithe rate, or a rector's rate, or any other rate "of a similar character; or (*c*) any rate which is leviable by the "conservators of a common; or (*d*) any rate payable by consumers "for a supply of water; or (*e*) any rate of the description com-"monly known as a garden rate or square rate, if levied by any "persons other than a rating authority."

To my mind, that shows that a rate of the type described in that Act, which, of course, is later than the Acts relevant to the supply of water, is something quite different from what is known popularly (and, indeed, in those Acts) as a "water rate."

In my judgment, the legislature really has in mind two different things, and one must turn to section 33 (1) (*a*) of the Bankruptcy Act, 1914, to see what they are. Paragraph (*a*) provides: "All "parochial or other local rates due from the bankrupt at the date "of the receiving order, and having become due and payable "within twelve months next before that time, and all assessed "taxes, land tax, property or income tax, assessed on the bank-"rupt up to April 5 next before the date of the receiving "order. . . ." Though those are different matters, they are alike in this respect, that they are matters of taxation: and what the legislature had in mind in the Bankruptcy Act, 1914, was local and general taxation, or it may be called local and national taxation. Therefore, it excludes completely the idea of payments for the supply of water, which may be called rates because they are assessed at a particular rate or payable at a particular rate.

This section, I would observe, is one conferring special preference on certain debts, and in conferring a privilege or preference on debts there must be care not to extend unduly the privilege or preference in question. The words, therefore, must be construed with some strictness.

For the reasons which I have stated, I am satisfied that a rate payable to a water company in respect of the supply of water to some occupier is not a "parochial or other" local rate within the meaning of section 33 of the Bankruptcy Act, 1914. Accordingly, I will declare that the aforesaid sums of £1 13s. 8d. and £2 9s. due to the company, being water rates, are not comprehended within

the term "all parochial or other local rates" under section 33 (1) (*a*) of the Bankruptcy Act, 1914, and, as such, are not entitled to be paid in priority. I direct that the costs of the official receiver be taxed and paid by the company.

Declaration accordingly.
Leave to appeal.

Solicitors: *Shelton, Cobb & Co., for Coles & James, Eastbourne; Solicitor, Board of Trade.*

K. R. A. H.

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[QUEEN'S BENCH DIVISION.]

* WOOLLETT *v.* MINISTER OF AGRICULTURE AND FISHERIES.

1954 *July* 19, 20, 21.

Stable J.

[1953 W. No. 3967.]

Agriculture — Agricultural Land Tribunal — Nominated members — Appointment—Members appointed by secretary—Validity of proceedings of improperly constituted tribunal—Validity of Minister's certificate—No application to the High Court within six weeks of service of notice of certificate—Jurisdiction of court to declare certificate void—Acquisition of Land (Authorisation Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *s.* 1, *Sch. I, paras.* 15, 16—*Agriculture Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 48), *ss.* 73, 85, 92, *Sch. IX, paras.* 13, 15, 20 (2).

Tribunal—Statutory. Compulsory Purchase.

It is of importance that an agricultural land tribunal, which is the sole judge between the subject and the Minister and whose decision is binding on both, should be appointed strictly in accordance with paragraph 15 of Schedule 9 to the Agriculture Act, 1947.

An agricultural land tribunal, the two members of which, other than the chairman, had been appointed by the secretary of the tribunal, who was not authorized and had no delegated authority from the Minister to appoint them, purported to confirm a proposal by the Minister to give a certificate under section 85 (2) of the Agriculture Act, 1947, retaining in his possession land under requisition, and the Minister, acting on the determination of the tribunal, gave such a certificate:—

Held, that the tribunal, its members not having been appointed in accordance with paragraph 15 of Schedule 9 of the Act of 1947, had not been properly constituted and its determination, and the Minister's certificate given in pursuance thereof, were null and void.

Held, further, that, as the most essential condition, the reference to a properly appointed tribunal, had not been observed, the certificate was not a certificate within the Act and, therefore, notwithstanding that no application had been made to the High Court within six weeks of the service of notice of the making of the certificate, paragraph 16 of the Schedule to the Acquisition of Land (Authorization Procedure) Act, 1946, did not apply, and the court was not precluded from declaring that the certificate was null and void.

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Action.

In 1941 the Essex War Agricultural Executive Committee took possession of certain land. In 1947, while the land was still under requisition, the plaintiff became the owner in fee simple of a part of some three acres of the land. On June 16, 1951, the Minister of Agriculture and Fisheries gave notice in writing that he proposed to give a certificate under section 85 (2)[1] of the Agriculture Act, 1947, relating to, inter alia, the plaintiff's land. The plaintiff appealed against the Minister's proposal and on September 24, 1951, her objection, together with the objection of a number of other owners whose land was affected by the proposal, was heard by an agricultural land tribunal. On October 12, 1951, the tribunal issued its decision purporting to confirm the proposal of the Minister in respect of the land of the plaintiff and of all but six of the other objectors. On September 30, 1952, a certificate under seal authenticated by a senior civil servant in the Ministry

[1] Agriculture Act, 1947, s. 85: "The following provisions . . . shall "have effect for the purpose of enabling the Minister to secure or "maintain the full and efficient use "for agriculture (*a*) of agricultural "land of which the Minister or a "person acting under his authority "is in possession. . . . (2) Where "the Minister or any person acting "under his authority is in possession "of the land mentioned in paragraph "(*a*) . . . under powers conferred by "regulations made under the Emergency Powers (Defence) Acts, 1939 "to 1945 . . . and the Minister is "satisfied that it is necessary for the "purpose mentioned in the last foregoing subsection that possession of "the land should be retained by him "or on his behalf, and certifies accordingly, the Minister may purchase "the land compulsorily in accordance "with the provisions of this Act in "that behalf. (4) The Minister shall "not give a certificate under this "section until, after affording . . . "an opportunity of making representations to the Minister . . . "he has given notice in writing to "[certain classes of person] of the "Minister's proposal to give the certificate. (5) Any person to whom "notice of a proposal is given . . . "may require that the proposal shall "be referred to the Agricultural Land "Tribunal established under this Part "of this Act."

S. 73: "(2) The provisions . . . of "the ninth schedule to this Act shall "have effect as to the constitution of "agricultural land tribunals. . . ."

Sch. IX, para. 13: "(1) An agricultural land tribunal shall consist of a chairman and two other "members."

Para. 15: "The two members of "an agricultural land tribunal other "than the chairman (hereinafter referred to as 'nominated members') "shall, for each reference to the tribunal, be appointed by the Minister. ". . ." Para. 20: "(2) All acts "done at any meeting of any such "body shall, notwithstanding that it "is afterwards discovered that there "was a defect in the appointment ". . . of a person purporting to be a "member thereof, be as valid as if "that defect had not existed."

S. 92: "(2) Where under any provision of this Act power is conferred on the Minister to purchase ". . . land compulsorily on the giving "of a certificate by him, the certificate shall have effect as if it were a "compulsory purchase order made "under section 1 of the said Act of "1946." [Acquisition of Land (Authorisation Procedure) Act, 1946.]

Acquisition of Land (Authorisation Procedure) Act, 1946, Sch. I, para. 15: "If any person aggrieved by a "compulsory purchase order desires "to question the validity thereof ". . . he may, within six weeks "from the date on which notice "of the confirmation or making of the "order . . . is first published . . . "make an application to the High "Court." Para. 16: "Subject to "the provisions of the last foregoing "paragraph, a compulsory purchase "order or a certificate under Part III "of this Schedule shall not, either "before or after it has been confirmed, "made or given, be questioned in any "legal proceedings whatsoever. . . ."

who was authorized by the Minister to authenticate the seal, was issued, relating to the land of the plaintiff and of various other owners, purporting to certify in pursuance of his powers under section 85 that the Minister was satisfied that it was necessary for the purpose of enabling him to secure or maintain the full and efficient use for agriculture that possession of the land should be retained by him or on his behalf. On October 6, 1952, notice of the giving of the certificate was served, and on October 16, 1953, a notice to treat was served on the plaintiff.

The chairman of the agricultural land tribunal which heard the reference had been duly appointed by the Lord Chancellor. The two nominated members were appointed by the secretary of the tribunal, who, after a discussion with the chairman and with his approval, orally asked them if they would sit on the tribunal for the purposes of the inquiry. The members agreed to sit and the secretary later wrote to them, confirming the appointments and sending them further details. The secretary was also a civil servant employed by the Ministry, but in selecting the members of the tribunal he was acting in the capacity of its secretary, and the letters to both members were signed by him as secretary of the tribunal, and at no time had he been given any authority or instructions to appoint the members of the tribunal.

The plaintiff brought proceedings in the High Court for declarations that the certificate dated September 30, 1952, and the notice to treat were null and void. She alleged that the tribunal purporting to confirm the Minister's proposal was not validly constituted, in that the members other than the chairman were not appointed by the Minister in accordance with the provisions of the Agriculture Act, 1947, and that the alleged confirmation was null and void. She also alleged that the certificate of the Minister was null and void in that it was not made by the Minister as required by the Act, and related to the land of various other persons in addition to her land.

The Minister denied the allegations. Alternatively, he contended that, as no application had been made to the High Court within six weeks of the service of notice of the giving of the certificate, it could not, by virtue of section 92 of the Agriculture Act, 1947, and section 1 and paragraphs 15 and 16 of the First Schedule to the Acquisition of Land (Authorization Procedure) Act, 1947, be questioned. He also relied on paragraph 20 (2) of Ninth Schedule to the Agriculture Act, 1947, as validating the proceedings of the tribunal.

The further facts are stated in the judgment of Stable J.

A. P. Marshall Q.C. and *Gilbert Dare* for the plaintiff.
Basil Wingate-Saul for the Minister.

No cases other than those referred to in the judgment were cited in argument.

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Stable J. This case raises questions of some difficulty and considerable importance. The action is brought by the plaintiff against the Minister of Agriculture in his corporate capacity, asking for a series of declarations which, if granted, will, at all events for the time being, prevent the acquisition by the Minister of three acres of land adjacent to the bungalow where she and her husband are living and where they contemplate some enterprise in the nature of a smallholding.

The plaintiff substantially rests her claim on three grounds. First, that by reason of a defect, if it was a defect, in the appointment of the tribunal, the conditions of the Agriculture Act, 1947, the Act empowering the Minister to acquire her land, have not been complied with, and that, accordingly, any compulsory power which the Minister purports to exercise and which must be conditional on a proper hearing by a properly appointed tribunal is null and void. Secondly, that the certificate, which purported to be issued under the seal of the Minister and which is a document of considerable importance in relation to an acquisition of land under the Act, was not the act of the Minister. Thirdly, although this was a matter hardly discussed, the plaintiff contends that by the inclusion of lands belonging to various owners in the same certificate and in one hearing before the tribunal, the requirements of the Act had not been complied with.

I need say little about the last point. Whether it is a desirable practice that the inquiry before the tribunal should comprise a vast number of different properties under different ownership is a matter on which I express no opinion one way or the other. I can see nothing in the Act of Parliament which invalidates proceedings because, as it were, the documents and proceedings consequent thereon comprised more than one property in different ownership.

The second point, that the certificate which was given under the seal of the Minister was not a ministerial act, can be disposed of very shortly. The seal was authenticated by one Garside, a senior civil servant in the Ministry. He was authorized by the Minister of Agriculture to authenticate the seal, but he had no express or specific direction from the Minister to issue this particular certificate. In my view that objection to the proceedings fails. I have no doubt that Garside, as he told me, was instructed by the Minister to proceed with the compulsory acquisition of this particular plot of land, and I think that that authority was quite sufficient to invest him with the power to take the necessary steps to set in motion the requisite machinery.

That leaves the first point, which goes to the composition of the tribunal. Section 85 of the Agriculture Act, 1947, provides: "... for the purpose of enabling the Minister to secure or main-" tain the full and efficient use for agriculture—(*a*) of agricultural " land of which the Minister or a person acting under his authority " is in possession, or (*b*) of other such agricultural land in con-" junction with which in the opinion of the Minister the land

"mentioned in paragraph (a) of this subsection ought to be "farmed," he, by taking the appropriate steps, has the power to acquire that land compulsorily, that is to say, to acquire it over the heads of the person or persons who own the land. In passing, it is worth noting that sections of the Act, as for example, sections 16 and 17, where machinery is set up for dispossessing people who were either farming their land badly or not managing the land as it should be managed, albeit that those sections come into force by reason of the failure of the owner or the occupier as the case may be, contain various safeguards to ensure that the procedure under them is not abused. Section 85 is very far-reaching. Quite how far it could be held to extend if the matter came before the ordinary courts of the country for construction we shall not know, because the effect of the section is that the only safeguard as between the subject whose land is being compulsorily acquired and the executive or government who are taking it, is the report and the determination of a statutory tribunal whose decision on the matter is binding on the Minister.

The importance of the tribunal and the gravity of the duty that it is called upon to discharge is indicated by the fact that not only are they the judges of fact in each case but it is to them alone that the construction of this particular section of the Act of Parliament is left. It is very difficult to envisage a state of facts in which an action could be brought before the courts on the grounds that the Minister in acquiring land under the section had gone outside and beyond the powers that the section confers, which are simply to acquire land to enable the Minister to secure or maintain the full and efficient use of it for agriculture. As a condition of setting the machine in motion, the Minister has to be satisfied that it is necessary for those purposes that he should obtain possession of the land, and he has to certify accordingly. The emphasis I place on that is that the word used is not "desirable" or "advantageous" but "necessary," and I have no doubt that that section is susceptible of interpretation by the competent courts where the exact meaning or emphasis placed on the word "necessary" would receive proper consideration.

The Act contains certain machinery for putting the powers into force, and it provides for the appointment of a tribunal. Section 74 (4) makes it compulsory on the Minister to act in accordance with the report of the tribunal "and not otherwise." The tribunal is, therefore, a most important feature in relation to that particular section. Paragraph 13 of Schedule IX to the Act provides that the tribunal "shall consist of a chairman and two other "members . . . The chairman shall be appointed by the Lord "Chancellor," and he must have the legal qualifications there set out. He holds office for three years and is eligible for reappointment. He may resign his office by notice in writing served on the Lord Chancellor and so on. Paragraph 15 provides that "The "two members of an agricultural land tribunal other than the

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"chairman (hereinafter referred to as 'nominated members') "shall, for each reference to the tribunal, be appointed by the "Minister and shall be so appointed respectively from a panel of "persons" drawn from two sources which I need not more particularly specify. The operative words are that "the two "members . . . shall, for each reference to the tribunal, be "appointed by the Minister," and the complaint here is that, far from being appointed by the Minister, the tribunal which inquired into this particular matter, and before which the plaintiff and others appeared and ventilated their grievances, was never appointed by anybody.

[His Lordship referred to the evidence, and continued:] What happened was that, one Comyns, who was a civil servant employed by the Ministry and attached to the department which was actually concerned with the management of the land in question, was also appointed secretary of this tribunal. I should like to emphasize that no sort of hint or suggestion against Comyns' bona fides in this matter has been made from first to last; he acted throughout with complete good faith and absolute integrity. He said that he had never had any specific instructions from anybody, but he simply carried on with the job done by his predecessor. There is no doubt that neither the Minister nor anybody acting for the Minister, nor anybody to whom the Minister's powers had been delegated, had ever purported to authorize or instruct anybody to appoint the two nominated members, either to this inquiry or, so far as I know, to any other. Comyns himself said that he regarded himself in a dual capacity; that when he was doing the Ministry's work he regarded himself as the servant of the Ministry; when he was acting as the secretary to this judicial tribunal he regarded himself as the servant of the tribunal. That is, in my view, a most proper attitude for him to adopt.

In this case the first of the two nominated members to be chosen, a Mr. Elliott, was selected in this way. Comyns was present with the chairman, Sir Cecil Oakes, and Mr. Elliott, and after discussion with Sir Cecil, and with Sir Cecil's knowledge and approval, Comyns approached Mr. Elliott and asked him if he would sit on the tribunal for the purpose of this particular inquiry. As regards the second member, a Mr. Soper, again after consultation with and with the approval of Sir Cecil Oakes, the chairman, he was approached by Comyns, and agreed to act as one of the two nominated members. Again there is not the slightest suggestion that either of those two gentlemen was biassed or misconducted himself in any shape or form. The whole point is whether they were appointed to the tribunal, and whether or not this tribunal ever was properly constituted.

It is to be observed that all Comyns' letters confirming the appointments, fixing dates, enclosing documents, were signed by him as secretary; they were all written on the notepaper of the

Agricultural Land Tribunal, and I have not the slightest doubt that he, in acting as he did was, as he quite honestly thought, properly acting in his capacity as secretary to the tribunal and not as a civil servant to whom had been delegated the selection and appointment of members to the tribunal by the Minister. But where a tribunal of this kind is the only protection that the subject has against the encroachment of the executive, it is of vital importance that its appointment should be regarded as a very serious matter, and should be made strictly in accordance with the provisions of the Act of Parliament.

I was referred to a number of authorities, and in deference to a very able argument that was addressed to me by Mr. Wingate-Saul, I think I ought to deal in some detail with the submissions that he made on this matter, and with the authorities that he cited in support of those submissions. The first authority which he cited is *West Riding County Council* v. *Wilson*,[1] in which the instrument under criticism was a letter signed by the assistant land commissioner, and expressed to be authorized by the Minister of Agriculture and Fisheries giving a requisite consent. Viscount Caldicote C.J., in disposing of that point, said[2]: "The further "point is taken that the letter from Hole is void because the "Minister had no power to delegate his responsibility to Hole. "I do not read the letter in that way. Hole was authorized, "according to the letter, by the Minister of Agriculture and "Fisheries, and, in the absence of any evidence that he was not "so authorized, I accept that letter as the letter of the Minister, "or as the consent of the Minister in writing. It is not the case "that all consents of ministers have to be signed by the ministers "themselves. The business and the duties of ministers of the "Crown would very often be quite impossible if they had to sign "all the documents in which their consent was given or their "opinion expressed."

In *Carltona Ld.* v. *Commissioners of Works*,[3] the question in issue was as to the validity of an order of the Commissioners of Works purporting to requisition certain premises. The passage which was cited, and which is not infrequently cited as laying down a general principle of approach to these matters, appears in the judgment of Lord Greene M.R., who said[4]: "In the adminis-"tration of government in this country the functions which are "given to ministers (and constitutionally properly given to minis-"ters because they are constitutionally responsible) are functions "so multifarious that no minister could ever personally attend to "them. To take the example of the present case no doubt "there have been thousands of requisitions in this country by "individual ministries. It cannot be supposed that this regulation "meant that, in each case, the minister in person should direct "his mind to the matter. The duties imposed upon ministers and

[1] [1941] 2 All E.R. 827.
[2] Ibid. 831.
[3] [1943] 2 All E.R. 560.
[4] Ibid. 563.

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"the powers given to ministers are normally exercised under the "authority of the ministers by responsible officials of the depart-"ment. Public business could not be carried on if that were not "the case. Constitutionally, the decision of such an official is, of "course, the decision of the minister. The minister is respon-"sible. It is he who must answer before Parliament for anything "that his officials have done under his authority, and, if for an "important matter he selected an official of such junior standing "that he could not be expected competently to perform the work, "the minister would have to answer for that in Parliament. The "whole system of departmental organization and administration is "based on the view that ministers, being responsible to Parlia-"ment, will see that important duties are committed to "experienced officials. If they do not do that, Parliament is the "place where complaint must be made against them." Then at the close of his judgment, Lord Greene M.R. said[5]: "All that "the court can do is to see that the power which it is claimed to "exercise is one which falls within the four corners of the powers "given by the legislature and to see that those powers are exer-"cised in good faith. Apart from that, the courts have no power "at all to inquire into the reasonableness, the policy, the sense, "or any other aspect of the transaction."

In *Metropolitan Borough and Town Clerk of Lewisham* v. *Roberts*,[6] the instrument in question was a letter emanating from the Ministry of Health, written by a general inspector in the Ministry stating that he was directed by the Minister to say that he delegated to the town clerk certain functions under regulation 51 of the Defence (General) Regulations, 1939. Bucknill L.J.[7] cited a passage from the judgment of the county court judge whose decision was under appeal, who, having had cited to him the passage from the judgment of Lord Greene M.R. in *Carltona Ld.* v. *Commissioners of Works*,[8] referred to that case and continued[9]: "'Applying these considerations to the present "'case, I am unable to say that the evidence shows that Mr. "'O'Gara in purporting to sanction on behalf of the minister "'the requisitioning of property, and in particular in issuing the "'document of November 12, 1946, was acting without authority "'to do so. On the contrary, the presumption being that "'ministerial acts will be performed, not by the minister in "'person, but by responsible officials in his department, I think "'that where such acts of an official nature, all of them involving "'the knowledge and some of them requiring and receiving the "'concurrence of other officials have, as here, continued over a "'long period, this of itself affords cogent evidence that the "'person in fact acting in such an official capacity was duly "'authorized to act.'" Bucknill L.J.[10] proceeded to point out

[5] Ibid. 564.

[6] [1949] 2 K.B. 608; 65 T.L.R. 423; [1949] 1 All E.R. 815.

[7] [1949] 2 K.B. 608, 617.

[8] [1943] 2 All E.R. 560, 564.

[9] [1949] 2 K.B. 608, 617.

[10] Ibid. 618.

that that was a finding of fact of the county court judge and that he was not disposed in any way to interfere.

Denning L.J. said [11]: "The first point taken here was that "the town clerk was not authorized to requisition this house "because his only authority was derived from a letter from an "official in the Ministry of Health who could point to no autho-"rity from the minister himself. Now I take it to be quite plain "that when a minister is entrusted with administrative, as "distinct from legislative, functions he is entitled to act by any "authorized official of his department. The minister is not "bound to give his mind to the matter personally. That is "implicit in the modern machinery of government: see *Carltona "Ld.* v. *Commissioner of Works*,[12] and an article by Professor "Willis in 21 Canadian Bar Review, at p. 257. When, there-"fore, a government department requisitions property itself under "reg. 51 (1), it is not necessary for the minister himself to con-"sider the matter. It is sufficient if one of the officials of that "department brings his mind to bear on the propriety of it. "When the government department delegates its functions to a "town clerk under reg. 51 (5), it is really only putting someone "in its place to do the acts which it is authorized to do. The "town clerk is, so to speak, an agent of the department, and a "sub-agent of the Crown. The delegation to the town clerk is "simply administrative machinery so as to enable the adminis-"trative function of requisitioning to operate smoothly and "efficiently; and, like all administrative functions, the act of "delegating can be exercised by any authorized official of the "government department."

Although it has no direct bearing on the present problem, Mr. Marshall cited *Acton Borough Council* v. *Morris*,[13] for the purpose of reading a passage of general application in the judgment of Somervell L.J., who said [14]: "These delegated "circulars were not normally available to members of the public "whose property might be taken under them, but they were, of "of course, disclosed on discovery. I think that it is a case in "which the principle to be applied is that those who are exer-"cising special powers to take private property must see that "they carry out accurately and in detail the Act of Parliament "or, in this case, the form and conditions of the delegation under "the Defence Regulations. Nor is it clear that this is a matter "of no substance. Nobody can say, and I think that it would be "inadmissible to call evidence on the subject. All that has "happened here is confirmation of something which did not "require confirmation, namely, taking possession of the premises. "There are no words to suggest that the Minister has been asked "to extend, and has extended, the time. For these reasons I "think that this first point succeeds."

[11] Ibid. 621.
[12] [1943] 2 All E.R. 560.
[13] [1953] 1 W.L.R. 1228; [1953] 2 All E.R. 932.
[14] [1953] 1 W.L.R. 1232.

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The sharp distinction between the first three cases cited to me and the facts of the present case is, that in each of those cases there was an instrument, a letter of some kind or another, emanating from an official, in which it was expressly stated that he was authorized to act for the Minister and purported to be so acting. In the present case it is abundantly plain that neither the Minister nor, so far as I know, anybody connected with the Ministry, gave the matter a moment's thought. So far from the Minister acting by an agent in the appointment of this tribunal, the evidence is plain that he did nothing of the kind. There was no instrument of appointment. All that happened was that Comyns rang up the members, found out if it was convenient for them to sit, and then confirmed the date and so on in the letters that he wrote. But in so doing, Comyns was not expressing himself to be authorized by the Minister; he did not purport to be acting on behalf of the Minister; he did not think that he was acting on behalf of the Minister, and in point of fact he was not. He was functioning as the secretary of the tribunal and nothing else.

Mr. Wingate-Saul, taking a somewhat formidable point, referred me to paragraphs 19 and 20 of Schedule IX to the Agriculture Act, 1947. Paragraph 19 deals with the disqualification of persons from sitting as members of a land tribunal, and paragraph 20 (2) is in these terms: "All acts done at any "meeting of any such body shall, notwithstanding that it is "afterwards discovered that there was a defect in the appoint-"ment or disqualification of a person purporting to be a member "thereof, be as valid as if that defect had not existed." There must be some limit to the operation of that paragraph. Can it be said that, if inadvertently the wrong person selected two people, or, if you like, three, from the wrong panel to act as an agricultural land tribunal, the body so constituted in disregard of every single provision of the Act of Parliament would acquire, under that sub-paragraph, validity for what it did? It must not be forgotten that the determination of the tribunal is binding on the subject and on the Minister and that it is subject to no appeal either in relation to matters of fact or questions of law. It is the only and the final tribunal.

Mr. Marshall meets paragraph 20 (2) with the contention, which I accept, that in the present case there was not a defect in appointment for there never was an appointment at all. It is important to observe that the land tribunal is not a body in more or less permanent session or even in a state of suspended animation. Reverting to paragraph 15 of Schedule IX: "The two members of an agricultural land tri-"bunal other than the chairman . . . shall, for each reference "to the tribunal be appointed by the Minister," therefore, unless and until in relation to a particular reference two nominated members have been appointed by the Minister, there is not an agricultural land tribunal in esse. In my judgment that is

exactly the position here. It was not a defective appointment, but because the tribunal did not exist, there never was an appointment which could have had a defect.

Before I pass from that, there is one further matter to which reference should be made. Section 74 of the Act provides that where, under the Act, a person is empowered to require that a proposal of the Minister shall be referred to the agricultural land tribunal, then the proposal shall be referred accordingly and then "(2) . . . the tribunal shall determine (*a*) whether "the conditions as to which the Minister must be satisfied "before taking the action are fulfilled, and (*b*) whether, "having regard to their determination under the foregoing para-"graph and to all the circumstances of the case, the Minister "should or should not take the action proposed, and shall report "to the Minister accordingly; and the Minister shall forward a "copy of the report to any person who availed himself of an "opportunity to make representations to the Minister." Subsection (4), to which I have already referred, directs that "the "Minister shall act in accordance with the report of the tri-"bunal and not otherwise."

Not unnaturally, the plaintiff applied to the Minister, as she was entitled to do, for a copy of the so-called tribunal's report. The result, I confess, of her request has astonished me. There were no less than 25 persons whose rights were involved, and the deliberation of the tribunal which was finally to determine those rights occupied no more than one day. The result was that 19 of the objectors were unsuccessful and had their land taken, whereas six, for some reason or another, succeeded and escaped from being compulsorily bought out. The so-called report of this tribunal is headed, "Between owners detailed "overleaf, applicants, and the Minister of Agriculture and "Fisheries, respondent," and there are a number of names on the back; the unsuccessful applicants apparently. It is headed "Decision of the tribunal." It is apparently a typed or printed form, and is signed by the chairman "For and on behalf "of the Eastern Province Agricultural Land Tribunal," and it is in these terms: "Whereas in exercise of the powers con-"ferred upon him by section 85 of the Agriculture Act, 1947, the "Minister of Agriculture and Fisheries has proposed to certify "that it is necessary for the purpose mentioned in subsection (1) "of the said section 85 for possession of the land above mentioned "to be retained by him or on his behalf, and whereas the appli-"cants being persons on whom notice of a proposed compulsory "purchase order would be required to be served under sub-"section (4) of the said section 85 have duly required that the "proposal of the Minister be referred to the said tribunal, now "the tribunal, having satisfied itself that all parties entitled to "appear before it have so appeared or have been duly summoned "to appear and having heard the evidence tendered by such

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"parties and having inspected the said land and having determined that the conditions as to which the Minister is required to be satisfied under subsection (2) of the said section 85 have been fulfilled and having regard to such determination and to all the circumstances of the case hereby confirms the proposal of the Minister of Agriculture and Fisheries in respect of the said land."

Although it is not a matter that is relied upon as invalidating these proceedings, I venture to say that I find it very difficult to believe that, when the Legislature said that the tribunal should report and that interested parties should have a right to receive a copy of that report, the Legislature did not have in mind something in the nature of a considered judgment which would set out not merely the conclusion at which the tribunal arrived, but the process by which that conclusion was reached.

The next point that Mr. Wingate-Saul made arises under the joint operation of the material sections of the Agriculture Act, 1947, and the Acquisition of Land (Authorisation Procedure) Act, 1946. Section 92 (1) of the Agriculture Act, 1947, provides that where the Minister has authority to purchase land compulsorily, the procedure shall follow that laid down in the Acquisition of Land (Authorisation Procedure) Act, 1946. Subsection (2) provides: "Where under any provision of this Act power is conferred on the Minister to purchase any particular land compulsorily on the giving of a certificate by him, the certificate shall have effect as if it were a compulsory purchase order made under section one of the said Act of 1946." Again, under subsection (2) (*c*), Part IV of the Acquisition of Land (Authorisation Procedure) Act, 1946, mutatis mutandis is tied up to the Agriculture Act, 1947.

Turning to paragraph 15 in Part IV of the First Schedule to the Act of 1946, it is provided that within six weeks of the giving of notice of the Minister's decision, an application may be made to the High Court by any person aggrieved. Paragraph 16 provides that "Subject to the provisions of the last foregoing paragraph, a compulsory purchase order"—for this purpose it will read, "The Minister's certificate"—"shall not, either before or after it has been confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on which notice is first published as mentioned in the last foregoing paragraph."

If I followed Mr. Wingate-Saul's argument, he contended that once notice has been given of the making of the Minister's certificate and six weeks have elapsed without an application being made to the court under paragraph 15, the certificate acquires a degree of sanctification which precludes anybody from questioning it in any legal proceedings whatsoever. If that is the right interpretation to put on that paragraph, it comes to this—that all the safeguards provided in the Agriculture Act, 1947, are not only

completely neutralized but, far worse, may create an illusion of security which does not exist, because if, let us assume, every conceivable irregularity has been committed, once notice has been given of the Minister's certificate for the requisite length of time, it becomes for all practical purposes a document of title which cannot be attacked by anybody in any court in any proceedings whatsoever. I find it very difficult to believe that paragraph 16, tucked away in Part IV of the First Schedule of the Act of 1946, was intended by the Legislature to destroy all the safeguards which they were so careful to insert in the Act of 1947.

Mr. Marshall submitted, and I accept his submission, that this certificate only becomes immune under the paragraph provided that it was in the first instance a proper certificate in accordance with section 85 of the Act of 1947. If the view that I have taken of this case is right, it never was a certificate in accordance with the provisions of that section because the most essential condition, namely the reference to a properly appointed tribunal, had not been observed, and inasmuch as there never was a certificate, then it never did obtain the freedom and shelter afforded by paragraph 16. In my view the plaintiff succeeds in this action on the grounds that I have stated.

Judgment for the plaintiff.

Solicitors: *Lucien Fior; Solicitor, Ministry of Agriculture and Fisheries.*

J. F. L.

[COURT OF APPEAL.]

* HALBAUER *v.* BRIGHTON CORPORATION.

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July 7, 8, 12.

Singleton, Denning and Morris L.JJ.

[1952 H. No. 4401.]

Contract—Exceptions clause—Negligence—Municipal caravan site—Theft of caravan—Exemption from liability of local authority for loss by "any person using camping ground."
Bailment.

The plaintiff, who was the owner of a caravan, kept it during the summer in a municipal camping ground maintained by the defendant corporation. Camping regulations made by the corporation provided for a summer season extending from the first Sunday in March of each year until the last Sunday in October, during which time the owners of caravans on payment of 25s. a week were entitled to occupy them. At the end of the summer season the regulations allowed such owners as desired to do so, to remove their caravans from the summer camping site to a tarmac park for storage during the winter, at a charge of 12s. 6d. a week. During the winter season owners were not entitled to use their caravans for residential purposes or to visit them except by permission, and the park was locked at night. Regulation 8 of the camping regulations provided: "Liability. The corporation will accept no liability for "injury to any person using the camping ground or for damage to, "or loss of the property of any such person."

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The plaintiff, who had used the camp facilities during the summer of 1951, had her caravan removed to the tarmac for the winter, and for her own convenience she allowed it to remain there until after the next summer season had begun. On March 11 the caravan was stolen during the night. The plaintiff brought an action against the corporation claiming the value of the caravan and its contents, which she alleged had been lost by reason of the defendants' negligence as bailees:—

Held, that, at the time of the loss of the caravan, the plaintiff was a person using the camping ground within regulation 8, and whether or not that regulation would apply to protect the defendants from liability for the loss of the caravan during the winter season, as the plaintiff had allowed the caravan to remain in the storage park until after the summer season had begun, the terms applicable to that season, including regulation 8, were in force at the time when the caravan was stolen, and the defendants were not bailees of the caravan and were relieved of liability for its loss.

Per Singleton and Denning L.JJ., Morris L.J. dubitante: During the winter season the defendants were bailees of the caravan.

Decision of McNair J. affirmed.

Appeal from McNair J. sitting at Lewes Assizes.

The plaintiff, Lily Eliza Halbauer, was the owner of a caravan. The defendants, the Brighton Corporation, provided a municipal camp for holiday makers with accommodation for caravans and motor-cars. The camp was closed each year from the last Sunday in October to the first Sunday in March, but persons who had caravans on the summer camping ground were permitted to leave them through the winter season on a tarmac site on payment of a storage charge of 12s. 6d. as opposed to the summer charge of 25s. a week. While the caravan was parked on the winter parking site, but after the summer season had begun, it was stolen.

The plaintiff brought an action against the corporation claiming the value of the caravan and its contents, which she alleged to have been lost as the result of the negligence of the defendants. The defendants denied liability and relied on the protection which they alleged was afforded them by regulation 8 of the camp regulations, which provided "Liability. The corporation will accept no "liability for injury to any person using the camping ground or for "damage to or loss of the property of any such person." It was contended for the plaintiff that regulation 8 only applied during the summer season and that during the winter there was a bailment of the caravan to the defendants and the regulation had no application.

McNair J. held that regulation 8 was sufficient to protect the defendants from liability.

The plaintiff appealed.

J. P. Graham Q.C. and *A. J. McCowan* for the plaintiff.
Dutton Briant Q.C. and *J. L. MacManus* for the defendants.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

July 12. The following judgments were read:

SINGLETON L.J. The defendants, the Brighton Corporation, have a camping ground which is described as "Sheepcote Valley "camping ground for holiday-makers." For three or four years prior to March, 1952, the plaintiff, Mrs. Halbauer, had a caravan on the camping ground. She had a book in which the camp regulations appear, and there were copies of the regulations posted in several places within the camping ground. It must be taken that she was aware of the regulations and of their terms. On the night of March 11, 1952, the caravan was stolen.

On March 12, the entertainments manager of the corporation wrote: "Dear Sir, Arrears of storage charges for your caravan, "which I am informed was removed from the municipal camping "ground, Sheepcote Valley, on March 11, 1952, amounted to "£2 15s. Will you kindly remit this amount direct to the above "office by return of post. A stamped addressed envelope is "enclosed for the purpose." The plaintiff replied to the effect that she did not know anything about the removal of her caravan; that there must be some mistake.

When evidence was given in regard to the matter, the plaintiff's husband was asked what the warden had said about the loss of the caravan when he went to see him, and Mr. Halbauer replied: "He took me into his office and told me: 'I "'am very sorry, Mr. Halbauer, your caravan was stolen on "'March 11 between 7 and 8, I think. It was beautiful moon-"'shine.' I said: 'Did not you hear anything?' He said: 'No, "'I did not hear anything. We had the wireless on. Everything "'was inside and we did not hear a thing.'" Mr. Halbauer asked the assistant if that was right, and the assistant, according to Mr. Halbauer, said: "I am sorry the caravan had gone, and "there was a lady on the ground who saw it pulled out by a very "powerful car with no light on, and we did not take any notice."

The plaintiff brought an action claiming damages for the loss of the caravan and its contents. The total loss was agreed at £343 17s. 6d. The corporation denied liability and relied upon one of the camp regulations printed in the little book. The claim was heard by McNair J. at the assizes at Lewes on April 12, 1954, and he gave judgment for the defendants, holding that they were protected by the terms of the regulation upon which they relied. He did not find that there was negligence on the part of the corporation, though it may be said that his judgment is based on the assumption that there was.

It is necessary that I should say something as to the nature of the camping ground which is described in the little book, and which is shown on a plan. There is an area for the parking of caravans, each site bearing a number; there is an adjoining area for cars and tents, and there is a tarmac area on which there are stores, lavatories, etc. The book shows that the camp is open from the first Sunday in March until the last Sunday in October,

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and the charge on the caravan site is 5s. a night or 25s. a week. This was the charge paid by the plaintiff for the parking of her caravan during what may be called the summer season.

On the same page of the book there are shown charges for kit storage, summer and winter, and: "Winter Parking, caravans "12s. 6d. per week (payable in advance)," to which is added: "(Note: Caravans accepted for parking during the winter *must* be "removed to the tarmac for the period)." During the period from 1948 or 1949 until March, 1952, the plaintiff's caravan had been on the camping ground. Each winter it was placed on the tarmac area, and winter parking charges were paid from the last Sunday in October until the first Sunday in March.

A letter in common form was sent out to caravan owners early in the month of October which was in the nature of a reminder. The one, a copy of which is before the court, is dated October 11, 1951, and reads: "Dear Madam, Municipal camping ground. As "you are aware the municipal camping ground at Sheepcote "Valley closes for the season on Sunday, October 28, and I shall "therefore be obliged if you will remove your caravan from the "site before that date. If you are unable to find alternative "accommodation, the caravan can be placed on the tarmac area "for the winter, at a storage charge of 12s. 6d. per week, but "during this period will not be accessible for residential purposes. "Yours faithfully, S. Avery, entertainments manager."

During October, 1951, the plaintiff and her husband packed up the things in the caravan, and, as they had not a car themselves, they gave the camp warden 5s. to remove the caravan on to the tarmac in accordance with the requirement. The caravan was on the tarmac until it was stolen on the night of March 11.

The regulation or condition on which reliance is placed by the corporation is regulation 8, which is in these terms: "Liability. "The corporation will accept no liability for injury to any person "using the camping ground or for damage to or loss of the "property of any such person."

It was not seriously contended that the regulation would not have protected the corporation if the caravan had been stolen during the summer when the plaintiff was using it. The submission on behalf of the plaintiff was that in the winter there was an entirely different position from that which existed in the summer; that there was a bailment of the caravan on the terms of the letter of October 11, 1951, and that regulation 8 did not apply. It was further submitted that when the caravan was on the tarmac, it was in the exclusive possession of the corporation; that the plaintiff could not use it for residential purposes, and that she was not a person "using the camping ground" within the words of regulation 8.

The defendants' case was that the regulation protected them in summer and in winter, and in whichever part of the camping ground the caravan was. They did not agree that there was a bailment, but they relied on the fact that the regulations described

that which was granted as a licence, and contended that there was nothing more than a licence.

No doubt there is a considerable difference between the summer season, when the caravan occupier is using the caravan, and is thus in possession of it, and when entry to the camping site is open and unrestricted, and the winter season, when the place is closed and the gate locked.

I agree with McNair J. that the winter arrangement was that the corporation should store the caravan for the plaintiff; in other words, that there was a bailment. Now, a bailee is only responsible for negligence, and thus, if regulation 8 applies to the contract as being one of bailment, it would absolve the corporation from liability for the negligence of their servants.

It is said on behalf of the plaintiff that the regulation does not apply to the winter parking, and that the plaintiff was not a person "using the camping ground" at the material time. I consider that this is too narrow and too technical a view. If it is right to say that the arrangements set forth in the book of regulations contemplate a different legal position as between summer and winter, it is equally right to say that the regulations are made to cover both, and that both parties to the contract must be assumed to have so intended. The plaintiff's caravan had been on the camping ground for more than three years, summer and winter, and in my view, on the ordinary understanding of the words, she was "using the camping ground" for the parking of her caravan both in summer and in winter. I do not think that the court ought to be swayed by refinements such as those put forward by counsel for the plaintiff, else one would reach the stage of having to consider whether a caravan owner who left the camping ground for a week, or for a month, was using the site within regulation 8. If the regulation is given its ordinary meaning, and that which the parties understood it to bear, it is sufficient to protect the corporation from liability on the facts of this case, as the judge held.

Furthermore, the first Sunday in March had passed before the caravan was stolen. It appears to me that, having regard to the arrangement between the parties and to their course of conduct, summer terms applied as from the first Sunday in March both as to the amount payable and otherwise whether the plaintiff moved the caravan back to the caravan site or not. I am in favour of dismissing the appeal.

DENNING L.J. During the summer months, the corporation gave to each camper a licence to use a caravan site for 25s. a week, which payment carried with it the right to use the facilities of the camp. The corporation did not let the site on a tenancy; they only licensed the camper to use it. They did not take possession of his caravan so as to become bailees of it. The camper remained in possession of it himself, and it was for him to take care for its safety. The corporation, as the camp authority, were, no

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doubt, under a duty to use reasonable care in their own sphere of operations. If their servants negligently ran into the caravan, they would be liable for the resulting damage. If they negligently allowed the camp to become filthy and insanitary, they would be liable for the resulting disease. But their responsibilities did not extend to locking up the caravans or chaining up the wheels so as to prevent their theft. That was the duty of the camper himself. The camp was open day and night throughout the summer, with campers and their friends coming in and out, with and without vehicles, without let or hindrance. In these circumstances the corporation could not be expected to be responsible for loss or damage to property not caused by them; and they were not in law responsible for it. In my opinion, condition 8 does no more than express the legal position as I have stated it. It is a warning to campers that they must take care of their own property. As such it is unobjectionable. It would not protect the corporation from their own negligence, for example, in running into the caravan.

During the winter months the position was different. The camp was closed. The road gates were kept locked; and the caravans of customers were parked on the hard tarmac. The corporation described them as being "stored" and made a "storage "charge" of 12s. 6d. a week. None of the camp facilities were available. During these months, I think the corporation were bailees of the caravans and responsible for their safe custody. If the corporation negligently left the gates unlocked so that a thief came and stole one of the caravans they would be responsible. I do not think that regulation 8 would protect them, because that, I think, only applies to the summer months when the campers are using the camping ground. In any case, I do not think that it is sufficiently clear to exempt them from their common law responsibilities.

The loss here occurred, however, during the summer months when the camp was open. The plaintiff was entitled to put the caravan on to a caravan site, but for her own convenience she left it on the tarmac for a week or two. That cannot, I think, increase the responsibilities of the corporation. All the facilities of the camp were available to her, if she cared to use them, and she was liable for the summer charges. Correspondingly, the corporation were only under the summer responsibilities.

The plaintiff must have known that, after the first Sunday in March, the camp was open day and night for people to come in and go out with and without vehicles. She could not expect the corporation to keep the gates locked on her account. She ought to have taken steps herself to safeguard the caravan, or she ought, at least, to have insured herself against loss. For these reasons I think the appeal should be dismissed.

Morris L.J. In order to determine the issues which arise in this case it first becomes necessary to decide what was the contractual relationship between the plaintiff and the corporation;

and, secondly, it is necessary to decide whether the camp regulations formed part of, or were incorporated in, any contract, and, if so, what is their meaning and effect? [His Lordship referred to the facts, and continued:]

In *Ashby* v. *Tolhurst*,[1] where the owner of a motor-car left it on a private parking ground and made a payment to an attendant and received a ticket which recorded conditions as to cars being left at owner's risk, Sir Wilfrid Greene M.R., in his judgment, said[2] "The first thing to do is to examine the nature of the "relationship between the parties, a matter upon which the "character of the ground is, I think, not without importance; "but the most important element is the document itself." In the present case the expression "winter parking" is significant and expressive. It denotes, as was the fact, that caravans (and only caravans, for motor-cars are not mentioned) may be left within the camp and in that part of the camp designated for the winter period, which means the period which in reference to the camp is regarded as winter.

It seems to me that whatever word of legal description is employed, it is to the terms recorded in the booklet (where the camp regulations are set out) that attention must be paid. Though the majority of the camp regulations only have effective operation while the camp is open, they all remain as effective camp regulations, and such as can operate even while the camp is closed do not lack effectiveness merely because others depend upon the camp being open.

One of the regulations applicable was, therefore, regulation 8, and it becomes necessary to consider its words and to see how they relate to the plaintiff. The question arises whether she was at the time of the loss of her caravan a "person using the camping "ground." In my judgment she was. The location and area of the camping ground are shown in the booklet. During the summer, when the plaintiff had her caravan on a caravan site, she might, if she chose, allow a long period to pass during which she did not go to the camp at all. She would, nevertheless, be a "person using the camping ground" within the meaning which those words in their context bear. So, during the period of winter parking, she would be a person using the camping ground. She could not go and occupy her caravan for residential purposes, but she could go down to see it, and if she wished she could attend to bedding or furniture or other contents; or she might not pay any visit. But whether present or absent, she would be a person using the camping ground.

Next it is necessary to consider the construction of the words in regulation 8. In *Rutter* v. *Palmer*,[3] Scrutton L.J. stated the rule or principle of approach as follows: "In construing an exemp-"tion clause certain general rules may be applied: First the

[1] [1937] 2 K.B. 242; 53 T.L.R. 770; [1937] 2 All E.R. 837.
[2] [1937] 2 K.B. 242, 248.
[3] [1922] 2 K.B. 87, 92; 38 T.L.R. 555.

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"defendant is not exempted from liability for the negligence of "his servants unless adequate words are used; secondly, the "liability of the defendant apart from the exempting words must "be ascertained; then the particular clause in question must be "considered; and if the only liability of the party pleading the "exemption is a liability for negligence, the clause will more "readily operate to exempt him."

Applying these principles to the present case, it is to be observed that the claim made in the action is based upon negligence alone. It is said that the defendants were negligent in that they did not take due and proper care of the caravan and of its contents. Regulation 8 provides that the corporation will accept no liability for the loss of the property of any person using the camping ground. But it is for such a loss that the present claim is brought. The words of the regulation may operate as an assertion or reminder that there is no liability in the corporation for the loss of any property for the reason that the corporation are not bailees, or they may record an exclusion of such liability for loss as there might be. If the corporation were bailees, their potential liability would be for negligence, and so the words would be apt to exclude liability on any such ground.

It is to be observed, however, that the words of regulation 8 are not as wide and as comprehensive as are the words which are found in some of the decided cases. Would the words exempt the corporation if one of their servants on duty in the camp wrongfully assaulted a camper and caused him injury? Would they exempt the corporation if one of their servants negligently drove a vehicle in the camp and caused personal injuries and damage to property? It is not necessary to decide these questions, but the fact that they can be raised lends support to the view that regulation 8 is indicative of, and declaratory of, the basis upon which persons use the camp. If a caravan is occupying a site while the camp is open, there is clearly no bailment, and if a caravan is removed by some third person without the owner's authority there is no liability in the corporation. If while the camp is closed a caravan is on the tarmac for "winter parking" I incline to the view that the corporation do not become bailees of it. I doubt whether there would be delivery of possession to the corporation. Furthermore, the existence of regulation 8 may be a pointer leading to the view that there was no bailment. In *Ashby* v. *Tolhurst* [4] Romer L.J. said: "But it is perfectly plain "in this case that the car was not delivered to the defendants for "safe custody. You cannot infer a contract by A to perform a "certain act out of circumstances in which A has made it perfectly "plain that he declines to be under any contractual liability to "perform that act." If, however, the corporation were bailees, then regulation 8 can, at least, operate to exclude liability for loss

[4] [1937] 2 K.B. 242, 255.

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due to negligence which would be the potential liability of the corporation as bailees.

In the present case the loss occurred during the time that the camp was open and the plaintiff became liable to pay the charge applicable to a caravan site in the summer season; it was merely because of arrangements which suited her convenience that the caravan had not been removed to a caravan site. Accordingly, even if the view is held that while the camp is open the corporation are differently placed, then when the camp is closed, it would seem only right that regard should be had to the conditions referable to times when the camp is open. I consider, therefore, that the corporation were not liable, and that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Woodham Smith, Borradaile & Martin; Sharpe, Pritchard & Co. for J. G. Drew, Town Clerk, Brighton.*

P. B. D.

[COURT OF APPEAL.]

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Evershed M.R., Denning and Hodson L.JJ.

Divorce—Cruelty—Sterilisation of husband—After birth of first child—Whether sterilisation cruelty.
Criminal Law—Assault—Sterilisation—Legality.

A husband and wife were married in 1934 when the wife was 21 years of age; the only child of the marriage was born in 1936. In 1938 the husband submitted to a sterilisation operation with the wife's knowledge. The husband and wife continued to live together, although there was increasing discord and quarrels in the home for 13 years until 1951, when the wife left. Sexual intercourse continued throughout this period. The wife petitioned for a divorce on the ground of cruelty:—

Held (Evershed M.R. and Hodson L.J., Denning L.J. dissenting) that, on the facts, the wife had not made out a case of cruelty. As between husband and wife, for a husband to submit himself to an operation of sterilisation, without good medical reason, would, unless his wife was a consenting party, be a grave offence to her which could, without difficulty, be shown to be a cruel act, if it were found to have injured her health or to have caused reasonable apprehension of such injury. If a husband submitted to such an operation without the wife's consent, and if the latter desired to have children, the hurt might be progressive to the nerves and health of the wife.

Per Denning L.J. An operation for sterilisation when done without just cause or excuse is unlawful, even though a man consents

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to it. If a man undergoes such an operation, he strikes at the very root of the marriage relationship. It is severe cruelty. Even if the wife, when young and inexperienced, consents to it, she ought not to be bound by it when in later years she suffers on account of it, especially when she was not warned that it might affect her health.

Per Evershed M.R. and Hodson L.J. We feel bound to dissociate ourselves from those observations. The question of illegality is irrelevant in the present case.

Regina v. *Coney* (1882) 8 Q.B.D. 534; *Rex* v. *Donovan* [1934] 2 K.B. 498; 50 T.L.R. 656; *J.* v. *J.* [1947] P. 158; 63 T.L.R. 435; [1947] 2 All E.R. 43 considered.

Appeal from Mr. Bush James Q.C., sitting as special commissioner.

A husband and wife were married on October 25, 1939, when the husband was 25 and the wife 21 years of age. They were both employed in a hospital. In 1936 a son, Leslie, the only child of the marriage, was born. In 1938 the husband underwent an operation for sterilisation in the hospital where he and his wife were employed. The wife knew of the operation but it appeared that she did not consent to it. The husband and wife continued to live together for a further 13 years until 1951, when the wife left. The wife petitioned for the dissolution of her marriage on the ground of cruelty. Commissioner Bush James dismissed the petition.

The wife appealed. The facts are more fully stated in their Lordships' judgments.

Edward Grayson for the wife.
L. I. Stranger-Jones for the husband.

The following cases were cited in argument in addition to those cited in the judgments: *Squire* v. *Squire* [1]; *Jamieson* v. *Jamieson* [2]; *Cackett* v. *Cackett* [3]; *Walsham* v. *Walsham.* [4]

Cur. adv. vult.

July 26. Their Lordships' judgments were read.

Denning L.J. The Master of the Rolls and Hodson L.J. have prepared a joint judgment, which my Lord, Hodson, L.J., will now read, and I will give mine afterwards.

Hodson L.J. This is an appeal from a decision of Mr. Commissioner Bush James given on October 29, 1953, whereby he dismissed a petition based on cruelty. The parties were married on October 25, 1934, and there is one child, a son Leslie, who was

[1] [1949] P. 51; 64 T.L.R. 371; [1948] 2 All E.R. 51.
[2] [1952] A.C. 525; [1952] 1 T.L.R. 833; [1952] 1 All E.R. 875.
[3] [1950] P. 253; 66 T.L.R. (Pt. 1) 723; [1950] 1 All E.R. 677.
[4] [1949] P. 350; [1949] 1 All E.R. 774.

born on December 19, 1936. At all material times the husband was employed as a hospital porter, first at the General Hospital at Croydon, and latterly at the Royal Northern Hospital, where they lived together from a time shortly before the birth of the child until the wife left the husband in September, 1951.

The case for the wife depends in the main on an allegation which appears in the petition as follows: "6. (iii) Less than 18 "months thereafter during the year 1938 the precise date thereof "your petitioner cannot remember the respondent without con- "sulting your petitioner, who had often expressed her desire to "have more children, informed your petitioner that he had seen "the surgeon at the Royal Northern Hospital and had arranged "for sterilisation which operation subsequently was performed, "thereby causing your petitioner to suffer great anguish and the "commencement of the deterioration of the marriage as afore- "said." The remaining allegations were summarized on her behalf in this court as consisting of the husband's dirty habits, of his excessive interest in Indian philosophy, art and music, and of his meanness in keeping her short of money. The question of money disappeared from the case, and the other two matters were dealt with by the commissioner in this way. [His Lordship read passages from the commissioner's judgment, and said:] This is, we think, clearly tantamount to a finding that, although the wife's evidence was not rejected on the topic of dirty habits, yet she had not proved anything sufficiently serious to be properly classified as an act, or acts, of cruelty on the husband's part, at any rate, taken in isolation from the rest of the case. As regards the Indian allegations, it appears to us that the commissioner was not at all impressed with the wife's complaint on this topic. After referring to the use of bad language, which was denied by the husband, and to other complaints of money shortage, to which we have referred earlier, the commissioner added that the petition contained a whole series of trivialities. He formed the opinion that there was discord in the household which became more exacerbated as time went on, and which (it may be) to a certain extent affected the wife's and also the husband's health, but that sexual relations had continued until shortly before the wife left.

We now turn to the main allegation upon which this appeal is founded, and which, in our opinion, is the only substantial matter to be considered, in view of the nature of the other allegations and the commissioner's conclusion thereon. The case sought to be made on behalf of the wife was that the husband had himself sterilised against her wishes, thereby causing a deep-seated and persistent grievance which disrupted the marriage, resulted in progressive deterioration of the relations of the parties, caused injury to her health or reasonable apprehension thereof, and culminated in the wife finding life so intolerable that she left the husband. This case was not made out to the commissioner's satisfaction. In our opinion, as we understand the judgment and the evidence, it failed for want of proof at all material points.

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The husband did in the year 1938 submit to a sterilisation operation performed, as he said, by a surgeon (who was named) at the well-known London hospital at which he was employed. As between husband and wife for a man to submit himself to such a process without good medical reason (which is not suggested here) would no doubt, unless his wife were a consenting party, be a grave offence to her which could without difficulty be shown to be a cruel act if it were found to have injured her health or to have caused reasonable apprehension of such injury. It is also not difficult to imagine that, if a husband submitted to such an operation without the wife's consent, and if the latter desired to have children, the hurt would be progressive to the nerves and health of the wife. But such was never the case put forward by the wife in the present proceedings. This operation, as it seems to us, took a relatively minor place among the wife's complaints both in her petition and in her evidence. She left her husband (according to her own evidence) because his temper got worse and worse. Although, according to her own admission, she plainly knew all about the operation before it was done, she said that she afterwards "refused to talk about it," and never suggested that he should (as could, apparently, have later been done) have his normal function restored. According to the wife the marriage was only "fairly happy" at the start, and though it subsisted a long time, matters appear to have steadily got worse for reasons altogether disconnected with the operation.

Did the wife consent to the operation? As we have said, there is not doubt on the wife's evidence that she knew that her husband was going to have it performed. She said that he had it done at the hospital where they were living, and that she took his clothes when he came out afterwards. In cross-examination her knowledge of the matter was further investigated. She said that he had told her what was going to be done. The following questions and answers follow: "(Q.) Did you make any attempt "to stop him having it done? (A.) I was so astounded and upset "at his making the suggestion to have it done that I could not "discuss it at that time. When first he spoke to me he just said: "'I will have to discuss it with you.' (Q.) You knew the surgeon "Mr. B? (A.) Yes. (Q.) And you knew the sister at the hospital, "Sister B., I think? (A.) Yes. (Q.) And the nurse who looked "after him, staff nurse C.? (A.) I do not remember the other "nurse's name. (Q.) I put it to you that you knew the surgeon "and the matron and the sister and everyone concerned with the "operation and that you never took any steps? (A.) No. (The "commissioner): Do you agree that you could have? (A.) No, "because my husband always had what he wanted. (Counsel): "But you did not approach any of these people and say you did "not want him to have the operation, did you? (A.) No."

The husband's evidence was to the effect that after the birth of Leslie the wife did not want any more children—that she was, indeed, very much afraid that she should; and, further, that,

because she disliked contraceptives, he consulted a surgeon, and said to her: "It is possible I understand to have an operation, "a simple thing, which will prevent our having any more children. "This will be a temporary measure and a slight operation can be "repeated later if we decide to change our minds." He was asked what she said to that, and he replied that she said that it was a good idea, and they agreed that it was.

In this state of the evidence the commissioner's finding is not very precise; but he said this "Apparently after the birth of the "boy Leslie, the parties were not happy, but they were having "intercourse and using preventatives, and then for some reason "this man goes and has this operation performed upon himself ". . . and I think that the wife quite possibly might have objected "to it." "Might have objected" could be read as meaning that "she possibly did so" or "that she might have done but did "not"; but, in view of the wife's own evidence, it is, in our view, quite impossible to conclude that she ever made any effective objection at all. She was living in the hospital and knew the persons concerned, surgeon and nurse, and had amply opportunity of making objection if she were not a consenting party. No doctor was called on either side, but we find it difficult to believe that any surgeon, a member of an honourable profession, would perform an operation of this kind on a young married man unless he was first satisfied that the wife consented.

We have already observed that the commissioner's findings are not perhaps as precise as we could have wished. But we find it impossible to avoid the conclusion that he did not accept the evidence of the wife (upon whom the onus of proof lay) that the husband had had the operation performed in disregard of her feelings and wishes, and notwithstanding her known desire to have more children. It is, indeed, reasonably clear that the wife (and her son) did not strike the commissioner as impressive witnesses, since he invited argument at the end of their evidence on the question whether the husband had any case to answer. It seems to us, therefore, that the wife's case fails in limine.

Even if, however, it were legitimate to find in her favour that the operation had been performed against the wife's will, this would not be the end of her difficulties. It would not be difficult, as we have said already, to construct in imagination a case of grave cruelty upon a wife founded upon the progressive hurt to her health caused by an operation for sterilisation undergone by her husband in disregard of, or contrary to, the wife's wishes and natural instincts. But, as we have pointed out, that was not the case presented by the petition and evidence of the wife in the present proceedings; and the question for us is, what did the wife here allege and prove? According to her evidence she never during the succeeding 13 years referred to the matter of the operation after her husband came back from it, although the husband said that she did once refer to it a year or so ago, by which he presumably meant shortly before she left home. When she did leave

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home she wrote to the husband as follows: "December 29, 1951. "To Mr. Bravery. I had hoped by now you would have started "the divorce proceedings, but apparently you have not so I shall "wait a week or two to hear from you via Leslie. If you do not "reply I shall start the proceedings myself bringing in the illegal "operation. This will mean bringing in also the name of the "surgeon and probably the hospital. I have no wish to do this "but unless you divorce me I have no choice. I may add that I "have it on good authority that it would win my case for me. So "I hope to get a note from you soon otherwise I shall take it that "you wish me to proceed. Sincerely yours, Iris Bravery." The reference in the letter to the illegal operation reads more like a threat to bring up something which the husband would not like resurrected than a serious complaint of the infliction of an injury upon the writer.

More serious still, so far as actual injury to health is concerned, the commissioner, in our view, negatived it by his finding. After referring to another case he said: "In that case it was proved "that the husband's conduct was such as definitely to affect his "wife's health and I have no evidence of that sort in this case." At the end of his judgment he said, referring to discord in the household: "It may be that to a certain extent that affected the "wife's health and also the husband's health." We do not regard this as a material qualification of the previous finding which was in accordance with the husband's evidence and not, we think, effectively contradicted by the wife. Certainly no medical evidence was called on her behalf to prove injury to her health.

In the absence of proof of actual injury to health, in a case of this kind, after the lapse of a period of 13 years from the act complained of, we do not think that the court is justified in drawing an inference of apprehended injury to health. We do not for ourselves think it legitimate, upon the commissioner's findings as to other causes of discord and as to the circumstances attending the operation, to attribute the deterioration in the marriage relationship to the effect on the wife of this operation. We do not forget that the wife said that for some time after the operation she could not bear her husband near her, but this was a matter of controversy. The husband attributed it to fear of conception dating from the birth of their only child. For these reasons we think that the appeal fails.

On the facts of the case, and the inferences to be drawn from the judgment of the commissioner, we have felt, accordingly, compelled to a different conclusion from that of Denning L.J., whose judgment we have had the advantage of reading in advance. The most, if not the only, significant question in the case has been undoubtedly the operation undergone by the husband for sterilisation in the year 1938. The divergence in view between Denning L.J. and ourselves has been mainly, if not entirely, in regard to the effect of this operation—did the operation or its consequences constitute cruelty to the wife? Though we do not

doubt the grave potentialities to the marriage relationship of such an operation, we think that in this case the commissioner clearly intended to find as a fact the wife's failure to establish that the husband, by undergoing, or as a result of his having undergone, the operation, had been guilty of "cruelty" to the wife; and our reading of the evidence, including the evidence directed to the wife's knowledge of, and consent to, (if not her initiation of) what was done, has not led us to any other conclusion than that which we attribute to the commissioner.

We also feel bound to dissociate ourselves from the general observations of the Lord Justice at the end of his judgment, in which he has expressed his view (as we understand it) that the performance upon a man of an operation for sterilisation, in the absence of "some just cause or excuse" (as was not, in his view, shown to exist in the present case) is an unlawful assault, an act criminal per se, to which consent provides no answer or defence.

The court must, no doubt, take notice of any relevant illegality which appears in the course of any proceeding before it. But in the present case, both the general question, whether an operation for sterilisation is prima facie illegal, and the more particular question, whether the operation here performed was a criminal assault, are alike irrelevant to the issue to be determined.

We have heard no argument adduced either to the general or to the particular question. Further, though it is true that no evidence was produced or called from the records or the staff of the hospital concerned showing what were the steps (if any) taken on the part of the hospital to see that the nature of the operation was fully appreciated and consented to by both spouses, we are not on that account prepared, in the absence of the surgeon and any member or representative of the hospital staff, to hold that the operation was done without proper justification. In *Regina* v. *Coney*,[1] one of the cases referred to by Denning L.J., the question decided was that persons voluntarily present at a prize fight could not be regarded as guilty of an assault, as aiding and abetting such a fight. The whole court expressed, however, the view that a prize fight was illegal, and the passage cited by Denning L.J. from the judgment of Stephen J. was related to this latter point: "the "injuries," he said,[2] "given and received in prize-fights are "injurious to the public both because it is against public interest "that the lives and the health of the combatants should be "endangered by blows, and because prize-fights are disorderly "exhibitions, mischievous on many obvious grounds." In our view these observations are wholly inapplicable to operations for sterilisation as such, and we are not prepared to hold in the present case that such operations must be regarded as injurious to the public interest.

In *Rex* v. *Donovan*,[3] also referred to by our brother, there was

[1] (1882) 8 Q.B.D. 534.
[2] Ibid.
[3] [1934] 2 K.B. 498; 50 T.L.R. 566.

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some discussion of cases of assault being per se unlawful, to which consent would be no defence; but none of the examples given appears to bear any close analogy to an operation for sterilisation, which was nowhere mentioned. It is, moreover, to be noted that, in the case cited, the conviction was quashed by the Court of Criminal Appeal, the court not being prepared to hold that the alleged assault (namely, caning or flagellation of a young girl), in spite of its disreputable character, could be regarded, without evidence of bodily harm likely to be done, or of the doer's intention (or both), as per se criminal.

In the circumstances of the present case and for the reasons we have given, we are unable to accept the conclusion of Denning L.J. at the end of his judgment. The nullity case of *J.* v. *J.*[4] appears to be the only other case in the books in which the fact of an operation for sterilisation came before the court. It was then argued for the petitioner that the operation had been an illegal act. The question of illegality was, however, irrelevant to the question then before the court as it is irrelevant in the present case. The court in *J.* v. *J.*[4] expressed no view on the point. In our view, in the circumstances of the present case, it is neither the duty nor the function of this court to do more than draw attention to the obviously grave potentialities of such an operation for the parties to a marriage: a matter which the facts of this case have well illustrated.

Denning L.J. The parties married on October 25, 1934, when the husband was 25 and the wife 21. They lived very happily together for two years until a son was born to them on December 19, 1936. About 18 months later, in 1938, a shocking thing took place. The husband underwent an operation to have himself sterilised. He was the porter at a London hospital. One of the surgeons operated upon him, and he was attended by the sister and staff nurse.

This operation provokes several questions. The first is: Why did the husband have this done? Let me give his answer in his own words. Counsel asked him: "What was the immediate "cause of the operation? (A.) It was because of my wife's "attitude towards the boy. He was not a baby to be caressed "and loved. He was a show-piece." Again: "Why did you agree "to have an operation for sterilisation? (A.) Because my wife "was so installed. She was so installed with the home, and with "this baby she had. (Q.) You said the baby was a show-piece? "(A.) Yes. (Q.) In what way? (A.) She wanted to have him "perfectly dressed, and when he was tiny, if there was the least "thing missing, she would be absolutely beside herself."

Those answers throw a flood of light on the husband's mentality. Why did he object to the wife treating the baby as a show-piece? Although he did not realize it, he must in some

[4] [1947] P. 158; 63 T.L.R. 435; [1947] 2 All E.R. 43.

strange way have been jealous of the place which the child had in the wife's affections; and his jealousy found expression in a determination not to give her any more children, seeing that was the way she treated this baby. But it may well be asked why go to the length of sterilisation? Why not use contraceptives? Both agreed that ever since the birth of the child, they had been having intercourse using contraceptives. He was the one who used them, not she. And yet he went and had himself sterilised. It is, as the commissioner said, "an amazing story"; and it was done simply because he was jealous of the baby. He did it so as to "pay her "out" for making so much of it. That seems to me to be cruelty in itself.

The second question is: Did the wife consent to it? The husband said she did. She says she did not. The commissioner has not accepted the husband's version. He has not found that the wife consented. On the contrary, he has found that the wife "quite possibly might have objected to it." I take that to mean that it is quite possible that she did object. But, nevertheless, she did not object as effectively as she might have done. The husband told her beforehand that he was going to have it done, but she did not go to the surgeon and protest. She was too astounded and upset, she said, to discuss it. I do not think this should be taken too much against her. It was not for her to approach the surgeon, but for the surgeon to approach her. It has never been suggested throughout this case that the surgeon ever saw her or asked her consent. The husband said that he signed papers assenting to the operation, but no one has ever suggested that she signed anything. If she had signed, I cannot help thinking that the paper would have been forthcoming, because the husband is still the head-porter of the hospital and has clearly had access to all the records dealing with the employment of himself and his wife. His counsel gave exact details of the dates and amounts of their wages, and so forth, which must have been got from the records. Nothing has been produced to show that she signed. Nor was the surgeon called. The only proper inference, to my mind, is that she did not consent.

The third question is: What was the effect of the operation? The physical details were not given in evidence, but if it was the same operation as in *J.* v. *J.*,[5] the result of it was to leave the husband just as capable as before of the actual sexual act and even of an emission but, nevertheless, to render him sterile. The husband said that his fertility could be restored by another operation, so long as this second operation was done within a few years—five years was mentioned—but not if it was delayed longer. The husband never had any such operation to restore his fertility; so that after 1942 or 1943 he was permanently sterile. It is significant that, on his own showing, it was then that the marriage fell to pieces.

[5] [1947] P. 158.

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The fourth question is: What was the effect of the operation on the wife? The commissioner says the operation "very probably "did affect her"; and, indeed, both parties agree that it did. She could not bear him near her. Let me give their answers in their own words: When the wife was asked "How did this opera-"tion affect you in your relationship to your husband and your "married life? (A.) Well, I was disgusted with him, and for "some time after the operation I could not bear him near me, and "especially since the operation he has become really effeminate "and I could not bear him near me." And as for the husband, he was asked: "How do you say things went on from 1942? "(A.) Things became very difficult. (Q.) In what way? (A.) My "wife could not bear me near her. If I tried to embrace her, she "became frivolent (sic) to begin with, and then she refused, and "I had to give up." I must say that that is just what I should expect. I cannot think of anything more disruptive of a marriage than for a party to sterilise himself in his way.

The fifth question is: What was the effect on the wife's health? The commissioner has summarized the position in these words: "There was discord in this household, and I think that the "position became exacerbated as time went on; and it may be "that to a certain extent affected the wife's health, and also the "husband's health." But the most cogent evidence comes from the son who was aged 15½ when his mother left and who stayed with his father for six months longer. His father said that he and his son were perfect friends. Yet this son gave evidence describing the rows which his parents had, and he attributed the responsibility for them to his father. He was asked: "Do you "remember how that affected your mother? (A.) It made her "very distracted and nervous and—well, she was very miserable. "(Q.) Did that show itself in any way? (A.) Yes, very often, "especially at night, I heard her crying, and she was nervous, "and it was this sort of thing that upset her, I am quite sure."

So on September 3, 1951, she left him after nearly 17 years of married life. Both had worked in the hospital for many years, he in the lodge, and she in the laboratory. They were regarded by the hospital folk as an ideal couple. But in their own home there was discord; and the health of both was injuriously affected. It is said that this injury to health was due to the discord in the home, not to the operation; but the two cannot be severed in this way. The operation produced the discord, and the discord produced the injury to health. There were other troubles, too, which seem to have followed on the operation. The husband had some unpleasant and distasteful domestic habits, and he was dirty and untidy. He also kept Indian idols and burnt incense in the sitting-room; but the wife seems to have acquiesced in this. These incidents by themselves could not be said to have been cruelty. The important question is the effect of the sterilisation.

After she left, she hoped that he would bring divorce proceedings. As he did not, she wrote a letter on December 29,

1951, in which she said: "If you do not reply, I shall start "proceedings myself, bringing in the illegal operation. This will "mean bringing in also the name of the surgeon and probably the "hospital. I have no wish to do this, but unless you divorce me "I have no choice. I may add that I have it on good authority "that it would win my case for me." She can, no doubt, be criticized for writing such a letter, but I do not think that she should be blamed overmuch for it. The marriage had come to an end. She wanted a divorce. She had no chance of getting one except by complaining of the operation; and she warned him that she would have to bring it in. That is all it comes to. The crucial question remains—whether by undergoing the operation he treated her with cruelty.

I start with this: There was no just cause or excuse for this operation at all. If the husband had undergone it without telling his wife about it beforehand, no one could doubt that it would have been cruelty. It was an act most disruptive of the married state, and she was the victim of it. It was indeed aimed at her, because it was done so as to prevent her having another child. It was likely to injure her health, and did in fact do so.

The only defence that I can see to the charge is the wife's acquiescence. He told her of the operation beforehand, and she made no effective protest. She stayed with him for years before instituting proceedings on account of it. This would be a defence if it amounted to condonation. But condonation was not pleaded, and the facts do not warrant it, and for this reason: when this husband was sterilised, the effect of it was not over and done with at once, like a blow with the fist or like an act of adultery. This operation had an effect which continued, day in and day out, year in year out, throughout the marriage. No act of sexual intercourse could result in a child. The effect on the wife's health might not be immediate. It might have a delayed effect. That seems, indeed, to have been what happened. The husband said that his wife first complained to him about the operation in 1942—four years after it had taken place—and that from that time things became very difficult. The son said that his parents had rows about the sterilisation operation, and he knew his mother very much wanted him to have a brother or sister. Eventually the wife, when she was aged 38, left her husband as she could stand it no longer. It is interesting to note that, in the only other case in the Law Reports where a husband had had himself sterilised, the wife agreed to it before marriage and put up with it for 11 years, and yet this court granted her a remedy by way of nullity. (See *J.* v. *J.*[6]) So here, I do not think that the acquiescence of the wife should deprive her of a remedy when the ill effects of the operation can last so long and be so devastating to the marriage. I think that the charge of cruelty was proved, and that she should be granted a divorce.

[6] [1947] P. 158.

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I have had the advantage of reading the judgment of the Master of the Rolls and Hodson L.J. in which they think that the wife must have consented, because she made no effective objection, and no surgeon would do this operation without her consent. I do not agree with this. I do not think she did consent, but even if I am wrong about this, even if we assume that the wife did consent at the time to the operation, I do not think that her consent then precludes her from complaining of its ill effects in later years, when it does in fact injure her health. In this respect an analogy is, I think, to be found from the criminal law about surgical operations.

An ordinary surgical operation, which is done for the sake of a man's health, with his consent, is, of course, perfectly lawful because there is just cause for it. But when there is no just cause or excuse for an operation, it is unlawful, even though the man consents to it. The classic instance is a case reported by Lord Coke, tried at Leicester in 1604, when a "young strong and "lustie rogue, to make him impotent," got his companion to cut off his left hand so that he might avoid work and be able the better to beg. Both were found guilty on indictment of a criminal offence.[7] A later instance can be given from early Victorian days when soldiers, as part of their drill, had to bite cartridges. A soldier got a dentist to pull out his front teeth so as to avoid the drill. In the opinion of Stephen J. both were guilty of a criminal offence. (See Stephen's Digest of Criminal Law, 3rd ed., p. 142.) Another instance is an operation for abortion, which is "unlawful" within the statute unless it is necessary to prevent serious injury to health. Likewise with a sterilisation operation. When it is done with the man's consent for a just cause, it is quite lawful; as, for instance, when it is done to prevent the transmission of an hereditary disease. But when it is done without just cause or excuse, it is unlawful, even though the man consents to it. Take a case where a sterilisation operation is done so as to enable a man to have the pleasure of sexual intercourse, without shouldering the responsibilities attaching to it. The operation then is plainly injurious to the public interest. It is degrading to the man himself. It is injurious to his wife and to any woman whom he may marry, to say nothing of the way it opens to licentiousness; and, unlike contraceptives, it allows no room for a change of mind on either side. It is illegal, even though the man consents to it; for it comes within the principle stated by Stephen J. (who was a great authority on criminal law) in *Regina* v. *Coney*[8]: "The principle as to consent seems to me to be this: "When one person is indicted for inflicting personal injury upon "another, the consent of the person who sustains the injury is no "defence to the person who inflicts the injury, if the injury is of "such a nature or is inflicted under such circumstances, that its "infliction is injurious to the public as well as to the person

[7] 1 Co.Lit. 127a, 127b; Hawkins P.C. 108.

[8] 8 Q.B.D. 534, 549.

"injured." That principle is well illustrated by *Rex* v. *Donovan* [9] and clearly covers cases of sterilisation.

Those cases under the criminal law have a bearing on the problem now before the court; because the divorce law, like the criminal law, has to have regard to the public interest, and consent should not be an absolute bar in all cases. If a husband undergoes an operation for sterilisation without just cause or excuse, he strikes at the very root of the marriage relationship. The divorce courts should not countenance such an operation any more than the criminal courts. It is severe cruelty. Even assuming that the wife, when young and inexperienced, consented to it, she ought not to be bound by it when in later years she suffers in health on account of it, especially when she was not warned that it might affect her health.

I would therefore, for myself, have allowed this appeal.

Appeal dismissed. Leave to appeal to the House of Lords refused.

Solicitors: *James Brodie & Co.; Hy. S. L. Polak & Co.*

B. A. B.

[9] [1934] 2 K.B. 498, 517.

[QUEEN'S BENCH DIVISION.]

* BROWN *v.* TROY & CO. LD.

1954
July 14, 15.
Gerrard J.

[1953 B. No. 1787.]

Building—Safety regulations—Safe means of access—"Every place"—Safe means of access "to every place at which any person . . . has "to work"—Whether duty limited to persons having to work on scaffolds—Concrete roadway—Uncompleted section—Scaffold board laid as temporary gangway to gate of premises—Building (Safety, Health and Welfare) Regulations, 1948 (*S.I.* 1948, *No.* 1145), *reg.* 5.

A surveyor was employed by defendant builders on a building site where they were constructing a new concrete roadway leading from a warehouse to the gate of the premises. The final section of the roadway had been excavated to a depth of 6 inches but had not been concreted and the defendants had laid, as a temporary gangway, a scaffold board. The surveyor, in the course of his duty, walked along the scaffold board, lost his balance and fell, sustaining injuries. He brought an action against the builders alleging, inter alia, a breach by them of regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948, by failing to provide a safe means of access to the plaintiff's work:—

[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

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Held, that, since the earlier words of regulation 5 enumerated a number of other places, in addition to scaffolds, at which a person might be required to work, and there were no words in the regulation limiting the effect of the words "sufficient safe means of access "so far as reasonably practicable shall be provided to every place "at which any person has at any time to work," those words applied to work carried out at all the places set out in the regulation and not only to work on scaffolds; and that the defendants therefore owed a duty to the plaintiff under the regulation. Since, however, the plank provided was a sufficient means of access and was as safe as it could reasonably be made for any employee on the building site, the defendants had fulfilled their duty under the regulation and accordingly the plaintiff's claim failed.

Decision of Hilbery J. in *Wingrove* v. *Prestige & Co. Ld.* [1953] 1 W.L.R. 449; [1953] 1 All E.R. 694 not followed.

Action.

The plaintiff, Edward Eustace Brown, aged forty-three, an experienced surveyor, was employed by the defendants, F. Troy & Co. Ld., builders and contractors, as a surveyor at a building site where the defendants were engaged upon the erection of a warehouse and the laying of a new concrete roadway. On September 19, 1952, although the work was practically finished, part of the concreting of the roadway along the side of the warehouse leading to the gate of the premises had not been completed, the final section leading to the gate having been excavated, filled with hard core, blinded with cinders and ash and covered with a reinforced mesh, but not concreted. Between the last concreted section of the roadway and the gate the defendants had laid a scaffold board 9 inches wide and 1½ inches thick, to form a temporary gangway. One end of the board rested on the last concreted section and the other on a ramp of asphalt in the vicinity of the gate. The board was supported in the centre by two bricks 9 inches long, laid with their length athwart the board, lying on top of each other so that the middle support was 6 inches in height. As the excavation on the unmade portion of the roadway was approximately 6 inches deep the board was supported by three points of approximately the same height.

At 5.30 p.m. on the day in question, the plaintiff, who, with one Cooper, had been measuring up the work done, was walking from the site office to the entrance gate. In order to reach the gate he had to walk along the scaffold board. In so doing, he lost his balance and fell, injuring his knee and ankle.

The plaintiff claimed damages from the defendants alleging that the accident and his injuries were caused by their negligence and breach of statutory duty. He alleged that they were negligent, in particular, in failing to support the board (which he said was warped and twisted) firmly and evenly, thereby exposing him to the danger of losing his balance (as he did) when the board suddenly moved as he walked across it; and he contended that the gangway was a trap and concealed danger. He further contended that the defendants, in breach of regulation 5 of the

Building (Safety, Health and Welfare) Regulations, 1948,* failed to provide safe means of access to every place at which the plaintiff had at any time to work, in that the gangway did not provide safe means of access to enable the plaintiff to survey the work being carried out by the defendants near the entrance gate of the premises.

The defendants denied liability. They alleged that the plaintiff's injuries were solely caused or contributed to by his own negligence in failing to put his foot squarely on the scaffold board or to walk with sufficient care or circumspection. They denied that they owed the plaintiff any statutory duty under regulation 5, contending that that regulation did not apply to the plaintiff's work.

The case is reported only on the point relating to alleged breach of statutory duty.

Rudolph Castle-Miller for the plaintiff.
Stephen Chapman for the defendants.

Case cited in argument: *Wingrove* v. *Prestige & Co. Ld.*[1]

GERRARD J., having stated the facts and reviewed the evidence, found that the plaintiff's allegation that the board was warped or twisted had not been made out; that if there had been a movement of the board it would not have been sufficient to throw the plaintiff off his balance, that a reasonable employer, considering the risk of injury, would not have taken more precautions than those taken by the defendants, and that in the circumstances there had been no breach of common-law duty. His Lordship continued:

In addition to the allegations of a failure of duty at common law, the plaintiff relies upon a breach of regulation 5 of the Building (Safety, Health and Welfare) Regulations, 1948. Mr. Chapman submitted that on any view of the case there could not be a breach of that regulation, and he cited, in support of that argument, the judgment of Hilbery J. in *Wingrove* v. *Prestige & Co. Ld.*,[1] where regulation 5 was considered. Hilbery J. said[2]: "Regulations 5 to 30 are regulations to protect from danger as far as possible a man using a scaffold. "The words in regulation 5 'and sufficient safe means of access "'shall so far as is reasonably practicable be provided to every

* Building (Safety, Health and Welfare) Regs. 1948, reg. 5: "Suitable and sufficient scaffolds shall be "provided for all work that cannot "safely be done on or from the "ground or from part of the building, or from part of a permanent "structure or from a ladder or other "available means of support, and "sufficient safe means of access shall "so far as is reasonably practicable "be provided to every place at which "any person has at any time to "work."

[1] [1953] 1 W.L.R. 449; [1953] 1 All E.R. 694.

[2] [1953] 1 W.L.R. 449, 456.

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Gerrard J.

"'place at which any person has at any time to work,' must "mean, it seems to me, a safe means of access to a place where "a person has to work on the scaffold; otherwise there would be "no relation to the purpose or purposes for which the scaffold "is erected or designed." Whilst having the greatest respect for Hilbery J.'s views on these matters, I feel constrained to differ from him in this particular matter. The regulation, it is perfectly true, comes under the general heading of scaffolds and means of access. [His Lordship read regulation 5 and continued.] Hilbery J. has said that the words mean safe means of access to a place where a person has to work on a scaffold, but it seems to me that that construction involves an addition of words at the end of the regulation having a limiting effect on the words as they stand by themselves. As a matter of construction, I do not feel that the addition is permissible unless the context compels it to make good sense of the regulation itself. The regulation could have read, "and sufficient safe "means of access so far as is reasonably practicable shall be "provided to every place at which any person has at any time "to work on a scaffold." But it does not do so. Moreover, the earlier words are words describing a variety of places in which people may have at any time to work which are not scaffolds. Indeed, the requirement of the regulation is that scaffolds shall be provided for work that cannot be done from the enumerated places, namely, "on or from the ground or from part of a "building; or from part of a permanent structure or from a "ladder or other available means of support." It seems to me that in those circumstances the very terms of the regulation setting out various places at which people may have to work contemplate safe means of access to all those places and not only to a scaffold as a place on which a person has to work. That is the view which I feel constrained to hold and, therefore, I reject Mr. Chapman's submission that regulation 5 cannot apply here because it applies only to safe means of access to a place where a person has to work on a scaffold.

I have to consider whether or not there has been a breach of regulation 5, and the means of access has to be sufficient and safe in so far as is reasonably practicable. What is the situation here? This plank was as safe as any plank is ever likely to be on a building site unless fantastic and elaborate precautions are taken. Such precautions are not required. The words "so "far as is reasonably practicable" negative any such requirement. I think that this plank was perfectly safe and sufficient in the ordinary course of work, and that to any employee on a building site it was as safe as it could reasonably be made. It was at a very low height. I do not think it was reasonably practicable to prevent the very small amount of movement which may have been possible in it. I am by no means satisfied that the plaintiff really knows what caused him to fall, and in that

sense the plaintiff has not discharged the burden of proof regarding the manner of causation of the accident. But even if a slight movement did cause him to lose his balance, when one takes into account all the factors, namely, what the plank was there for, how long it had been there, the height at which it was, what it was standing on, the very tiny amount of movement, the very sort of movement which one would expect to encounter on a building site, I think that there was sufficient safe means of access, so far as was reasonably practicable, to take the plaintiff or anyone else to a place at which he might have to work on this site. In the circumstances, regretfully, my judgment must be for the defendants.

Judgment for defendants.

Solicitors: *Radford, Frankland & Mercer; L. Bingham & Co.*

[CHANCERY DIVISION.]

* *In re* HALL'S SETTLEMENT. SANDERSON AND OTHERS *v.* INLAND REVENUE COMMISSIONERS.

1954
June 30.
Upjohn J.

Revenue—Estate duty—Valuation—Shares—Property deemed to pass—Shares in company controlled by deceased—Disposition within three years of death—Method of valuation—Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55.

On July 27, 1942, H., who died on September 30, 1943, voluntarily settled certain shares in a company in which he held a controlling interest on trust for his son and daughter. On the question whether the value of the shares was to be ascertained under section 55 of the Finance Act, 1940, or on an open market basis under section 7 (5) of the Finance Act, 1894:—

Held, that the shares were to be valued in accordance with the provisions of section 55 of the Act of 1940, since, on its true construction, that section applied to shares which, by section 2 (1) (*c*) of the Finance Act, 1894, were property deemed to be included in the property passing on the death of the settlor.

ORIGINATING SUMMONS.

The deceased, Harold Hall, was the owner of some 2,500 shares in a private limited company in which he had a controlling interest. By a voluntary settlement dated July 27, 1942, the deceased settled 400 of the shares in question upon trust for the benefit of his son and daughter. On September 30, 1943, the settlor died and the settled shares became liable to estate duty by virtue of section 2 (1) (*c*) of the Finance Act, 1894.

By this summons the court was asked to determine whether the value of the settled shares was to be ascertained in accordance

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[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

1954

Hall's Settlement, *In re.* Sanderson *v.* Inland Revenue Commissioners.

with the provisions of section 55 of the Finance Act, 1940,[1] under which the value had been agreed at £90 10s. a share, or in accordance with section 7 (5) of the Finance Act, 1894, under which the value would be in the region of £22 10s. a share.

F. N. Bucher and *J. A. Armstrong* for the plaintiffs.
B. L. Bathurst Q.C. and *J. H. Stamp* for the Crown.

The following cases, not referred to in the judgment, were cited in argument: *Cowley (Earl)* v. *Inland Revenue Commissioners*[2]; *Attorney-General* v. *Milne*[3]; *Potts' Executors* v. *Inland Revenue Commissioners.*[4]

Upjohn J. This summons raises an interesting point on the true construction of section 55 of the Finance Act, 1940, which imposes (provided certain conditions are satisfied) a method of valuing shares in a company. The section is a valuation section; it does not impose a liability. On the other hand, it is fair to say that its plain object is, by imposing a different method of valuation (shortly called "the assets valuation"), to produce a larger liability to duty than if the shares in the company are valued under section 7 (5) of the Finance Act, 1894; the basis of the

[1] Finance Act, 1940, s. 55: "(1) "Where for the purposes of estate "duty there pass, on the death of a "person dying after the commence-"ment of this Act, shares in or "debentures of a company to which "this section applies, then if—(*a*) the "deceased had the control of the com-"pany at any time during the three "years ending with his death . . . "the principal value of the shares or "debentures, in lieu of being "estimated in accordance with the "provisions of subsection (5) of "section seven of the Finance Act, "1894, shall be estimated by reference "to the net value of the assets of the "company in accordance with the pro-"visions of the next succeeding sub-"section. (2) . . . (*a*) The net value of "the assets of the company shall be "taken to be the principal value "thereof estimated in accordance with "the said subsection (5), less the like "allowance for liabilities of the com-"pany as is provided by subsection "(1) of section fifty of this Act in "relation to the assets of a company "passing on a death by virtue of sec-"tion forty-six of this Act, but subject "to the modification that allowance "shall be made for such a liability as "is mentioned in paragraph (*b*) of "that subsection unless it also falls "within paragraph (*a*) thereof."

S. 57: "(1) The provisions of sub-"section (5) of section eight of the "Finance Act, 1894 (which relate to "the delivery of particulars relating "to property forming part of an estate "in respect of which estate duty is "leviable on a death) shall, on a "death on which it appears to the "Commissioners that section forty-"six or fifty-five of this Act has effect, "apply to the company, and to any "other company to which the said "section forty-six or fifty-five, as the "case may be, applies, and to every "person who is or was at any time "an officer or auditor of that com-"pany or of any such other company "as those provisions apply to a per-"son who has administered any part "of the estate."

S. 65: ". . . Part IV of this Act "[which contains sections 55 and 57] "shall be construed as one with Part "I of the Finance Act, 1894."

Finance Act, 1894, s. 7 (5): "The "principal value of any property shall "be estimated to be the price which, "in the opinion of the Commissioners, "such property would fetch if sold in "the open market at the time of the "death of the deceased."

[2] [1899] A.C. 198; 15 T.L.R. 270.

[3] [1913] 2 K.B. 606, 611, C.A.; [1914] A.C. 765; 30 T.L.R. 476.

[4] [1951] A.C. 443, 456; [1951] 1 T.L.R. 152; [1951] 1 All E.R. 76.

latter valuation being as between a willing vendor and purchaser in the open market.

[His Lordship stated the facts, read section 55 (1) and (2), and continued:] I need not read section 50: it is sufficient to say that the valuation proceeds on a stringent basis, when looked at from the point of view of the subject. I think that I need only refer to two other sections of the Act of 1940. First, section 57 (1). [His Lordship read the subsection and continued:] The effect is that, where, as in this case, section 55 is admittedly applicable at any rate to the shares vested in the deceased at the time of his death, the Crown have powers of a most powerful character to obtain information with regard to the company.

The remaining section is section 65, and that provides (among other things) that "Part IV of this Act" (which contains sections 55 and 57) "shall be construed as one with Part I of the Finance "Act, 1894."

The question which I have to determine is whether the 400 shares settled by the deceased have to be valued in accordance with section 55 or on the usual open market basis. Mr. Bucher, for the subject, said, and I think rightly, that section 55 is intended to produce an additional liability to estate duty although it is, strictly speaking, not a charging section but a valuation section; and for the reasons which I have already given I agree with that submission. The whole object of the section is to produce an artificial method of valuation which will produce a larger liability than under the old method of valuation. Mr. Bucher pointed out that very grave hardship might arise if section 55 were applied to a case such as this; for whereas the Crown has ample powers to obtain information to enable it to make an assets valuation it might well be impossible for the trustees of the settlement to obtain the like, or indeed any, information from the company. If the trustees still hold the shares, they will no doubt have the advantage of a balance sheet and profit and loss account, but that does not do much to assist them in an assets valuation; and, of course, the company in any given case may well refuse to give the trustees any additional information to enable them to resist the demands of the Crown; and so Mr. Bucher rightly pointed out that the section, if it was to be applied in circumstances such as these, might well work a great hardship upon the subject. But ultimately it comes to a question of construction of section 55.

I have been referred to a number of sections in the Finance Act, 1894, and in other Finance Acts, where the words used have been somewhat similar to the words in section 55: that is to say, there has been a reference to "property passing upon the death." In some cases those words have been held to include or obviously do include property which, though not actually passing upon the death, is to be deemed to be included in property passing upon the death, by virtue of section 2 of the Finance Act, 1894. For

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instance, in sections 4 and 7 of the Act of 1894, it is obvious that the reference to "property passing on the death" includes property which is deemed (to put it shortly) to pass on the death. Section 4 is the aggregation section and section 7 is the valuation section; and if one did not include, in references in these sections to "property passing," property which is to be included in the property passing, though not actually passing, it is clear that one would make nonsense of the whole scheme of the Act, therefore one must give a wide meaning to the phrase.

There is no such compelling necessity in this case. The property does not escape taxation. The only question is, what is the basis of valuation?

Then, again, there are other sections (a number have been mentioned to me) where the context plainly requires that "property passing" should include property which is deemed to pass. I need only mention section 51 of the Finance Act, 1947, where it is plain that the section has made its own dictionary with regard to the property passing.

Then there is, at any rate, one decision, *Attorney-General* v. *Milne*,[1] where the property passing has been held to exclude property which notionally passed: that was on the construction of section 5 of the Act of 1894. That section was a charging section which imposed in certain circumstances upon property a further estate duty called settlement estate duty.

Speaking for myself, I do not derive a great deal of assistance from the consideration of similar words in other sections of other Acts. It seems to me that the only safe canon of construction which I can adopt is to give the words their natural meaning, unless the context otherwise requires. By section 55 (1), "Where ". . . there pass, on the death of a person . . . shares . . . or "debentures," then certain consequences follow. Prima facie the reference to "there pass . . . shares . . . or debentures" as a matter of grammar means an actual passing and does not include a notional passing. Strong support for that view is to be found in *Milne's* case,[2] and though it is true that it is distinguishable from the present case, because it was concerned with a new liability and because section 2 of the Finance Act, 1894, had no reference to settlement estate duty, yet, nevertheless, it is plain that at any rate Lord Parker of Waddington and I think also Viscount Haldane L.C. did intend to decide the case upon a broader principle, because Viscount Haldane L.C. said[3]: "Having come to this conclusion, I see no answer to the reason-"ing of Buckley L.J. in the Court of Appeal." Buckley L.J. quite plainly decided the matter on the broad principle that it did violence to the language in section 5 of the Finance Act, 1894, to construe the word "passes" in that section as "notionally passes."

[1] [1914] A.C. 765; 30 T.L.R. 476.
[2] Ibid.
[3] [1914] A.C. 771.

Lord Parker of Waddington expressed the same view[4]: "The "Finance Act"—that is, the Act of 1894—"is a taxing statute, "and if the Crown claims a duty thereunder it must show that "such duty is imposed by clear and unambiguous words. All the "words of section 5 can be satisfied without having recourse to "any notional passing of property, and in my opinion considerable "violence would be done to these words if the idea of a notional "passing of property were introduced into the section."

However, the words "there pass" in section 55 do not stand by themselves. They are preceded by words which I regard as of great importance. They are, "Where for the purposes of estate "duty there pass." Section 1 of the Finance Act, 1894, it is well known, imposes a charge to estate duty upon property actually passing. Section 2 is a "deeming" section and starts in this way: "Property passing on the death of the deceased shall be "deemed to include the property following, that is to say"; and then it sets out four classes of property which do not actually pass on the death, but are necessarily included in property as though they did pass, in order to give effect to the whole scheme of estate duty legislation.

The point was put very shortly by Lord Sands in *Lord Strathcona* v. *Inland Revenue Commissioners*[5]: "The theory "underlying a revenue Act must bow to its express provisions, "but an appreciation of the theory may sometimes help "to elucidation. It appears to me that the theory of the "provisions here in question was, just as in the case of the 1881 "Act, that, in order to avoid disappointment of the estate duty, "the property donated should be treated just as if no donation "had been made, and the property in question had remained part "of the deceased's estate and had actually passed upon his "decease. The property is deemed to pass; that is to say, "for the purposes of estate duty, it shall be treated as if it had "passed." It is worthy, I think, of note that the words of the section are not "deemed to pass" but "property passing . . . "shall be deemed to include" certain property. On the other hand, the side-note to the section is, "What property is deemed "to pass."

Now the real question I have to consider in this context is: For the purposes of estate duty, do "there pass" shares which have been given by the deceased within three years of his death? There is no doubt that those shares are caught by the provisions of sub-paragraph (*c*) of section 2 (1) of the Finance Act, 1894. That, of course, is conceded. Ought I, therefore, to hold that for the purposes of estate duty those shares, being caught by section 2, do pass; or ought I to give the section a meaning which excludes those shares? Of course, it is well known since the *Cowley* case[6] that section 2 is not a definition section as to the

[4] Ibid. 781.
[5] 1929 S.C. 800, 807
[6] [1899] A.C. 198.

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meaning of "property passing"; but when I see that in section 2 the "property passing on the death" is "deemed to include" certain property which includes the property in question here, it seems to me that the natural meaning of the opening language of section 55 is apt and appropriate to include property which actually passes under section 1, and also property which is to be deemed to be included in that property for the purposes of section 2; and I declare accordingly.

Declaration accordingly.

Solicitors: *Peacock & Goddard for Sanderson & Co., Hull; Solicitor of Inland Revenue.*

[COURT OF APPEAL.]

C. A.

July 27, 28. 1954

Evershed M.R., Jenkins and Hodson L.JJ.

* *In re* A DEBTOR: *Ex parte* THE DEBTOR *v.* SCOTT AND THE OFFICIAL RECEIVER

[No. 20 of 1953.]

Bankruptcy—Petition—Debt—Requirements—At date of act of bankruptcy debt of damages and untaxed costs—Costs subsequently taxed—Whether good petitioning debt—Validity of bankruptcy notice—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 2 (ii), 4 (1), 5 (2).

In July, 1953, a petition in bankruptcy was presented by a creditor based on the sum of £200 damages awarded to her (together with costs) in an action in the Queen's Bench Division, in which judgment had been given on March 17, 1953. A bankruptcy notice had been issued on April 16, based on the damages alone. The time for compliance with the notice was extended to July 3. On July 17 the taxing master issued his certificate. The taxed costs amounted to £226.

The petition was filed on July 28, alleging a debt of £426.

The hearing of the petition was, on October 21, 1953, adjourned pending the hearing of an appeal in the action. On October 22, 1953, the Court of Appeal reduced the damages to £25 and allowed the debtor to set off one-half of his costs in the Court of Appeal against the judgment against him in the court below.

On November 27, 1953, the petition was restored and a receiving order was made against the debtor.

The debtor appealed to the Divisional Court in Bankruptcy, on the grounds that the reduction by the Court of Appeal of the sum of £200 to £25 left a figure which was not a correct figure for bankruptcy proceedings, and that the registrar in the county court had wrongly proceeded with the hearing of the petition, as he did not know at what figure the costs awarded to the debtor which had not then been taxed, ranked. The Divisional Court dismissed the appeal:—

Held, that, although the requirements of sections 4 (1) and 5 (2) of the Bankruptcy Act, 1914, that the debt on which a petition was founded must amount to £50 and be a debt for a liquidated sum, both at the date when the petition was presented and at the

date of the hearing, were satisfied, the further requirement under the common law of bankruptcy that the petitioning creditor's debt must also be shown to have existed and to satisfy the statutory requirements also at the date of the act of bankruptcy, was not satisfied. On July 3, 1953 (the date of the alleged act of bankruptcy), the costs of the action could not be said to constitute a liquidated debt presently payable to the creditor, for they had not then been taxed and certified, and the petitioning creditor could not say that the whole of the debt upon which she founded her claim had existed as a debt available for bankruptcy purposes under section 4 at the time of the act of bankruptcy.

In re Debtors (669 of 1926) [1927] 1 Ch. 19 followed.

In re Crump (1891) 7 T.L.R. 556 considered.

Decision of the Divisional Court (Harman and Danckwerts JJ.) [1954] 1 W.L.R. 393; [1954] 1 All E.R. 454 reversed.

Appeal from the Divisional Court.

On March 17, 1953, the petitioning creditor (Mrs. Suzane Scott), in an action in the Queen's Bench Division, obtained judgment against the debtor for £200 and costs. On April 16, 1953, a bankruptcy notice based on that sum of £200 (the costs not having then been taxed) was issued against and subsequently served on the debtor.

The debtor opposed the bankruptcy notice and the registrar dismissed his opposition. On June 17, 1953, the debtor appealed to the Divisional Court against the registrar's decision and his appeal was dismissed. On July 17 the taxing master made his certificate and allowed the costs at £226 9s. 9d.

On July 28, 1953, a petition in bankruptcy was filed in the Brentford County Court for a receiving order against the debtor. The petition was presented by the creditor and stated that the debtor was indebted to her under the judgment in the Queen's Bench action in the sum of £426 9s. 9d., being £200 in respect of damages awarded by the court in the action and £226 9s. 9d. in respect of the taxed costs of the action. This petition came on for hearing on October 21, 1953, when the hearing was adjourned pending an appeal by the debtor from the decision in the Queen's Bench action. That appeal was heard by the Court of Appeal on October 22, 1953, and was allowed to the extent that the damages awarded were reduced to £25, the order as to costs being undisturbed, save that the debtor was allowed to set off one-half of his costs in the Court of Appeal.

On November 27, 1953, the petition was restored and a receiving order in bankruptcy was made against the debtor by the registrar of the Brentford County Court.

On December 18, 1953, notice of appeal against the receiving order was given by the debtor, in which he put forward as grounds of appeal that in the events which had happened no available act of bankruptcy had been proved; and that when the petition (which was for £426 9s. 9d.) was before the registrar at the Brentford County Court, he proceeded with it before the debtor's costs in the Court of Appeal had been taxed.

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On January 25, 1954, the appeal came on for hearing before the Divisional Court in Bankruptcy who dismissed the appeal.

The debtor appealed.

Muir Hunter for the debtor.

Michael Corley for the petitioning creditor.

The only cases cited in argument are referred to in the judgment of Evershed M.R.

Evershed M.R. In this case, Harman J. opened his judgment in the court below with the words, " This case raises one " or two novelties "; and, indeed, it does. In order to appreciate what are the points which we have to decide, it is necessary, briefly, to give the history of this litigation. It begins, so far as it is relevant, with a judgment pronounced on March 17, 1953, in an action by the petitioning creditor as plaintiff against the appellant debtor as defendant, by Lynskey J. for the sum of £200 damages and costs. The action related to certain land in Eel Pie Island on the River Thames, on which island the two parties to the action were neighbours. The debtor asked for a stay of execution, intimating that he desired to appeal; but, in effect, no stay was granted. Thereupon the petitioning creditor served a bankruptcy notice upon the debtor in respect of the sum of £200. The debtor applied to set that bankruptcy notice aside, but that application did not succeed. The Bankruptcy Court did, however, grant, from time to time, extensions of the time within which the debtor was required to comply with the bankruptcy notice. Finally, the time for compliance was extended until July 3, 1953, and that date is of some significance, for the taxation of the costs which the debtor had been ordered by Lynskey J. to pay had not then been completed.

In the meantime, however, the debtor had served a notice of appeal against Lynskey J.'s judgment, and the appeal was heard on October 22, 1953, and the order made by this court was in the following terms: " It is ordered that this appeal be allowed " and the judgment herein of the Honourable Mr. Justice Lynskey " dated the 17th day of March 1953 whereby it was adjudged " that judgment be entered for the plaintiff for the sum of £200 " with costs aforesaid be varied by substituting the sum of £25 " for the sum of £200. It is further ordered that the defendant " do have one-half of the costs of this appeal such costs to be " taxed by a Taxing Master and set off against the judgment debt " and costs." In my judgment, the form of orders of that kind may require hereafter a little careful consideration according to whether the court does, or does not, intend that the sum total of the original debt plus costs, or the original debt as reduced plus costs, should be subject to a set-off which might have the effect of extinguishing the debt itself altogether; or whether it is merely intended to give to the appellant in such a case a right

to set-off the costs which he is entitled to recover against the costs, or the costs plus the judgment, which he is bound to pay.

The taxation of the costs of the action before Lynskey J. was completed exactly fourteen days after the expiry of the time for compliance with the bankruptcy notice, the taxing master's certificate bearing the date July 17, 1953. Those costs, when taxed, amounted to £226. We have not before us any copy of the judgment itself, but counsel have told us it followed the form, usual in actions in the Queen's Bench Division, which will be found in Appendix F to the Rules of the Supreme Court, and this case has been argued upon the footing that the judgment did take that form.

Looking at the form, it will therefore appear that the judgment starts by being dated, that being in accordance with the earlier rules, and the date on which this judgment or order was made was March 17, 1953. It thus provided, according to the form, as follows: "It is this day adjudged that the plaintiff "recovered against the defendant £200 and [blank pounds] "costs." Then the form goes on: "The above costs have been "taxed and allowed at [blank pounds] as appears by a taxing "officer's certificate dated the [blank] day of [blank]."

As we have been informed, and as we understand, when the judgment in this case was completed and perfected on March 17, it became a judgment for £200 immediately enforceable for that sum, but on July 17, or immediately after July 17 when the taxing master's certificate was given, the blanks in the final paragraph I have read were filled in, so that thenceforth the order would read with the first blank for costs filled in with the figure of £226 9s. 9d., and the last paragraph would read: "The above "costs have been taxed and allowed at £226 9s. 9d. as appears "by a taxing officer's certificate dated the 17th day of July, "1953." That would be the form which the judgment took.

The next date to mention is eleven days later, when the petition in the present case was presented by the petitioning creditor. The petition states, so far as is material, that the debtor "is justly and truly indebted to me in the aggregate sum of "£426 9s. 9d. under a judgment of the High Court of Justice "dated the 17th day of March, 1953, being £200 in respect of "damages awarded by the court in the action to which the said "judgment relates and £226 9s. 9d. in respect of the taxed costs "of the said action." In the final paragraph the petition alleges that the debtor "within three months before the date of presenta-"tion of this petition has committed the following act of bank-"ruptcy, namely, he has failed to comply before the 3rd day of "July 1953"—which it will be remembered was the final date given for compliance—"with a bankruptcy notice issued against "him in this court . . ." and then particulars of that bankruptcy notice are given.

The petition first came on for hearing on October 21, being the day before, as the bankruptcy registrar was informed, the appeal

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was coming on in this court. The hearing of the petition was therefore adjourned until after the appeal had been heard and decided. It finally came before the registrar on November 27, 1953. A receiving order was then made.

It will be appreciated that there had been something of a change in the nature of the obligations of the debtor to the petitioning creditor between the time when the petition was presented and first came on for hearing, and the time when it came for the second time to be heard, for in that interval the £200 had been reduced to £25, and the debtor was at least given the right to set-off half his costs in the Court of Appeal against the judgment debt so reduced and the costs of £226 which he had been ordered to pay. But the registrar proceeded on what is a simple, and may be called a common-sense arithmetical view. I read now from Harman J.'s judgment: "He simply took the "view that, as the costs to be taxed in favour of the debtor "when taxed would not reduce the total debt of the creditor "below £50, there was a good petitioning creditor's debt and a "receiving order ought to be made." I should perhaps say in explanation that, although the costs in the Court of Appeal had not been taxed, the debtor was able to give a reasonably accurate forecast of what they would amount to, and that forecast justified the arithmetic which I have stated from Harman J.'s judgment.

The debtor appealed against the receiving order, and two grounds of appeal were taken and were considered by the judges. The first point taken was that as a result of the order of the Court of Appeal first reducing the judgment debt to £25 and then providing for a set-off, and since the debtor's costs would be and were admittedly more than £25, therefore the original debt, the non-payment of which constituted the alleged act of bankruptcy, had ceased to exist altogether.

The matter was thus put by Harman J.[1]: "Under section 5 of "the Bankruptcy Act, 1914, the court is bound to require proof of "the act of bankruptcy, and it is said here that it could not be "satisfied in that respect because, in the events which happened, "there was no proof of an act of bankruptcy despite the fact "that this court had declared the act of bankruptcy a good one "and there has been no appeal against that. This bizarre result "is arrived at in this way. It is said the act of bankruptcy "alleged was respecting £200. The Court of Appeal reduced that "to £25. £25 would be a sufficient debt to avail as an act of "bankruptcy, but it is further said that the debtor has the right "to set off against the debt, that is to say, the £25, the right to "costs which may amount to £60, and, therefore, having regard "to the effect of the order of the Court of Appeal, there was no "debt to support the act of bankruptcy, the condition of the "statute was not complied with, and the court cannot make an "order."

[1] [1954] 1 W.L.R. 393, 395; [1954] 1 All E.R. 454.

Then secondly the point was taken, and again I will read from the judgment,[2] that if a creditor "serves a bankruptcy "notice on a man for a very large sum which he cannot pay and "follows it up by a petition admitting that the sum is very much "smaller, the debtor has suffered an injustice" and, therefore, putting it briefly, in the exercise of the discretion under sub-section (3) of section 5, the court ought to refuse to make a receiving order.

The judges, Harman and Danckwerts JJ., rejected both those arguments, and, for my part, I do not in any way dissent from the view which they took upon them. On the more general point, the second one, I think that it is sufficient to say, as the judges said, that there was here no such case made out which would justify the exercise of discretion in the debtor's favour. Upon the former point, I cannot, I think, do better than read a short passage from Danckwerts J.'s judgment[3]: "It is true that the "judgment of Lynskey J. for £200 was reduced by the Court of "Appeal to £25, and, therefore, the bankruptcy notice when it "was issued was demanding a sum which ultimately turned out "to be larger than the proper sum. Presuming, therefore, that "it is to be treated as stating too large a sum, and that the "judgment of Lynskey J. must be treated as if it ought to have "been from the beginning one for £25, it seems to me that that "amount was a valid subject for a bankruptcy notice. As to "the argument that it would be wiped out by the amount of costs "which were recoverable by the debtor under the order of the "Court of Appeal, I agree that, at the date of the bankruptcy "notice, that right of the debtor could not possibly be operative. "It was a claim which did not and could not arise until the "Court of Appeal dealt with the matter on October 22, 1953."

In other words the judges were of opinion, putting it briefly, as Jenkins L.J. put it during the argument, that at each stage of these proceedings one should take the facts as one found them.

But another point was taken before us which, if it was taken before the judges in the court below, is not noticed in their judgment, and upon which, in my view, the debtor is entitled to succeed. The point is this: The petition which I have read was founded upon the claim that the debtor was indebted to the petitioning creditor in the sum of £426 odd; of that sum, £226, rather more than half, represented costs. As I have said, those costs were not taxed, and the figure therefore was not ascertained until July 17, two weeks after the date of the alleged act of bankruptcy. It has been argued by Mr. Muir Hunter (and, in my view, correctly argued) that the petitioning creditor must establish that the debt on which his petition is founded was a debt presently payable and available to the petitioning creditor at the date of the act of bankruptcy—though he need not show

[2] [1954] 1 W.L.R. 393, 396. [3] [1954] 1 W.L.R. 393, 397.

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that non-payment of the whole debt constituted the act of bankruptcy alleged.

In order to make that point good, I will refer to two sections of the Bankruptcy Act, 1914. Section 4 (1) provides: "A "creditor shall not be entitled to present a bankrupcy petition "against a debtor unless—(*a*) the debt owing by the debtor to "the petitioning creditor, or, if two or more creditors join in "the petition, the aggregate amount of debts owing to the "several petitioning creditors, amounts to £50, and (*b*) the debt "is a liquidated sum, payable either immediately or at some "certain future time. . . ."

Section 5 (2) provides: "At the hearing"—that is, the hearing of the petition—"the court shall require proof of the debt of "the petitioning creditor, of the service of the petition, and of "the act of bankruptcy, or, if more than one act of bankruptcy "is alleged in the petition, of some one of the alleged acts of "bankruptcy, and, if satisfied with the proof, may make a "receiving order in pursuance of the petition." It is well known that bankruptcy is a matter which not only affects the debtor and his status, but it also affects the general public, and the court therefore has a duty to see that all the requirements, either express or implicit in the statutes, have been strictly observed.

The statute itself makes it quite plain that the petitioning creditor's debt—that is, the debt on which the petition expresses itself as founded—must be proved to be existing and have the quality and character mentioned in section 4, both at the date when the petition was presented, and at the date of the hearing.

In this case those statutory requirements are satisfied, but I think that there is a further requirement which emerges from what has been called the common law of bankruptcy, that is, the rules or principles which the courts have held to be applicable in bankrupcy proceedings, though in terms this requirement does not appear to be expressly stated in the statute. The requirement, in my judgment, is that the petitioning creditor's debt must also be shown to have existed and to have the necessary character and quality stated in section 4 at the date of the act of bankruptcy as well as at the date of the presentation and hearing of the petition.

I think that that does emerge sufficiently from the case to which Mr. Muir Hunter alluded, and which I understand he did not cite in the court below, *In re Debtors* [669 of 1926].[4] That was a case in which the debtors were members of a rubber trade association, and the debt arose out of the contract (as I follow it) which membership of that association involved; but the headnote, which sufficiently bears upon the present case, is as follows: "In order to constitute a good petitioning creditor's "debt the debt must be a liquidated sum, payable either "immediately or at some certain future time at the date of the

[4] [1927] 1 Ch.D. 19.

"act of bankruptcy. It is not sufficient that the debt should "have become a liquidated sum in the interval between the date "of the act of bankruptcy and the presentation of the petition." Subject to one point that is the situation here. The statement in the headnote is founded upon the judgment of Lord Hanworth M.R., and particularly the passage on p. 27.

After referring to the judgments of Cockburn C.J. in *Ex parte Muirhead*[5] and Bacon C.J. in *In re Whelan*,[6] Lord Hanworth M.R. states[7]: "The decisions in those cases show that there "must be at the date of the act of bankruptcy an available debt "payable and due from the debtor, and therefore, under "section 4 of the Bankruptcy Act, 1914, the creditor is not "entitled to present a bankruptcy petition against the debtor "unless the debt is a liquidated sum." He then cites a passage from the then edition of Williams' Bankruptcy Practice (13th ed., p. 42): "By what may be called the Common Law of Bankruptcy, "it has always been held that the petitioning creditor's debt must "have accrued due before the act of bankruptcy on which it is "intended to found the petition . . . but the debt need not have "been due to the petitioning creditor at the date of the act of "bankruptcy." The last sentence has no bearing on the present case. Warrington L.J. refers to the same passage in the textbook, and concludes thus[8]: "In my opinion that passage correctly "expresses what is really the law, that is to say, the debt must, "at the date of the act of bankruptcy, be such a debt as could "be relied upon by the petitioning creditor to support his bank-"ruptcy petition."

I have sufficiently stated the facts to make it clear that, if the matter is looked at in the way which, when I was considering the rest of the case, seemed to me to be the correct way, that is to say, by treating the facts as they were at each of the various stages, then on July 3, 1953 (the date of the alleged act of bankruptcy), it could not be said of the costs of the action that they constituted a liquidated debt presently payable to the creditor, for they had not then been certified.

But to meet that, Mr. Corley has contended that the form of the judgment which I have read by my reference to the forms in Appendix F has this effect: that after the taxing master has certified the costs, and the amount of those costs has been written into the judgment, then for all purposes (or at least for the purposes with which we are concerned) we must treat the sum of costs as having been written back and related back to the date of the original order, namely, March 17, 1953, so as to enable the creditor to say, when her petition came to be heard: "I am now in a position to say that the sum of costs was, on "July 3, a liquidated debt presently payable."

[5] (1876) 2 Ch.D. 22, 25.
[6] (1878) 48 L.J.Bk. 43, 44.
[7] [1927] 1 Ch. 19, 27.
[8] Ibid. 29.

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I have been unable to accept that view. I think, apart from any other considerations, that the circumstance that the order refers to the date of the certificate, which in this case would be July 17, makes it impossible to say that one has got to read this order as though it had, from the start, included the sum of £226. It is quite true that under the rules as they now are, and following the Judgments Act, 1838, it is established that interest on costs will, prima facie, run from the date of the judgment; that is to say, the debtor will be liable to pay interest on the sum of costs when finally ascertained—namely, £226—from a back date, that is, the date of the judgment, March 17. That may well be so, but that does not seem to me to carry with it the consequence, particularly in a bankruptcy matter, that we must treat the original judgment as though it contained from its own date the figure of £226 as part of the sum due—a figure which it did not in fact contain; and I think that that view of the matter is supported by another case in 1891, to which Mr. Muir Hunter referred us, *In re Crump.*[9] That does not bear directly upon the present case. It was of this nature: a judgment had been obtained in the same form as is found in Appendix F, but it so happened that in that case the sum of costs, though it had been ascertained and the taxing master had given his certificate or allocatur, had never been written into the order, and the Divisional Court took the view that this could not therefore be a proper debt upon which a petition in bankruptcy could be founded since the sum, never having been put into the order, was not capable of being recovered by court process and no execution could have been issued in respect of it. Thus is to be found in the report the note: "At the request of the court "Master Pollock attended and informed the court that execution "could not be issued on such a judgment and the allocatur. The "practice was always to fill up the judgment. It might happen "that in certain cases the clerk might take the judgment and "the allocatur from the solicitor, but before execution could be "issued the practice was always to fill up the judgment first." Upon that view the court expressed the opinion that the appeal must be allowed and the receiving order must be discharged.

It seems to me that the argument in that case is in line with the view which I have formed myself in the present case, and supports my conclusion that, since these costs had not been finally taxed and the amount had not been inserted in the order until on or after July 17, it was impossible for the petitioning creditor to say that the whole of the debt upon which she founded her claim had existed as a debt available for bankruptcy purposes under section 4 at the time of the act of bankruptcy.

In those circumstances, I arrive at the conclusion that this debtor is entitled to succeed and that the appeal must be allowed, and the receiving order discharged.

[9] (1891) 7 T.L.R. 556.

C. A.
1954
A Debtor, *In re. Ex parte* The Debtor *v.* Scott.

Jenkins L.J. I agree, and find nothing I can usefully add to the reasons which my Lord has given for holding that this appeal should be allowed.

Hodson L.J. I also agree.

Appeal allowed with costs. Order of the Divisional Court set aside and receiving order rescinded. Order as to costs below set aside. Order for the taxation of the appellant's costs under the Third Schedule to the Legal Aid Act.

Solicitors: *John T. Lewis & Woods; Piesse & Sons.*

B. A. B.

[CHANCERY DIVISION.]

* INLAND REVENUE COMMISSIONERS *v.* BUTTERLEY CO. LD.

1954
July 27.
Roxburgh J.

Revenue—Profits tax—Nationalized industry—Compensation—Interim income payments—Income from "other property"—Liable to profits tax—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *Sch. IV, para.* 7—*Coal Industry (Nationalisation) Act,* 1946 (9 *&* 10 *Geo.* 6, *c.* 59), *ss.* 19, 22 (2), (3), (4)—*Coal Industry (No.* 2) *Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 79), *s.* 1 (2).
Mines and Minerals—Coal—Nationalization.

By section 19 (1) of the Coal Industry (Nationalisation) Act, 1946, compensation on the transferred assets was "due on the "primary vesting date [January 1, 1947], subject to determination "of the amount. . . ." Section 19 (2), and section 22 provided a right to "interim income" or to "revenue payments" for the period between "the primary vesting date and the date on which "any such compensation is fully satisfied. . . ." Payments were to be calculated for the years 1947 and 1948 under section 22 (3) of the Act and for the year 1949 under section 1 (2) of the Coal Industry (No. 2) Act, 1949, payments under both these heads being termed "revenue payments"; payments made subsequently to these years were to be calculated in accordance with section 22 (2) of the Act of 1946 and were called interim payments.

By paragraph 7 of Sch. IV to the Finance Act, 1937, as amended by section 32 (1) of the Finance Act, 1947, it was provided that "Income received from investments or other property shall be "included in the profits . . ." for the purposes of profits tax.

The respondent company carried on a number of businesses, including a colliery undertaking, on January 1, 1947, the assets of their colliery trade vested in National Coal Board under the Act of 1946; and during the years 1947–1950 they received "interim "income" or "revenue" payments under section 19 (2) calculated in accordance with section 22 (2) and (3) of the Act of 1946 and

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section 1 (2) of the Act of 1949. These sums were included in the computation of their profits for the purposes of their assessments to profits tax. The Special Commissioners discharged the assessments so far as these sums were included. On appeal by the Crown from that decision:—

Held, that the right to compensation, which was due, but payment of which was deferred, was a chose in action notwithstanding that it was created by statute, and the interim income and revenue payments which arose from that right were "income received "from . . . other property" within the meaning of paragraph 7 of Sch. IV to the Finance Act, 1937, and should therefore be included in the computation of the company's profits for the purposes of profits tax. The appeal should accordingly be allowed, and the case remitted to the commissioners for adjustment.

Appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The respondent company, the Butterley Co. Ld., was formed in 1888, and carried on a number of trades which included coal mining. On January 1, 1947, the assets of the company employed in its colliery undertaking vested in the National Coal Board under section 5 (1) of the Coal Industry (Nationalisation) Act, 1946, the date appointed by the Minister as the "primary "vesting date." After that date the company ceased to carry on its colliery trade, but it continued to carry on its other trades.

Compensation payable on the assets transferred to the Board was by section 19 (1) of the Act declared to be "due on the "primary vesting date, subject to determination of the amount "thereof." Section 19 (2) gave a right to payments of "interim "income" between the primary vesting date (January 1, 1947) and the date on which the compensation was fully satisfied.

The respondent company received five assessments in respect of the years 1947–1950 which included in its liability to profits tax interim income payments under section 19 (2) calculated in accordance with section 22 (2) and section 22 (3) of the Act of 1946, and with section 1 (2) of the Coal Industry (No. 2) Act, 1949, and termed "revenue payments" for the years 1947–1949. The company appealed to the Special Commissioners from these assessments on the ground that they were wrongly included in the computation of its profits for the purposes of profits tax.

The commissioners allowed the appeal and held: (i) that the payments under the Coal Acts of 1946 and 1949 were not properly included in computing the profits of the company for the purposes of profits tax; (ii) that all the payments in issue constituted income of the company; (iii) that on the evidence before them the company's composite trade or business consisted at the material time of a number of separate and severable trades, of which its colliery concern was one; and that that trade ceased entirely on January 1, 1947; (iv) that in view of their finding under head (iii) the payments were not receipts of any trade carried on by the company during the relevant chargeable accounting periods, because it had ceased to carry on its colliery

trade on January 1, 1947; (v) that on a proper construction of sections 19 (2) and 22 of the Act of 1946, section 1 of the Act of 1949 and paragraph 7 (1) of Sch. IV to the Finance Act, 1937, as amended by section 32 (1) of the Finance Act, 1947, the payments were not "income received from investments or other "property"; (vi) that the assessments should be reduced so far as they included these sums.

The Crown appealed from that decision.

Sir Reginald Manningham-Buller Q.C., *S.-G.* and *Sir Reginald Hills* for the Crown.

John Senter Q.C. and *Desmond C. Miller* for the Butterley Co. Ld.

Cases cited in argument: *Glenboig Union Fireclay Co.* v. *Inland Revenue Commissioners* [1]; *Hudson (John) & Co. Ld.* v. *Kirkness* [2]; *Inland Revenue Commissioners* v. *Desoutter Bros. Ld.*[3]; *Inland Revenue Commissioners* v. *Dowdall O'Mahoney & Co. Ld.*[4]; *Inland Revenue Commissioners* v. *Imperial Tobacco Co. (of Great Britain and Ireland) Ld.*[5]; *Simpson* v. *Maurice's Executors* [6]; *Whelan* v. *Dover Harbour Board.*[7]

ROXBURGH J. (after stating the facts:) The Coal Industry (Nationalisation) Act, 1946, provides by section 19 (1) that compensation should be paid in respect of a transfer of transferred interests—in other words, the respondent company's colliery concern—and that it should be due (and I attach importance to that word) on the primary vesting date, January 1, 1947, subject to determination of the amount thereof. Subsection (2) of section 19 provides as follows: "For the period "between the primary vesting date and the date on which any "such compensation is fully satisfied, there shall be a right to "interim income, to be satisfied in accordance with the pro-"visions of section 22 of this Act."

Section 22 is the general provision with regard to interim income. Subsection (1) provides: "The right conferred by sub-"section (2) of section 19 of this Act to interim income "for the period between the primary vesting date and the date "of the satisfaction in full of compensation in respect of a "transfer of transferred interests, or of an overhead expenses "increase, shall be satisfied in accordance with the provisions "of this section. (2) Subject to the provisions of subsections (3) "and (4) of this section as to the revenue payments therein

[1] (1922) 12 Tax Cas. 427.

[2] [1954] 1 W.L.R. 40; [1954] 1 All E.R. 29.

[3] [1945] 2 All E.R. 532; *on appeal*, 62 T.L.R. 110; [1946] 1 All E.R. 58; 29 T.C. 155, C.A.

[4] [1952] A.C. 401; [1952] 1 T.L.R. 560; [1952] 1 All E.R. 531.

[5] [1940] 2 K.B. 287; 56 T.L.R. 870; [1940] 3 All E.R. 248; 29 T.C. 1.

[6] (1929) 45 T.L.R. 371, 581; 14 T.C. 580.

[7] (1934) 15 T.L.R. 288; 18 T.C. 555.

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"mentioned, (*a*) the said right conferred by subsection (2) of "section 19 of this Act shall be satisfied, so far as regards interim "income for the period between the primary vesting date and "the time when any amount of compensation in respect of a "transfer of transferred interests . . . is satisfied, by making, "in addition to the issue of the stock then issued in satisfaction "of that amount of compensation . . . a money payment of an "amount equal to interest for that period on that amount of "compensation at such rate or rates as may be prescribed. . . ."

Subsections (3) and (4) contain provisions which are restricted to the first two years from the vesting date, and provide for what are called in the Act "revenue payments," which are to be in substitution for the interim income provided for by subsection (2) of section 22, which, apart from an amendment, to which I will refer later, continued indefinitely until the compensation was satisfied. The revenue payments were confined to the first two years. The effect of the Coal Industry (No. 2) Act, 1949, however, was to substitute a revenue payment for the interim income payment in respect of the year 1949. The sequence is therefore revenue payments for 1947 and 1948; revenue payment under the Act of 1949 for 1949, and thereafter interim income payments.

The company received payments under each of these headings, and the first question which had to be determined by the Special Commissioners was whether they were to be treated as taxable income, as distinct from capital. The commissioners held that they were taxable income; I cannot feel any doubt about that aspect of the case, and it is unnecessary to elaborate the matter further. But there remains the question with which I am really concerned: liability for profits tax. There are, of course, differences between profits tax and income tax.

The Crown contended before the commissioners that the payments were part of the profits of the trade or business carried on by the company in the chargeable accounting periods commencing January 1, 1947, and ending on December 31, 1950. But the company contended that the payments were not part of the profits of the trade or business carried on by the company during the relevant chargeable accounting periods, but arose to it from its colliery concern, which trade ceased entirely on January 1, 1947.

In the view that I take of this case it is not necessary for me to determine whether the finding of the commissioners, which was in favour of the company on this point, was well founded or not. I leave it entirely at large, except to mention that the Solicitor-General argued against it strenuously, and only forbore to continue his argument in deference to a request from me. The reason why I dissuaded him from further continuing his argument was because I could not see, and I still cannot see, how the company can escape from the alternative argument of the Crown that the revenue payments and the interim income payments

were, on the true construction of paragraph 7 (1) of Schedule IV to the Finance Act, 1937, as amended by section 32 (1) of the Finance Act, 1947, "income received from investments or other "property."

The Finance Act, 1937, makes special provisions with regard to what is now called profits tax; and Schedule IV provides: "7. (1) Income received from investments or other property shall "be included in the profits . . ." There are certain exceptions to that provision which nobody suggests are applicable to this case. This is a very short point, and I may be wrong about it, but having reached a clear conclusion upon it, it did not seem to me necessary to pursue the difficult questions which arise under the other contention of the Crown. These sums were certainly received by this company and they were, as I have said, undoubtedly income, and the question is, therefore, were they received from investments or other property?

It was not contended before me that the words "other "property" can be restricted by the application, or attempted application, of the principle of ejusdem generis and, quite plainly, they could not. The words to be construed therefore are "other property." This compensation could not properly be regarded as an investment, but I can see no reason at all why it is not "other property."

I refer again to section 19 of the Act of 1946; compensation under that section was due on January 1, 1947, but it was not immediately payable, because it had not been determined. The company's right to that compensation was, in my judgment, plainly a chose in action; nonetheless a chose in action because it was the creature of statute. Counsel has argued that that may be so, but that the interim income, or the revenue payments (and I think that they must all stand upon the same footing), do not arise from the property—that is to say, the right to compensation—but that they are an additional correlative right. It is a question of how those two words are regarded. But when I see that there is a right to interim income, I ask the question: "interim income from what?" It is income for a period; true, it is a right conferred by statute, but from what is it to be income? I should have thought plainly from the compensation due, payment of which was still deferred. In other words, these payments arose from the chose in action, consisting of compensation due but still unpaid, and fall directly within the words "income received from . . . other property," and, therefore, by virtue of paragraph 7, should be included in the profits. Accordingly, on that ground I allow the appeal.

Appeal allowed; assessment referred to commissioners for adjustment.

Solicitors: *Solicitor of Inland Revenue; Thicknesse & Hull.*

I. G. R. M.

[CHANCERY DIVISION.]

1954
July 21, 22, 30.

Roxburgh J.

* SEVERNE (Inspector of Taxes) *v.* DADSWELL.

INLAND REVENUE COMMISSIONERS *v.* SAME.

Revenue—Income tax—Discontinuance of trade—Gratuitous payment for work done—Account not finally settled when trade discontinued—Account re-opened—Liability to tax.

Revenue—Excess profits tax.

The taxpayer was a miller who had ceased to mill flour in 1929. In 1941, wishing to start milling again, he obtained a licence to do so from the Ministry of Food (who controlled the whole flour industry at that time). As a licensed miller he was entitled to receive rebates based on the flour which he milled; but as he had not been a miller at the outbreak of the war he was not entitled to remuneration under the agreement made between the British Millers' Mutual Pool Ld. and the Ministry, by which any pool miller was entitled to a rebate for a loss suffered under the system of rebates.

By a letter dated October 27, 1942, his accountant was told by the Ministry that the taxpayer would probably be required to furnish accounts on lines similar to the remuneration agreement forms used by the pool millers. On December 28, 1943, the accountant was informed by the Ministry that the basis on which millers, who had commenced milling during the period of control, would be remunerated was under consideration. On October 27, 1944, and May 11, 1945, the accountant was informed that no decision had been reached but that the matter was still under consideration.

On September 30, 1945, the taxpayer ceased to trade. On September 6, 1946, his accountant was required to furnish accounts in respect of the taxpayer's flour milling activities because the "remuneration" was under consideration. In 1949 the taxpayer received the sum of £3,289 from the Ministry as "remuneration." This sum was included in the profits for the relevant years in his assessments for income tax under Schedule D and for excess profits tax. The Special Commissioners discharged the assessments on the ground that it was not a trading receipt.

On appeals by the Crown from their decision:—

Held, that when the taxpayer discontinued to trade in 1945 the payment for work done by him had not, on the facts, been finally settled, and the further payment of £3,289 for that work (although gratuitous and not made in pursuance of any legal claim) enabled his account to be reopened so as to let in that sum, which was analogous to a trading debt at the amount actually received. The sum of £3,289 should therefore be included in the profits in the computation of the taxpayer's income tax and excess profits tax, and the appeals should be allowed.

Isaac Holden & Sons, Ld. v. *Inland Revenue Commissioners* (1924) 12 T.C. 768; *Johnson* v. *W. S. Try Ld.* (1946) 62 T.L.R. 355; [1946] 1 All E.R. 532; 27 T.C. 167; and *British Mexican Petroleum Co. Ld.* v. *Inland Revenue Commissioners* (1932) 16 T.C. 570 applied.

Severne *v.* Dadswell.

Appeal from a decision of the Commissioners for the Special Purposes of the Income Tax Acts.

The case stated so far as material provided: The respondent taxpayer, Thomas Dadswell, had been trained as a flour miller, but he had ceased to mill flour in 1929. In 1941 he wished to start milling flour again and, as the whole flour milling industry had come under the control of the Ministry of Food (hereafter called "the Ministry") at the outbreak of war, he applied to the Ministry for a licence to mill flour. The Ministry granted him a licence on October 8, 1941. As a licensed miller the taxpayer was entitled to receive rebates based on the flour he milled; and these rebates provided him with a profit. The rebates took the form of a deduction from the invoiced prices of imported wheat sold to him by the Ministry, and periodic cash payments to him by the Ministry in respect of home-grown wheat purchased by him. The purpose of the rebates was to compensate the miller for the price he was required to pay for his wheat, such price being uneconomic in relation to the control price at which the miller was required to sell flour.

At the beginning of the war the Ministry had granted licences to all millers who were at that time engaged in milling flour. All these millers (hereafter called "pool millers") combined to form a company called "the British Millers Mutual Pool Ld." to enable terms of remuneration to be agreed between themselves and the Ministry.

On November 10, 1941, this company made an agreement (hereafter called the "remuneration agreement") with the Minister of Food by which any pool miller who suffered a loss under the system of rebates was given a right to receive compensation.

As the taxpayer had not been a miller at the outbreak of war, he was not a member of this company nor could he become a pool miller so as to be entitled to benefit under the remuneration agreement. There were a few other millers in a similar position, and they were known as non-pool millers. There was no statutory enactment or agreement with the Ministry by which non-pool millers were to receive anything more than the rebates.

In 1942 the taxpayer, who knew nothing about the way in which pool millers were remunerated, received a number of forms and documents from the Ministry relating to the payments for flour milling. The covering letter, sent with the forms, dated March 3, 1942, made use of the expression "any remunera-
"tion to which you may become entitled as a flour miller." He sent these forms to his accountant, Mr. Quaife.

On October 19, 1942, Mr. Quaife wrote to the Ministry to find out what information would be required by the Ministry so as to enable him to keep the appropriate records on behalf of the taxpayer. On October 27, 1942, Mr. Quaife was told by the Ministry that although the taxpayer was not entitled to become a party to the pool millers' remuneration agreement, the accounts, which the taxpayer would in all probability be required to furnish, should be prepared on lines similar to the remuneration

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agreement forms used by the pool millers. On December 16, 1943. Mr. Quaife wrote to the Ministry to find out when the taxpayer was likely to be asked to submit accounts and from what date they should be prepared. He also asked whether the taxpayer would have to comply with any other formalities.

On December 28, 1943, Mr. Quaife was informed by the Ministry that the general basis on which millers who had commenced milling during the period of control would be "remu-"nerated" was at that time under consideration and that the taxpayer would be advised when a decision was reached and he would be instructed in regard to the accounts which he might be called upon to furnish. On October 27, 1944, and May 11, 1945, Mr. Quaife received from the Ministry, in answer to his inquiries, information that no decision had been reached, but that the matter was still under consideration.

The taxpayer ceased to trade on September 30, 1945, when his business was taken over by James Hodson (Millers) Ld. At that time neither he nor Mr. Quaife expected that any payment would be made beyond the rebates. There was never any entry in the taxpayer's balance sheets in anticipation of any such payment.

On September 6, 1946, Mr. Quaife was requested by the Ministry to submit accounts in respect of the taxpayer's flour milling activities because the "remuneration" to be allotted to millers who had commenced milling since the beginning of the control period was under consideration. Between then and May, 1948, there was intermittent correspondence.

By May, 1948, the taxpayer, although he still had no real expectation of receiving any further "remuneration" (and Mr. Quaife was sceptical on the matter) realized that neither of them was sufficiently experienced to deal with the Ministry's forms without some assistance, and consulted Mr. Roberts, a partner in a firm of accountants, who specialized in accounts connected with the flour milling industry.

Mr. Roberts proceeded to get out figures in respect of the taxpayer's flour milling activities on the same basis as if he had been a pool miller. He did this because, although he did not regard him as having any right whatever to receive any remuneration, he knew from his previous dealings with the Finance Department of the Ministry that the Treasury had consented in 1947 to entertain claims for additional payments to non-pool millers.

When the Ministry received the forms and accounts in 1949 showing the losses on trading and allowances for salary and remuneration sustained by the taxpayer and the company which succeeded him in respect of his flour milling activities, the Ministry made two payments, the first on May 26, 1949, of £2,000, and the second on December 13, 1949, of £3,546, representing a total sum of £5,546, of which (on apportionment) Mr. Dadswell received £3,289.

The Special Commissioners, by their decision dated July 16, 1953, held that the taxpayer had no right to receive any payment other than the rebates to which he was entitled as a licensed miller, and that the sums of money which he received in 1949 from the Ministry were ex gratia payments and not trading receipts in his hands, and that this remuneration was not to be included in the computation of his liability to income tax, and that the assessments on him which included it should be discharged.

The Crown appealed from that decision.

Heyworth Talbot Q.C. and *Sir Reginald Hills* for the Crown.
R. E. Borneman Q.C. and *C. N. Beattie* for the taxpayer.

Cases cited in argument other than those set out in the judgment: *Commissioner of Taxation of the Commonwealth of Australia* v. *Squatting Investment Co. Ld.* *; *Rownson, Drew and Clydesdale Ld.* v. *Inland Revenue Commissioners.*†

Cur. adv. vult.

July 30. ROXBURGH J. read the following judgment in which he stated the facts and continued:

It is common ground that when the taxpayer ceased to trade on September 30, 1945, he had no legal or equitable right to any further payment from the Ministry, and that he had no asset which could then have been properly entered in a final account as a book debt. At first sight I was disposed to think that a man who had made out a final account including all items properly then to be described as book debts was not liable to have his account reopened after retirement from business so as to let in a gratuitous payment received long afterwards.

But a study of the cases has convinced me that the relevant question is not whether at the date of retirement there was any outstanding book debt or any contingent or deferred legal or equitable right, but whether any work had been done in the course of trade in respect of which the reward had not been finally settled, or, in other words, anything outstanding in the nature of, or analogous to, a book debt.

I was referred first to *Isaac Holden & Sons Ld.* v. *Inland Revenue Comminsioners,*[1] where the headnote is as follows: "The "appellant company was a member of the Wool Combing "Employers Federation who were engaged in combing wool on "commission for the Government, during the period of control of "the wool trade, on the basis of a tariff fixed in 1917. In July, "1918, following negotiations between the federation and the "Government, a provisional increase of 10 per cent. on the tariff,

* [1954] A.C. 182; [1954] 2 W.L.R. 186; [1954] 1 All E.R. 349.
† (1931) 16 T.C. 595.
[1] (1924) 12 Tax Cas. 768.

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"to operate as from January 1, 1918, and to be subject to adjust-
"ment either up or down on completion of the examination of
"accounts to December 31, 1918, was agreed, and in July, 1919,
"a total increase of 20 per cent., to include the first increase,
"was awarded as a final settlement. In its accounts for the year
"ended June 30, 1918, the company charged the full costs for
"work done in the period, but it included for that work only the
"amount of commission which had been received under the tariff
"as increased by the agreement of July, 1918. *Held*, that the
"total amount of commission received for the year ended June 30,
"1918, under the terms of the final settlement arose from the
"company's trade in that year, and must be included in arriving
"at the profits of that period for the purpose of computing the
"company's liability to excess profits duty."

This case is not entirely satisfactory because Rowlatt J. appears to have overlooked the fact that neither the first nor the second percentage increase was legally exigible at the close of the accounting period, and as the company had given credit in the accounts for the first, there seemed to be no reason why it should not give credit for the second as well. But though there may have been some misapprehension, the ratio decidendi is clear and proceeds on another basis [2]: "These woolcombers had done a
"certain amount of work by June, 1918, and they were paid the
"1917 tariff plus 10 per cent. up to June, 1918. It was uncertain
"whether they ever would receive more at that time: they
"certainly had no right to demand more. It was uncertain that
"they ever would receive more, and it might be that they would
"receive less the next half-year. That is quite clear, but in the
"result what happened? They were paid 20 per cent., that is to
"say, 10 per cent. more, in respect of the whole of 1918; pound
"for pound of their work they earned another 10 per cent. beyond
"what had been paid them in June, 1918; if they did more work
"they got more; if they did less work they got less. It was paid
"to them, as the Solicitor-General says, in respect of work in
"1918, including the half-year. Looking at it merely on those
"facts, what have I to say? Did not that arise from the work
"that they did in their trade in the first half of 1918? If not,
"what did it arise from? Could it be said that it arose at all
"from the charity of the Government? I cannot see what it arose
"from, unless it arose from the trade in the first half-year. . . .
"I cannot see any sensible way of looking at the facts other than
"that which leads me to say that these profits arose from the
"business in the accounting period, and, therefore, that the
"decision of the commissioners was right. As the fact which
"shows that the books were wrong has occurred after they have
"been closed, I do not see any difficulty in reopening them and
"putting them right."

This decision, and the reasoning upon which it was based,

[2] Ibid. 772.

have been accepted and explained in a number of later cases of high authority.

Thus, in *Northern Aluminium Co. Ld.* v. *Inland Revenue Commissioners*,[3] Lord Greene M.R. said: "There are well-known "cases under the legislation in the last war which dealt with the "question of the period to which amounts received at a later date "should be attributed. The cases were cases in which, for "example, some time after the expiration of an accounting period "increases of price were granted, sometimes voluntarily, in "respect of goods sold or services rendered during the accounting "period. The *Woolcombers'* case[4] is a well-known example. "Broadly speaking, it was held in those cases that the subsequent "receipt of an addition to the price was referable to the trans-"action under which the goods were sold. The price for which "the goods were sold in the accounting period was so much, and "that price later on was increased by virtue of some under-"standing or something which might fall short of a contractual "obligation. There the increased price was held to be referable "to the original transaction, and therefore the accounts must be "reopened in order to bring that increase into the profits of the "company in the accounting period."

In *Inland Revenue Commissioners* v. *Gardner Mountain and D'Ambrumenil Ld.*,[5] Lord Simon referred to *Isaac Holden & Sons Ld.* v. *Inland Revenue Commissioners*[6] and explained it in the following words[7]: "In other words, the taxpayer was treated as "earning, by his work in that year, all the profits arising from "the business of the year, even though there was no legal right "to part of them until the agreement was afterwards made. It "will be observed that the Crown's contention in the present case "does not go so far as the contention which prevailed in the "*Woolcombers'* case,[8] for in the latter there was no legal right, "at the time when the work was done, to receive the amount "which was ultimately paid. Here the appellant company had a "legal right to be paid in futuro."

Mr. Borneman relied on the summary of *Isaac Holden & Sons Ld.* v. *Inland Revenue Commissioners*,[8] given by the Lord President in the Scottish case of *James Spencer & Co. Ld.* v. *Inland Revenue Commissioners*,[9] where he said[10]: "In the case "of credit items, such cases as *Inland Revenue Commissioners* v. "*Newcastle Breweries Ld.*[11] and *Isaac Holden & Sons Ld.* v. "*Inland Revenue Commissioners*,[12] indicate that, if the title to "the sum arose in one accounting period, the fact that the precise "amount of the credit was not fixed until later will not prevent "the eventual receipt being credited in the earlier year."

[3] (1947) E.P.T. Leaflet No. 32, p. 3 and No. 58.
[4] 12 T.C. 768.
[5] [1947] 1 All E.R. 650; 29 T.C. 69.
[6] 12 T.C. 768.
[7] [1947] 1 All E.R. 650, 654.
[8] 12 T.C. 768.
[9] (1950) 32 T.C. 111.
[10] Ibid. 116.
[11] (1927) 43 T.L.R. 476; 12 T.C. 927.
[12] 12 T.C. 768.

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If by "title" the Lord President meant "legal title" (and I certainly doubt it), then it is not an accurate summary of the effect of *Isaac Holden's* case.[12] I much prefer that given by Lord Greene M.R. in *Johnson* v. *W. S. Try Ld.*[13]: "That was a case "where money was payable under a contract. The actual amount "payable for the work done under the contract in respect of a "particular year was only finally settled some time after that "year had expired. But there again it was something which "was quite clearly referable to a trading contract. All that had "happened was that the original amount was not left untouched "but was subsequently increased by agreement. It seems to me "that this again is a case which can fairly be regarded as "analogous to a trade debt. The circumstance that the amount "of remuneration was only fixed at a later date does not alter "the fact that the remuneration was in respect of trading "operations of the earlier year."

Alternatively I would prefer the explanation given by Lord Thankerton in *British Mexican Petroleum Co. Ld.* v. *Inland Revenue Commissioners*,[14] when he said[15]: "The remaining four "cases related to the final adjustment of the amount at which "receipts or liabilities had been entered in the earlier trading "account, when the amount had not been finally ascertained or "admitted between the trader and his debtor or creditor. In "*Isaac Holden & Sons Ld.* v. *Inland Revenue Commissioners*[16] "the amount of the payment for woolcombing, originally entered "for Excess Profits Duty purposes, was only a provisional settle-"ment with the Government, the final settlement not being made "until a year later."

Mr. Borneman was constrained by pressure of authority to admit that sometimes a receipt may be related back to the year in which it was earned, although not then received or finalized and although not then receivable under any contract or other legal or equitable title. But this could only be done, in his submission, "When the amount actually received or agreed (or the "formula agreed for quantification) before the discontinuance of "the trade is not the final amount (or final formula for quanti-"fication of the amount) referable to the item concerned but is "only provisional and may fall to be increased by a further "amount to which a legal right may subsequently be "established."

There is no authority to support this proposition and the relevance of the subsequent establishment of a legal right I find it hard to discover. Once circumstances arise which allow the reopening of a final account, it seems to me immaterial whether the further payment is gratuitous or not, provided that it relates to work done before the discontinuance of the trade.

[13] (1946) 62 T.L.R. 355; [1946] 1 All E.R. 532; 27 T.C. 167, 185.

[14] (1932) 16 T.C. 570.

[15] Ibid. 591.

[16] 12 T.C. 768.

Mr. Beattie did not lend his aid to Mr. Borneman's proposition. He submitted another to the effect that the final account could only be reopened "where at the end of the accounting "period there is in existence a contract under which some further "payment may fall to be made on the doing of an act or the "occurrence of an event." This would appear to involve the necessity of a contingent right (I distrust the phrase "inchoate "right") and so to limit the power of reopening an account would be to defy the whole trend of authority. Authority, in my view, establishes the proposition that if it can be said at the moment of discontinuance that the payment for some work already done has not been finally settled, even though there is no legal claim for any more, then if a further payment is made afterwards, although wholly gratuitous, the account can be reopened so as to let in what is analogous to a trade debt at the figure actually received. If, on the other hand, the item is not analogous to a trade debt, or if there has been a final settlement, the account has been finally closed.

This must be a question of fact. No doubt in the present case the taxpayer and Mr. Quaife were pessimists. Mr. Roberts (whose special knowledge was greater) was less pessimistic. No doubt, too, as is usual in matters such as this, the wheels of Government grind slowly and the payment was long deferred. But on December 28, 1943, Mr. Quaife was informed by the Ministry that the remuneration of millers who had begun to mill during the period of control was under consideration, and on October 27, 1944, and again on May 11, 1945, that it was still under consideration and that no decision had been reached.

In those circumstances I have no hesitation in holding that for the work in question payment had not been finally settled on September 30, 1945, when the taxpayer ceased to trade.

Accordingly, I allow the appeal with costs. The £3,289 must be brought into the reopened accounts and the assessments restored.

INLAND REVENUE COMMISSIONERS *v.* DADSWELL.

It being conceded that the appeal of the Crown in this case on the question of excess profits tax must be decided on income tax principles, ROXBURGH J. made a similar order on this appeal in respect of assessments to excess profits tax.

Appeals allowed.

Solicitors: *Solicitor of Inland Revenue; Bridgman & Co.*

I. G. R. M.

[COURT OF APPEAL.]

C. A.

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July 22, 30.

Evershed M.R., Jenkins and Hodson L.JJ.

*BARCLAYS BANK LD. *v.* ROBERTS.

[1953 B. 5741.]

Execution—Sheriff—Writ of possession—Eviction of subtenant protected by Rent Acts—Claim by subtenant for wrongful eviction—Whether sheriff's officer landlord's agent—R.S.C., Ord. 47, *r.* 1.
Landlord and tenant—Rent restriction.

The proprietors of a house within the Rent Acts obtained a writ of possession of the premises. One of several occupiers refused to leave the premises, alleging that he was a lawful subtenant for the purposes of the Acts and he notified both the proprietors and the sheriff's officers of his contention. The sheriff's officers were advised by the solicitors acting for the proprietors that the subtenancy was unlawful and that they should continue with the ejectment. Accordingly, they executed the writ and evicted the subtenant. On the same day the subtenant applied for an injunction; obtained a stay of execution, and was permitted to re-enter the premises on the afternoon of the day on which he had been evicted. He obtained leave to defend in the original action against the tenant and he counterclaimed for damages for wrongful eviction. The action against him was dismissed on the proprietors' admission that the subletting was lawful, but his counterclaim was dismissed. On appeal against the dismissal of the counterclaim:—

Held, that, on the facts, the eviction was not wrongful. The sheriff's officers were acting in accordance with the direction of the court and within the powers conferred on them by the writ of possession, and, although they had sought and acted on advice tendered by the solicitors acting for the proprietors, the responsibility for so acting was theirs and theirs alone. They could not be converted into the agents of the persons on whose behalf the advisers were acting unless it had been shown, which was not the case, that their subsequent actions were only undertaken on the basis of those other persons assuming responsibility therefor. In such circumstances the officers had not acted as agents for the proprietors so as to make them liable in damages to the evicted subtenant.

Williams v. *Williams & Nathan* [1937] W.N. 208; [1937] 2 All E.R. 559 applied.

Quaere whether in a case in which the sheriff and his officers received notice of facts sufficient to show that an occupier was protected by the Rent Acts, but, nevertheless, proceded to evict him, the sheriff or his officers would be liable in damages to the occupier.

Per curiam: R.S.C., Ord. 47, r. 1, conflicts with the statutory protection afforded to a lawful subtenant of premises within the Rent Restriction Acts and revision is desirable.

Decision of Judge Bensley Wells upheld.

Appeal from Judge Bensley Wells sitting at Marylebone County Court.

The following statement of facts is taken from the judgment of Evershed M.R. The respondents, Barclays Bank Ld. (hereinafter called the bank), were proprietors for a term of years of premises known as 17, Castellain Road, Maida Vale, London,

in the capacity of executors and trustees of a deceased testator. The premises had been sublet, and at the time of the commencement of the proceedings next mentioned the sublease had become vested in one Mrs. Eliza Amelia Winnearls. The bank, alleging that Mrs. Winnearls was seriously in arrears with her rent, and also in breach of covenants in her lease, issued a specially indorsed writ against her on December 9, 1953, claiming possession of the premises and other relief on the basis that she had validly forfeited the lease. Mrs. Winnearls did not defend the proceedings, and on December 29, 1953, the bank obtained judgment in default of appearance for possession of the premises and for arrears of rent, damages, and costs.

Various persons appear to have been in occupation of parts of the house. Among these persons was one George Roberts. The bank's solicitors, claiming that any sublease by Mrs. Winnearls or her predecessors in title had been in breach of the covenants contained in the lease and that none of the above-mentioned persons had, accordingly, any right to remain in occupation, wrote to them all on January 22, 1954, informing them of the judgment which they had obtained and stating that they proposed, if any of the subtenants remained in occupation after January 30, to apply for a writ of possession.

Roberts, by his solicitor, wrote to the bank's solicitors on January 29 claiming that he was (contrary to the bank's contention) a lawful subtenant within the meaning and subject to the protection of the Rent Restrictions Acts, and at an interview on February 2, between the solicitors for Roberts and the bank, Roberts contended that any irregularity in the subletting to Roberts had long since been waived. The bank's advisers did not at that time accept Roberts's contention, and on February 8 they applied for, and obtained, a writ of possession pursuant to R.S.C., Ord. 47, r. 1.[1]

The bank duly complied with the second paragraph of the rule, since they proved that their solicitors sent the letter of January 22 to all persons in occupation of parts of the house. The actual writ was not in evidence, but apparently it was in the form set out in R.S.C., Appendix H; that is, it was addressed to the sheriff, and after reciting the judgment for possession commanded the sheriff to enter the premises and cause the plaintiffs in the action to have possession thereof.

On the following day, February 9, the solicitor acting for Roberts wrote to Messrs. Nathan & Co., the sheriff's officers,

[1] R.S.C., Ord. 47, r. 1: "(1) A "judgment or order that a party do "recover possession of any land may "by leave obtained on ex parte "application to the court or a judge "supported by affidavit, be enforced "by writ of possession in manner "immediately before November 1, "1875, used in actions of ejectment "in the superior courts of common "law. (2) Such leave shall not be "given unless it is shown that all "persons in actual possession of the "whole or any part of the land have "received such notice of the proceed-"ings as may be considered sufficient "to enable them to apply to the court "for relief or otherwise."

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asserting again that Roberts was a lawful subtenant. He added that Roberts was no party to the action between the bank and Winnearls, and "has not been served with notice thereof," a statement of which the bank later compained as neglecting their solicitors' letter of January 22 already mentioned. As a result a telephone conversation took place between the bank's solicitors and Messrs. Nathan & Co., the only record of which was a diary entry of the bank's solicitors, which read: "Attending Nathan & "Co. when they telephoned with regard to a letter they had "received from Roberts's solicitors, advising them that notice of "proceedings had been given and that no application had been "made to the court and in the circumstances and as our instruc-"tions were that the subletting was unlawful they should "continue with the ejectment on the 15th."

Following this conversation, Nathan & Co. proceeded to execute their writ on February 15. According to the pleadings and to a further entry in the diary of the bank's solicitors, the sheriff's officers effected entry about 1.30 p.m. In the meantime Roberts had applied for an injunction, apparently, in the Winnearls action, and in the afternoon of that day he obtained a stay of execution. At 5.30 p.m. the bank permitted Roberts to re-enter, though they still denied all his claims of right. On February 22 an order was made in the Winnearls action giving Roberts liberty to enter appearance in the action and to defend, at the same time remitting the action to the Marylebone county court.

Roberts then put in a defence to the bank's claim to possession, based upon his being a lawful subtenant within the meaning of the Rent Restriction Acts. By way of counterclaim he alleged: "On February 15, 1954, the plaintiffs" (that is, the bank) "their "servants and agents broke and entered the second defendant's" (that is, Roberts) "said dwelling-house and evicted the second "defendant therefrom."

He claimed damages accordingly, referring by his particulars of damage to the cost of his applications to the court, for an injunction and otherwise.

At the trial before the county court judge, Judge Bensley Wells, the bank for the first time admitted the validity of Roberts's claim to be a lawful subtenant. Accordingly, they assented to the dismissal of their action against Roberts with costs. The bank resisted, however, his counter-claim, which was tried without oral evidence being given, both sides conceding that the facts were as stated above, that is as they appeared in the pleadings and in the correspondence. The county court judge was of opinion that on such facts the case was governed by *Williams* v. *Williams & Nathan* [2] and he dismissed the counterclaim with costs.

Roberts appealed.

[2] [1937] W.N. 208; [1937] 2 All E.R. 559.

C. L. Collymore for the subtenant, Roberts.
Lionel Jellinek for Barclays Bank Ld.

No cases other than those referred to in the judgments were cited in argument.

Cur. adv. vult.

July 22. EVERSHED M.R., having stated the facts as set out above, continued: The sole ground of the appeal is that the bank must be treated, as a consequence of the telephone conversation between their solicitors and Nathan & Co. (according to the true interpretation of the diary entry which I have read), as having become the principal of the sheriff's officers when the latter evicted Roberts and took possession of his dwelling-house. If this view is right, then it appears to be conceded by the bank that the damages claimed flowed naturally from the wrongful act of trespass which had been committed. I emphasize that this point has been the only point argued on Roberts's behalf. I am not to be taken as doubting the wisdom in this respect of Roberts's advisers, but it is the fact that, according to the pleadings, the bank's own agent did take possession of Roberts's premises after his eviction therefrom by the sheriff's officers.

I have come to the conclusion, not without hesitation, and not without some feeling of dissatisfaction, that the county court judge rightly held the case to be covered by *Williams* v. *Williams & Nathan*,[1] and that the present appeal, therefore, fails. In the cited case the landlord had, as in the present case, brought an action and obtained a judgment against the head tenant alone; and had also (as in the present case), after giving notice to the occupying subtenant, applied for and obtained, by way of execution of his judgment, a writ of possession. The sheriff's officers thereupon executed the writ and evicted the subtenant, who was, in truth, protected by the Rent Restriction Acts, and who thereupon brought an action for damages against both the landlord and the sheriff's officers. The subtenant succeeded in the county court, but the judgment was set aside in this court. As regards the sheriff's officers, this court held, following a decision of Parke B. in 1847 (*Howard* v. *Gosset*,[2]) that "the sheriff and the officers "executing a judgment, however wrong the judgment may be or "however mistaken they may be as to the effect of the judgment, "are not liable to have an action brought against them for "damages for what they have done." As I follow the facts of *Williams* v. *Williams & Nathan*,[3] the sheriff's officers had, in fact, no knowledge of the subtenant's rights. They acted in strict accordance with the terms of the writ of possession and in the belief that they were entitled to evict the plaintiff. As regards the landlord, the only evidence of his participation in the sheriff's

[1] [1937] W.N. 208; [1937] 2 All E.R. 559.
[2] (1847) 10 Q.B. 411, 453.
[3] [1937] 2 All E.R. 559.

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officers' proceedings was that he was personally present as a silent spectator at the eviction. It was held that such presence did not suffice to make the sheriff's officers, who were acting as officers of the court, the agents of the landlord. Greer L.J., who delivered the leading judgment with which Scott L.J. and Finlay J. were content merely to concur, said[4]: "First of all, with regard to "the case of the defendant Williams, the landlord, I think it is "clear to demonstration, from the case that has been cited of "*Woollen* v. *Wright*[5] and other cases, and from a well known "rule of law, that a sheriff and a sheriff's officer, executing a judg- "ment of the court, are acting, as one may say, on behalf of the "court. Each is doing his duty as an officer of the court, and is "not a servant or agent of the plaintiff who has recovered judg- "ment in the action. Of course, there may be circumstances "which show that the plaintiff by intervention had made the "sheriff his agent to do something which was not covered by the "judgment, or by the writ of execution. If I had thought that "what happened in this case amounted to that, or that the county "court judge had found as a fact that the landlord Williams "interfered, and requested the sheriff's officer to execute the "judgment on property upon which he was not entitled to execute "the judgment, then the judge would have been right. But, in "my view, there is no evidence justifying any finding as to the "special direction given to the sheriff or the sheriff's officer which "might make the sheriff or the sheriff's officer the agent of the "defendant Williams, the landlord. That is enough to dispose of "the case as regards the defendant Williams. It seems to me "that, with all respect to the very forcible argument of Mr. "Weitzman, the cases he has cited have nothing to do with the "matter. They are cases in which the agent of the judgment "creditor, the man who has obtained judgment, has requested "the officer to execute judgment against somebody who was not "a party to the judgment at all, and was not a party to, or "included within, the writ of *fi. fa.* Of course, if a plaintiff who "has recovered judgment against Jones says to the sheriff's "officer, who is about to issue execution and writ of *fi. fa.* on the "judgment against Jones: 'Issue execution against Williams,' "he would be liable for the consequences of having so instructed "the sheriff's officer. But in this case there is no evidence of any "such instructions. The only evidence before the judge on which "Mr. Weitzman relies is that the defendant Williams, being "present, did not say to the officer: 'You must not execute "'judgment on the three rooms which are alleged to have been "'controlled premises.' But that is quite different from saying "that the appellant Williams instructed the officer to execute the "judgment otherwise than in the manner in which in law it had "to be executed. In addition to that, one has to remember that "the judgment given by the master in this case was intended by

[4] Ibid. 561.

[5] (1862) 1 H. & C. 554.

"the master to bind everybody on the premises, as in form it "does."

It was Mr. Collymore's argument in this court that the bank's participation in the present case had not been of a merely passive character; that they had here actively intervened in Roberts's eviction; that they had instructed Nathan & Co. to evict Roberts; and that Nathan & Co., having acted on those instructions, must be treated as having been the bank's agents in the doing of a wrongful act, namely, trespass on the Roberts's dwelling-house. In my judgment, the terms of the telephone conversation between the bank's solicitors and Nathan & Co., as recorded by the former, cannot fairly lead to the inference alleged. It is clear that Nathan & Co., having heard from Roberts, sought and obtained the advice of the bank's solicitors and thereupon chose to act upon it. There is no question here, as it seems to me, such as was in the mind of Greer L.J., of the sheriff or his officers departing, at the instance of a judgment creditor, from the terms of the writ of execution. The sheriff's officers adhered throughout to the strict terms and command of the writ of possession and, having done so, must prima facie at any rate, on the authority of *Williams* v. *Williams & Nathan*,[6] be treated as having acted independently of the landlord and as officers of the court. As a matter of principle, it seems to me impossible that the character and quality of their actions were entirely altered because they sought advice and then chose to act upon that advice (as it was, no doubt, expected that they would). The responsibility for acting on the advice they sought and received was their responsibility. They cannot, in my judgment, be converted into the agents of the persons on whose behalf the advisers were acting—whether that person was the landlord or a stranger to the property in question—unless at the very least it were shown that the sheriff's officers made it plain that their subsequent actions were only undertaken on the basis of that other person assuming responsibility therefor. And nothing of that kind, in my judgment, is established in the present case. Whether in a case in which the sheriff and his officers received notice of facts sufficient to show that an occupier was protected by the Rent Restriction Acts, but, nevertheless, proceeded to evict him, he or they would be liable in damages to tbe occupier, notwithstanding the decision in *Williams* v. *Williams & Nathan* [6] (in which, as I have said, no such notice appears to have been received by the sheriff's officers) it is unnecessary in the present case to decide.

I have said that I have reached my conclusion with some feeling of dissatisfaction. The whole of the costs of these proceedings have been occasioned by the mistaken view of Roberts's rights persisted in by the bank until the case came before the county court judge. The bank's counsel also contended that Roberts could at any time after his receipt of the letter of

[6] [1937] 2 All E.R. 559.

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January 22, and should, have applied for "relief" in the Winnearls action. But my sympathies are with Roberts, who, no doubt, shared the reluctance common to most men towards embarking in litigation unless compelled so to do.

This consideration brings me to a matter of some general significance. The terms of Ord. 47, r. 1, reflect the state of the law before the impact of the rent restriction legislation. At that time the determination upon forfeiture of a lease necessarily and automatically put an end to the rights of all occupiers derived out of the lease, subject only to the statutory right of such an occupier to apply to the court for relief from the forfeiture. It is, however, fundamental to the rent restriction legislation that no order for possession may be made against a protected tenant save in accordance with the conditions laid down in the Acts. (See, for example, section 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933.[7]) So, in *Haskins* v. *Lewis*,[8] Scrutton L.J. appears to lay it down that a writ of possession obtained at the suit of a landlord in an action in which the head tenant only has been joined as a defendant does not entitle the bailiff to evict a subtenant protected by the Acts. He said[9]: "I think an order for recovery of possession of the whole "premises can be made in favour of the landlord against the "tenant which will result in determining the tenant's interest in "the whole of the dwelling-house, and that any suggestion that "the order for possession will entitle the bailiff to turn the sub-"tenants out of the part of the premises they occupy is met by "the provision that as they are tenants of the landlord under the "Act, and not tenants of the original tenant, by reason of "section 15 (3),[10] the bailiff will not be able to have such "power"—a view which Greer L.J., who dissented in *Haskins* v. *Lewis*,[11] accepted in *Williams* v. *Williams & Nathan*[12] as being the view of the majority of the Court of Appeal.

We were also referred to *Lewis* v. *Gunter-Jones*,[13] but that was a case which arose out of the Small Tenements Recovery

[7] Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3: "(I) No order or judgment for "the recovery of possession of any "dwelling-house to which the prin-"cipal Acts apply or for the eject-"met of a tenant therefrom shall be "made or given unless the court con-"siders it reasonable to make such "an order or give such a judgment, "and either—(a) the court has power "so to do under the provisions set "out in the First Schedule to this "Act; or (b) the court is satisfied "that suitable alternative accom-"modation is available for the tenant "or will be available for him when "the order or judgment takes effect."

[8] [1931] 2 K.B. 1; 47 T.L.R. 195.

[9] [1931] 2 K.B. 1, 15.

[10] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15: "(3) Where the interest of a "tenant of a dwelling-house to which "this Act applies is determined, "either as the result of an order or "judgment for possession or eject-"ment, or for any other reason, any "sub-tenant to whom the premises "or any part thereof have been law-"fully sublet shall, subject to the "provisions of this Act, be deemed to "become the tenant of the landlord "on the same terms as he would have "held from the tenant if the tenancy "had continued."

[11] [1931] 2 K.B. 1.

[12] [1937] 2 All E.R. 559, 561.

[13] [1949] W.N. 119; 65 T.L.R. 181.

Act, 1838, and depended on the special terms of that Act, and it does not appear to carry the matter any further.

I do not think that these citations can affect the validity or effect in the present case, as regards the liability of the bank, of the decision in *Williams* v. *Williams & Nathan.*[14] I venture, however, to suggest that upon some convenient occasion the terms of Ord. 47, r. 1, might usefully be reviewed by the appropriate authority. But for the reasons which I have stated I think that this appeal must be dismissed.

JENKINS L.J. I agree that this appeal fails. The judgment for possession extended to the whole of the premises, and I understand the writ of possession to have been in the usual form directing the sheriff to cause the bank to have possession of the whole of the premises. Accordingly, the sheriff in ejecting Roberts was acting within the authority with which the court had invested him by the writ of possession, and the intervention of the bank's solicitors did not result in anything being done by the sheriff or his officers beyond what they were authorized, and indeed directed, to do by the court. In these circumstances I am not prepared to hold that the sheriff's officers, in ejecting Roberts, were acting not as agents of the court but as agents for the bank so as to make the bank liable in damages to Roberts for his wrongful eviction. It is no doubt true that the eviction of Roberts was wrongful in the sense that the judgment could not affect his rights as a lawful subtenant entitled to the protection of the Rent Restriction Acts; but it was regular in the sense that it was authorized by the terms of the judgment and writ of possession. The wrong done to Roberts was thus, in my view, attributable to a defect in the practice of the court for which neither the sheriff or his officers, nor the plaintiffs can be held liable. The court appears to have acted correctly in accordance with the Rules of the Supreme Court, Ord. 47, r. 1, and the injustice which has resulted suggests that a revision of this rule to meet cases where there are protected sub-tenants might well be considered.

HODSON L.J. I agree. The wrong done to Roberts was done, I think, due to a defect in the court's procedure which may result in the eviction of a tenant protected by the Rent Restriction Acts without the landlord being called upon to satisfy the court that the provisions of section 3 of the Act of 1933 have been complied with. R. S. C., Ord. 47, r. 1, puts the burden on the tenant to apply for relief in cases where application is made for recovery of land. Roberts was given notice of the proceedings and the writ of possession was regularly issued after notice had been given to him and no relief had been sought by him with the consequence that he was evicted.

[14] [1937] 2 All E.R. 559.

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It was thought that in such a case as the present where persons in possession of part of the premises had become tenants of the landlord by virtue of the operation of section 15 (3) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, eviction would not take place. (See *Haskins* v. *Lewis*,[15] the passage which the Master of the Rolls has read.) It is plain, as this case shows, that eviction may occur when no reply is made to the notice given under Ord. 47, r. 1, for the court is not then informed that persons in possession of part of the premises are protected. This procedure therefore runs counter to the section of the Act of 1933 which places restrictions on the right to an order for possession in cases to which the Acts apply and puts a burden upon the landlord to satisfy the court that it is reasonable to make an order and that the other conditions therein contained are satisfied. A revision of the rule would, therefore, appear to be desirable.

Appeal dismissed without costs.

Solicitors: *Alban P. B. Gould; Wainwright & Co.*

E. D.

[15] [1931] 2 K.B. 1, 15.

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July 21.
Willmer J.

* THOMASON *v.* SWAN HUNTER & WIGHAM RICHARDSON, LD. THE ALBION (No. 2)

Fatal Accidents Acts—Costs—Taxation—Taxation as between solicitor and client—Fatal Accidents Acts, 1846–1908 (8 *Edw.* 7, *c.* 7)—*Supreme Court of Judicature* (*Consolidation*) *Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 50—*R.S.C., Ord.* 22, *r.* 14 (9) (11).

In actions under the Fatal Accidents Acts the discretion of the court under section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925,[1] is limited by R.S.C., Ord. 22, r. 14,[2] and, in the absence of consent, there is no power to direct payment by the defendant of costs to be taxed otherwise than as between party and party.

Summons.

The plaintiff, Mrs. Ivy Alexandra Thomason, widow, whose

[1] Supreme Court of Judicature (Consolidation) Act, 1925, s. 50: "Subject to the provisions of this Act "and to rules of court and to the "express provisions of any other Act, "the costs of and incidental to all "proceedings in the Supreme Court ". . . shall be in the discretion of the "court or judge, and the court or "judge shall have full power to "determine by whom and to what "extent the costs are to be paid."

[2] R.S.C. Ord. 22, r. 14, para. 11 provides: "The costs of the plaintiff ". . . shall be taxed . . . as between "party and party and as between "solicitor and client, and the Taxing "Master . . . shall certify the respective amounts of the party and party "and solicitor and client costs, and "the difference (if any) . . . and no "costs other than those so certified "shall be payable to the solicitor for "any plaintiff in the cause or "matter."

husband lost his life while serving as a seaman on board the steamship *Maystone* when in collision with the aircraft carrier *Albion* in 1949, sued the defendants, Swan Hunter & Wigham Richardson, under the Fatal Accidents Acts, 1846–1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, as administratrix of her husband's estate in respect of her husband's death. The defendants admitted liability and the parties arrived at a settlement.

On the question of costs, the plaintiff applied for an order that the defendants should pay the plaintiff's costs in the action to be taxed as between solicitor and client. The application was heard in chambers and adjourned into court for judgment.

Richard Vick for the plaintiff.
D. H. Hene for the defendants.

Cur. adv. vult.

July 21. WILLMER J, read the following judgment. This matter came before me in chambers on a summons to approve the terms of settlement of an action brought under the Fatal Accidents Acts, 1846–1908, and under the Law Reform (Miscellaneous Provisions) Act, 1934, by the widow and administratrix of the estate of a deceased seaman. The action arose out of a collision at sea, which occurred on October 18, 1949, as a result of which a number of lives were lost, including that of the plaintiff's husband. I have already dealt in chambers with the substantial matters which fall to be determined between the parties. But the summons included an application for an order that the defendants, who had admitted liability, should pay the plaintiff's costs of the action (including certain costs of proceedings in the King's Bench Division) to be taxed as between solicitor and client. This appeared to me to raise a question of general interest and importance—especially as I was informed that a similar question was likely to arise in a number of other actions arising out of the same casualty—and I therefore thought it right to adjourn this part of the summons into court for judgment.

Counsel for the plaintiff made it clear at the outset that what he sought was to recover from the defendants his costs to be taxed as between solicitor and own client, i.e., on a full indemnity basis. He was not able to cite any reported case in which such an order had been made in a case of this character, but stated that in his experience such orders were not uncommonly made in chambers, more particularly in the Queen's Bench Division. My own understanding is that, where such orders have been made, they have been made by consent, or at least without active opposition on the part of the defendant. Be that as it may, counsel for the plaintiff contended that the discretion of the court in the matter of costs included a discretion to order that they be paid on a full indemnity basis, and submitted that

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on the facts of this case my discretion should be exercised in that way, having regard to the great delay which has occurred, through no fault of the plaintiff, between the death of the deceased man and the determination of the defendants' liability. That delay has in fact been due to the fact that the plaintiff's action was stayed for a long period while it was being determined in other proceedings (which went to the Court of Appeal), which of five different defendants sued by the plaintiff was responsible for the casualty. It was contended that in such circumstances it would be wrong that the amount of the plaintiff's recovery should be diminished by any liability, however small. in respect of unrecovered costs.

Counsel for the defendants contended that, even allowing for the court's unfettered discretion in the matter of costs, there was no power, in a case of this character, to order the payment of costs to be taxed as between solicitor and own client. Alternatively, he submitted that, even if such power existed, there was no good reason in the present case for awarding costs against the defendants otherwise than on a party and party basis, seeing that the defendants were no more responsible than the plaintiff for the long delay that elapsed before liability was determined.

In view of the general interest and importance of the subject, it is surprising to find such a paucity of reported authority on the power of the court, in a case such as this, to order payment of costs to be taxed as between solicitor and client. In support of his argument counsel for the defendants relied on a passage in Halsbury's Laws of England, 2nd ed., Vol. 26, para. 190, p. 101, under the title "Practice and Procedure," contributed by no less an authority than Sir George Bonner. It is there stated as follows: "In general the costs are taxed as "between party and party. In matters of equitable jurisdiction, "and in cases where there is express statutory provision to that "effect, and, in cases where there is an obligation to indemnify "or contribute, costs to be taxed as between solicitor and client "may be awarded; but in general there is no power to award "such costs." A similar view is expressed in Odgers in Pleading and Practice, 13th ed., p. 303, where it is stated: "Except in matters of equitable jurisdiction, the judge cannot "award costs as between solicitor and client to the successful "party, unless there is an express statutory provision enabling "him to do so (e.g., the Public Authorities Protection Act, "1893), or unless both parties consent."

Before the passing of the Judicature Act, 1873, it was held in *Mordue* v. *Palmer*,[1] that the Court of Chancery had power to award costs as between solicitor and client. But in the same case Mellish L.J.[2] expressed the view that the Courts of Common Law had no such power. In 1881, i.e., 8 years after the passing of the first Judicature Act, the Court of Appeal, consisting of

[1] (1870) L.R. 6 Ch. 22. [2] Ibid. 32.

Sir George Jessel M.R., Brett and Cotton L.JJ., decided unanimously in *Cockburn* v. *Edwards*,[3] that a successful plaintiff was not entitled to receive, as damages in the same action, the difference between solicitor and client and party and party costs. Cotton L.J. succinctly expressed what I conceive to be the view of all three members of the court in the following words[4]: "I "am of opinion that the difference between solicitor and client "costs and party and party costs in an action cannot be given "by way of damages in the same action, the latter costs being "all that the plaintiff is entitled to. Costs in another action "stand on quite a different footing." I apprehend that what the learned Lord Justice had in mind, in relation to that last sentence, was the case where the plaintiff's claim is for an indemnity against costs incurred by him in prosecuting or defending some other action. (Compare the passage from Halsbury's Laws of England, which I read a moment ago.) It is to be observed that in *Cockburn* v. *Edwards*[5] the difference between solicitor and client costs and party and party costs was claimed as an item of damages in the action, whereas in the present case the claim is for the recovery of the whole of the solicitor and client costs as costs. The effect, however, appears to be the same, and the observations of the Court of Appeal would seem to be equally applicable, however the claim is put.

In 1887 a similar question again came before the Court of Appeal in *Andrews* v. *Barnes*,[6] when the court, citing *Mordue* v. *Palmer*[7] with approval, decided that since the passing of the Judicature Act, 1873, the High Court of Justice had, as the old Court of Chancery formerly had, in matters of equitable jurisdiction a general discretionary power to give costs as between solicitor and client. The previous decision in *Cockburn* v. *Edwards*[8] was doubted, and the question whether the High Court had the same power in matters of common law jurisdiction was expressly left open, the court refraining from expressing a decided opinion on that point. Since the date of *Andrews* v. *Barnes*[9] I have been unable to find any reported decision which gives an authoritative ruling on the point, and certainly none has been cited to me.

The material statutory provision in relation to costs which was in force at the time of *Cockburn* v. *Edwards* and *Andrews* v. *Barnes* was the Judicature Act, 1875, Sch. I, Ord. 55, which was in the following terms: "Subject to the provisions of this Act, "the costs of and incidental to all proceedings in the High Court "shall be in the discretion of the court . . ." The corresponding provision today is section 50 of the Supreme Court of Judicature (Consolidation) Act, 1925, which substantially reproduces

[3] (1881) 18 Ch.D. 449.
[4] Ibid. 463.
[5] Ibid. 449.
[6] (1888) 39 Ch.D. 133; 4 T.L.R. 609.
[7] L.R. 6 Ch. 22.
[8] 18 Ch.D. 449.
[9] 39 Ch.D. 133.

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section 5 of the Judicature Act, 1890. Section 50 of the Act of 1925 provides: "Subject to the provisions of this Act and to "rules of court and to the express provisions of any other Act, "the costs of and incidental to all proceedings in the Supreme "Court . . . shall be in the discretion of the court or judge, and "the court or judge shall have full power to determine by whom "and to what extent the costs are to be paid." It will be seen that the section, as it stands today, and as it was substantially enacted in 1890, contains additional words, as compared with the corresponding section in the Act of 1873, which may well be thought to be of no little significance. In particular, it can be argued that, even if prior to 1890 there was no power in common law proceedings to award costs as between solicitor and client, as stated by Mellish L.J. in *Mordue* v. *Palmer*,[10] and as would seem to follow from the Court of Appeal's decision in *Cockburn* v. *Edwards*[11] (if that decision be accepted), such a power was abundantly conferred by the very wide words of section 5 of the Act of 1890.

As a matter of history, it has been said that section 5 of the Act of 1890 was passed in consequence of the decision in *In re Mills' Estate*,[12] and for the purpose of conferring on the court jurisdiction to award costs in certain classes of case in which it had previously been held that there was no jurisdiction to do so: see *In re Fisher*.[13] But it can well be argued that, coming so soon after the decision of the Court of Appeal in *Andrews* v. *Barnes*,[14] the section was further intended to resolve the question therein left open as to the jurisdiction of the court to award solicitor and client costs in common law proceedings. At all events, Kay L.J. in *In re Fisher*,[15] appears to have been disposed to give the words of the new enactment a wide interpretation. He said[16]: "Then follow these additional words: 'And the court "'or judge shall have full power to determine by whom and to "'what extent such costs are to be paid.' Taking these last words "alone, to what costs do they apply? Clearly to the costs "of and incident to all proceedings in the Supreme Court. The "object of the words so plainly expressed must be to give the "court power to do that which it had not power to do before. "In my opinion, it is impossible to read section 5 in any way "but this. It is an enabling section enlarging the jurisdiction "of the court; giving it jurisdiction where it had not jurisdiction "before in respect of costs. What is the limitation to that "jurisdiction? The limitation is contained in a former part of "the section, 'subject to the Supreme Court of Judicature Acts, "'and the Rules of Court made thereunder, and to the express "'provisions of any statute whether passed before or after the "'commencement of this Act.'" Pausing there, I might

[10] L.R. 6 Ch. 22.
[11] 18 Ch.D. 449.
[12] (1886) 34 Ch.D. 24; 3 T.L.R. 61.
[13] [1894] 1 Ch. 450.
[14] 39 Ch.D. 133.
[15] [1894] 1 Ch. 450.
[16] Ibid. 452, 453.

observe that Kay L.J. is there quoting the words of the Act of 1890. Then he goes on: "That means if there be a provision "in the Judicature Acts or in the Rules of Court, or an express "provision in any statute which limits the discretion of the "court, the Act is to be taken subject to that limitation; but it "also means that the court is to have a discretion where the "former Acts are silent as to costs." I think Kay L.J. might well have added "or where the Rules of Court are silent as to "costs."

A rather different and narrower view was expressed by Lord Alverstone C.J. in *Civil Service Co-operative Society* v. *General Steam Navigation Co.*[17] In that case the trial judge, while dismissing the plaintiffs' claim, nevertheless ordered each party to bear their own costs, because he did not approve of the fact that the defendants had refused to agree to what he considered reasonable terms of settlement. The Court of Appeal held that there were no materials upon which the judge could exercise his discretion by making that order, and they ordered that the defendants should have their costs. In the course of the argument in the Court of Appeal it was contended for the plaintiffs that the judge's discretion was unlimited, because the discretion of the court had been extended by section 5 of the Judicature Act, 1890, which, it was argued, conferred a new jurisdiction. Dealing with this point, Lord Alverstone C.J. said[18]: "section 5 "of the Judicature Act, 1890, did not alter the law with respect to "the discretion of a judge as to costs, or with respect to the "powers of the Court of Appeal in dealing with that discretion. "Section 5 merely brought within the ambit of the discretion "certain cases in which it had previously been considered "doubtful whether costs were in the discretion of the judge."

In the light of these conflicting dicta I have to construe section 50 of the Act of 1925 as best I can. The section gives the court or judge "full power" to determine not only "by "whom" but also "to what extent" costs are to be paid. Reading these words in their natural and ordinary sense, it appears to me that standing by themselves they are prima facie sufficient to empower me, in a proper case, to order the payment of costs to be taxed as between solicitor and client, and even as between solicitor and own client. But, as pointed out by Kay L.J. in *In re Fisher*,[19] the words must be used subject to the limitation imposed by the opening words of the section, i.e., "Subject to the provisions of this Act and to Rules of Court." In my judgment, therefore, it is necessary to look closely at the provisions of the Rules of the Supreme Court, in order to ascertain whether, and to what extent, the "full power" conferred by section 50 of the Act of 1925 is subject to any limitation.

The most obvious limitation is that contained in Order 65, rule 27 (29), which provides as follows: "On every taxation the

[17] [1903] 2 K.B. 756; 20 T.L.R. 10.
[18] [1903] 2 K.B. 765.
[19] [1894] 1 Ch. 450.

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"taxing master shall allow all such costs, charges and expenses, "as shall appear to him to have been necessary, or proper for the "attainment of justice or for defending the rights of any party, "but save as against the party who incurred the same no costs "shall be allowed which appear to the taxing master to have "been incurred or increased through over-caution, negligence or "mistake or by payment of special fees to counsel or special "charges or expenses to witnesses or other persons, or by other "unusual expenses." If, as the plaintiff asks, I were to order payment of costs to be taxed as between solicitor and own client, i.e., on an indemnity basis, the registrar, when he comes to tax the costs, would be prevented from doing the very thing which he is directed by this rule to do, namely, to disallow (as against the paying party) such costs as appear to him to have been incurred, e.g., through over-caution, negligence or mistake, or by payment of special fees, or by other unusual expenses. He would be bound to allow the whole of the costs in fact incurred, save only such costs, if any, as could not properly be charged by the solicitor against his own client. In my judgment, having regard to the limitation imposed by rule 27 (29), it is not open to me to direct payment of costs to be taxed as between solicitor and own client.

As was pointed out, however, by Havers J. in *Gibbs* v. *Gibbs*,[20] between the extremes of solicitor and own client taxation on the one hand and party and party taxation on the other, provision is made for various forms of so-called solicitor and client taxation, which really amount to party and party taxations, but on a more generous basis. Such, for instance, is the form of taxation which the court is required to order in the case of an assisted person under the Legal Aid Scheme. I do not think that there is anything in Order 65, rule 27 (29) to prevent my directing the payment of costs taxed on a solicitor and client basis, as so defined. On the contrary, in certain instances, e.g., where the Public Authorities Protection Act, 1893, applies, it is mandatory to direct the payment of costs to be taxed on such a basis. I can well conceive that there may be other types of case, where there is no such mandatory requirement, in which the court, in the exercise of the "full power" conferred by section 50 of the Act, could properly direct payment of costs to be taxed on an ordinary solicitor and client basis, without offending against the provisions of Order 65, rule 27 (29). An instance may be found in the case where a pleading is ordered to be struck out as unnecessary or scandalous: see Order 19, rule 27, which expressly authorizes the court to order costs to be taxed as between solicitor and client in such a case. Here, however, I have to deal with a special class of case, namely, one in which damages are adjudged to be paid under the Fatal Accidents Acts, 1846 to 1908, to an infant and to the widow of the person killed. Cases of this class are subject to a special

[20] [1952] P. 332; [1952] 1 T.L.R. 1143; [1952] 1 All E.R. 942.

code of rules, as set out in the various paragraphs of Order 22, rule 14: see particularly paragraph (9), which specifically brings cases under the Fatal Accidents Acts within the provisions of this special code of rules. Paragraph (11) provides: "The costs "of the plaintiff . . . shall be taxed . . . as between party and "party and as between solicitor and client, and the Taxing "Master . . . shall certify the respective amounts of the party "and party and solicitor and client costs, and the difference "(if any) . . . and no costs other than those so certified shall be "payable to the solicitor for any plaintiff in the cause or matter." Again, paragraph (3) empowers the court to give directions as to the dealing with any money adjudged to be paid, and by paragraph (4) such directions may include directions "as to "any payment to be made either directly or out of the amount "paid into court . . . to the plaintiff . . . or to the plaintiff's "solicitor in respect of costs or of the difference between party "and party and solicitor and client costs."

If in the present case I were to direct payment by the defendants of costs to be taxed as between solicitor and client, how, it may be asked, is the registrar on taxation to comply with the requirements of paragraph (11) of the rule, which have more than once been held to be mandatory? How again would it be possible to apply the provisions of paragraph (4), which clearly contemplate that there shall have been both a party and party and a solicitor and client taxation? In all the circumstances, I am driven to the conclusion that, so far at any rate as actions under the Fatal Accidents Acts are concerned, the discretion of the court under section 50 of the Judicature Act, 1925, is limited by the Rules of Court, and that in the absence of consent there is no power to direct payment by the defendant of costs to be taxed otherwise than as between party and party. My order in the present case will, therefore, be that the defendants do pay the plaintiff's costs to be taxed as required by Order 22, rule 14 (11).

I think it is perhaps right that I should add this. If I had come to the conclusion that I had a discretion to order the payment of costs otherwise than on a party and party basis, I should not in any event, in the particular circumstances of this case, have felt disposed to make the order asked for by the plaintiff, having regard to the fact that the defendants are no more responsible than the plaintiff for the unfortunate delay which has occurred in settling this claim. It should, I think, be made clear that there has been no suggestion of any default, or impropriety in the conduct of the proceedings, on the part of the defendants or their solicitors.

Order accordingly.

Solicitors: *Neil Maclean & Co.; Bentleys, Stokes & Lowless, for William Mark Pybus & Sons, Newcastle-upon-Tyne.*

H. G.

[CHANCERY DIVISION.]

1954
July 30.

Wynn-Parry J.

* *In re* LEVEN AND MELVILLE (EARL), DECD. INLAND REVENUE COMMISSIONERS *v.* WILLIAMS DEACON'S BANK, LD. AND OTHERS.

[1953 L. No. 2575.]

Revenue—Estate duty—Valuation—Settled estate—Ultimate limitation to earl for time being—Class entitled to take including persons other than "relatives"—Tenants for life to insure for death duties—Deed of covenant by tenant for life to pay premiums—Acceptance by order of court of offer to convert policies to fully-paid policies—Death duties in respect of settled estate on tenant for life's death paid out of his free estate—Whether allowance to be made on assessment of free estate to estate duty—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 3, 7 (1)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *ss.* 44, 45 (2), 59.

By clause 3 of his will made in 1909 the then Earl of Leven (hereinafter called "the testator") devised his K estate to the use of his brother A and his assigns during his life with remainder to the use of his first and every other son successively in tail male with remainder to the use likewise of his brother D with remainder to the use likewise of his brother I with remainder "to the use of "the person who at the time of the failure or determination of the "preceding uses and when this present ultimate limitation shall "take effect in possession shall be or become entitled to the title "and dignity of the Earldom of Leven and his heirs and assigns "absolutely." By clause 5 he constituted a settled legacy of £200,000 on trust to hold it during the period specified to pay the income to the earl for the time being and at the end thereof for the then earl. By clause 8—a forfeiture clause—he made each brother and any of their sons born in his lifetime provide for death duties by taking out insurance policies and assigning them to the trustees of the will.

In 1913 the testator died. A (hereinafter called "the earl") succeeded him and took out on his own life and in the trustees' names policies of insurance for £150,000. By deed executed in 1914 between the trustees and the earl covenanted to do nothing whereby the policies might become void or voidable, and not to hinder the trustees from receiving policy moneys; to effect a new one or new ones should any become void; and duly to pay the premiums; and he irrevocably authorized the trustees to pay them out of the income of the settled legacy and charged that income with their payment.

In June, 1942—the K estate having been sold and the proceeds of sale invested—the court authorized the acceptance of an offer by the insurance company to convert the policies into fully-paid whole-life policies totalling £172,566 and ordered the earl to covenant with the trustees that on his death his estate should bear all duty then payable in respect of the proceeds of sale. By deed executed in July, 1942, the earl did so covenant. In 1945 he and his eldest son barred the entail. In 1947 the earl died and estate duty became payable in respect of his interest in the property settled by the testator's will. Duty amounting to £68,384 13s. 2d. was paid out of the earl's free estate. The Crown claimed a declaration that, having regard to section 44 of the Finance Act, 1940, and section 7

(1) of the Finance Act, 1894,[1] in determining the value of the earl's estate for assessment to estate duty no allowance was to be made for that debt.

Held, it being admitted that the deed of 1942 was a "disposition of property" within the meaning of section 44 (1) of the Finance Act, 1940;

[1] Finance Act, 1894, s. 7 (1): "In determining the value of an estate for the purpose of Estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest, nor (*b*) for any debt in respect whereof there is a right to reimbursement from any other estate or person, unless such reimbursement cannot be obtained, nor (*c*) more than once for the same debt or incumbrance charged upon different portions of the estate; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

Finance Act, 1940, s. 44 (1): "Where a person dying after the commencement of this Act has made a disposition of property in favour of a relative of his, the creation or disposition in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not be treated for the purposes of section 3, or of subsection (1) of section 7, of the Finance Act, 1894, as consideration for the disposition made by the deceased. (2) In this section the expression 'relative' means, in relation to the deceased,—(*a*) the wife or husband of the deceased; (*b*) the father, mother, children, uncles and aunts, of the deceased; and (*c*) any issue of any person falling within either of the preceding paragraphs and the other party to a marriage with any such person or issue; and references to 'children' and 'issue' include references to illegitimate children and to adopted children. (3) In this section the expression 'annuity' includes any series of payments, whether inter-connected or not, whether of the same or of varying amounts, and whether payable at regular intervals or otherwise, and payments of dividends, or interest on shares in or debentures of a company shall be treated for the purposes of this section as a series of payments constituting an annuity limited to cease on a death if the payments are liable to cease on the death, or the amounts thereof are liable to be reduced on the death, by reason directly or indirectly of the extinguishment or any alteration of rights attaching to, or of the issue of, any shares in or debentures of a company. (4) If the deceased has made in favour of a company to which this section applies a disposition which, if it had been made in favour of a relative of his, would have fallen within subsection (1) of this section, this section shall have effect in like manner as if the disposition had been made in favour of a relative of his, unless it is shown to the satisfaction of the Commissioners that no relative of the deceased was, at the time of the disposition or subsequently during the life of the deceased, a member of the company."

Section 45 (2): "The extinguishment at the expense of the deceased of a debt or other right shall be deemed for the purposes of the said enactments"—namely, those relating to estate duty—"to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished, and in relation to such a disposition the expression 'property' in the said enactments shall include the benefit conferred by the extinguishment of the debt or right."

Section 59: "In this Part of this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say . . . 'Disposition' includes . . . in relation to shares in or debentures of a company, the extinguishment or any alteration of rights attaching thereto, whether effected by a single operation or by associated operations."

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(1) that, for the purposes of estate duty, the effect of the disposition must be determined as at the date thereof, and not as at the death of the deceased;

(2) that, as the class entitled to take under clause 3 of the will included persons who were not "relatives" within the meaning of section 44 (2), and the person who would actually enjoy the benefit was not ascertainable at the date of the disposition, the section did not apply;

(3) that in section 44 (1) the word "disposition" did not, in its context, include extinguishment, so that the extinguishment of the earl's liability to make a "series of payments" namely, the premiums, was not "the . . . disposition in favour of the deceased "of an annuity. . . ."

(4) that, accordingly, the £68,384 13s. 2d. was properly to be treated as a deduction for the purpose of calculating the estate duty payable on the earl's estate.

Action.

By this action the Crown claimed against the executors of the late Earl of Leven and of Melville a declaration that, having regard to section 44 of the Finance Act, 1940, and section 7 (1) of the Finance Act, 1894, in determining the value of the earl's estate for assessment to estate duty no allowance was to be made for a debt of £68,384 13s. 2d., being an amount paid on the earl's death in respect of an estate of which he had been tenant for life until, less than five years before his death, he and his son had barred the entail.

The following statement of the facts is taken in substance from the judgment of Wynn-Parry J.

By clause 3 of his will dated August 27, 1909, the then earl (hereinafter referred to as "the testator") devised his Kirtlington Estate in the county of Oxford to the use of his brother Archibald Alexander Lester Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder to the use of his brother David William Leslie Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder to the use of his brother Ian Leslie Melville and his assigns during his life with remainder to the use of his first and every other son successively in remainder one after the other according to their respective seniorities in tail male with remainder "to the use "of the person who at the time of the failure or determination of "the preceding uses and when this present ultimate limitation "shall take effect in possession shall be or become entitled to the "title and dignity of the Earldom of Leven and his heirs and "assigns absolutely."

By clause 5 of his will the testator constituted a settled legacy of £200,000, directing his trustees to hold it and the investments for the time being representing it for the period specified in the

clause on trust to pay the income thereof "to the person who "shall for the time being be entitled to the title and dignity of "the Earldom of Leven," and at the end of the period to stand possessed of the settled legacy in trust for the person who should then be entitled to such title or dignity.

By clause 8 the testator laid on each of his brothers and any sons born in the testator's lifetime of his brothers, who should become entitled to the title and dignity of the Earldom of Leven, the obligation, by means of a forfeiture provision, to provide for the death duties estimated to be payable on his death by taking out a policy or policies of insurance on his life and assigning it or them to the trustees of the will.

On June 11, 1913, the testator died. He was succeeded as Earl of Leven by his brother Archibald Alexander, hereinafter referred to as "the earl," who in due course complied with the conditions of clause 8 of the will of the testator by effecting on his own life and in the names of the trustees of the will four policies of insurance for the aggregate sum of £150,000 at the total annual premiums of £3,050, and by executing a deed dated April 29, 1914, expressed to be made between the trustees of the one part and the earl of the other part.

By this deed the earl covenanted as follows: First, that he would not do or suffer anything whereby the policies might become void or voidable or the trustees be hindered from receiving all or any of the policy moneys: secondly, that if the policies or any of them should become void he would immediately effect a new policy or policies on his life in the name of the trustees for a sum or sums not less in the whole than the sum of £150,000; thirdly, that he would from time to time duly pay the premiums for the time being necessary for keeping the policies on foot. Further, the earl irrevocably authorized the trustees to pay the premiums out of the income of the settled legacy, and charged that income with the payment thereof.

On some date before June, 1942, the Kirtlington Estate was sold, and the proceeds of sale were invested. On June 8, 1942, Farwell J. at chambers made an order under section 57 of the Trustee Act, 1925, authorizing the trustees to accept an offer by the insurance company with which the policies had been effected to convert the policies into fully-paid-up whole life policies securing the aggregate sum of £172,566. The order further provided that the earl should enter into a covenant with the trustees that at his death his estate should bear any duty payable on his death in respect of the proceeds of sale of the estate. In pursuance of the order, the earl, by deed dated July 16, 1942, entered into a covenant with the trustees as required by the order of Farwell J.

On August 21, 1945, the earl's eldest son, who had attained his majority, executed a disentailing assurance and the earl released his life estate to his son. On January 15, 1947, the earl died and, as his death occurred within five years of the release of

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his life interest, estate duty became payable in respect of his interest in the property settled by the testator's will. Duty to the amount of £68,384 13s. 2d. was paid out of the earl's free estate.

By this action the Crown claimed a declaration that, having regard to section 44 of the Finance Act, 1940, and to section 7 (1) of the Finance Act, 1894, no allowance was to be made for the debt of £68,384 13s. 2d. in determining the value of the earl's estate for assessment to estate duty.

Geoffrey Cross Q.C. and *J. H. Stamp* for the Crown.

Sir Andrew Clark Q.C. and *E. I. Goulding* for the earl's executors.

Wynn-Parry J. stated the facts and continued: The question which now arises is whether or not, having regard to the provisions of section 44 of the Finance Act, 1940, the £68,000 is properly to be treated as a deduction for the purpose of calculating the estate duty payable in respect of the earl's free estate. [His Lordship read section 40 (1) (2) (3) and (4) and continued:] On the facts which I have detailed, it is agreed that there has been a "disposition of property" within the meaning of that phrase as used in section 44 (1), so that the first condition of that subsection is fulfilled.

The next condition is that the disposition should have been made "in favour of a relative." Here the parties are at variance. The first question is whether the effect of the disposition is to be determined as at the date of the disposition, or as at the date of the death of the deceased. In my view, the answer is as at the date of the disposition. I can see no justification for choosing the date of death. The choice of any date other than that of the disposition might well lead to great uncertainty and confusion, and cases might well be postulated in which it would be impossible to resolve the matter either at the date of death or for some considerable time thereafter. On the other hand, if the question is to be answered by reference to the position obtaining at the date of the disposition, no such doubt or confusion can arise.

The next question, then is, taking one's stand at the date of the disposition—in this case July 16, 1942—can the disposition be said to have been made in favour of a relative of the earl? In view of clause 3 of the testator's will it cannot be said that, at the date of the disposition, only a relative could have benefited. If the ultimate limitation took effect, the disposition would favour a person who was not a relative.

The object of the section is to provide that in the case, but only in the case, of a disposition in favour of a relative is the creation of or disposition of the annuity mentioned in subsection (1) not to be regarded as consideration for the purposes of the Finance Act, 1894. If, however, the relevant date for testing the nature of the disposition (so far as its objects are concerned)

is the date thereof, it cannot be said whether or not there was consideration for the purposes of the Finance Act, 1894, because it cannot be said at the date of the disposition, whether a relative or a stranger will benefit by the disposition.

In my view, a disposition in favour of one of a class, all the members of which were "relatives," would satisfy the condition of the section; but where, as here, the class includes a person or persons who do not come within the definition of "relative" in subsection (2), and the person who actually enjoys the benefit is not ascertainable at the date of the disposition, the section is inapplicable.

It was argued that a disposition of property in favour of a class which included relatives, though it did not consist exclusively of relatives—all the interests being, of course, contingent at the date of the disposition—must be a disposition in favour of a relative as being in favour of every member of the class. My answer to that is that that view is tenable, if at all, only until one reads the rest of subsection (1), because, when it is appreciated that the object of the section is to determine whether or not the "annuity or other interest" is to be treated as consideration and that that matter must be tested as at the date of the disposition, it is seen that it cannot be said whether or not the annuity or other interest is good consideration, because it cannot be said who will benefit.

My attention was directed to section 44 (4), but in my view that subsection does not affect the construction of subsection (1). Subsection (4) is designed to strike at attempts to avoid coming within the mischief of subsection (1) by making the disposition in favour of a company to which the section applies.

The view which I have expressed is, of course, sufficient to dispose of the action; but as a further point was argued, and as the case may be taken to a higher court, I ought perhaps to express my present view on it.

The third condition of subsection (1) is that there should be shown the creation or disposition in favour of the deceased of an annuity or other interest. The word "annuity" is given a very wide meaning by subsection (3). It includes "any series of "payments." It cannot be disputed that, before Farwell J.'s order and the acceptance of the insurance company's offer pursuant thereto, the earl was under an obligation to make "a series "of payments," namely, the annual premiums. The result of the order was to extinguish the liability to make those payments, and that order operated in favour of the earl. On this basis it was argued for the Crown that the word "disposition" in subsection (1) included "extinguishment," and therefore it followed that there had been a disposition in favour of the earl of an annuity, with the result that section 44 applied.

The word "disposition," taken by itself, and used in its most extended meaning, is no doubt wide enough to include the act of extinguishment. To talk of disposing of one's enemy, no doubt,

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indicates his extinguishment; but the primary meaning of the word, at any rate in relation to property, is to deal with the property in one of a number of ways, the property remaining in existence. Looking only, in the first instance, at subsection (1) I should have thought that the word "disposition" denoted some dealing with an annuity, as used in the section, so that the annuity continued in existence during the lifetime of the deceased, conferring on him over that period a benefit.

On the language of subsection (1), it would, to me, be a quite unexpected result that the subsection should apply to a liability of the deceased. Some light is, I think, thrown on the problem by section 45 (2) which expressly provides that the extinguishment, at the expense of the deceased, of a debt or other right shall be deemed for the purposes of the Finance Act, 1894, to have been a disposition made by the deceased in favour of the person for whose benefit the debt or right was extinguished; and that in relation to such a disposition the expression "property" in the Finance Act, 1894, shall include the benefit conferred by the extinguishment of the debt or right.

From this subsection, it is clear that where the legislature intended that, as against the subject, "disposition" should include "extinguishment," it was at pains to make express provision. Again, in section 59, the definition section, the word "extinguishment" is used in connexion with the word "disposi-"tion," but only in a limited sense. These two pointers serve, in my view, to underline the conclusion to which I have already come on the wording of subsection (1), namely, that in that subsection the word "disposition" does not, in its context, include "extinguishment."

In my judgment, therefore, the action fails, and must be dismissed with costs.

Action dismissed.

Solicitors: *Solicitor of Inland Revenue; Lee & Pembertons.*

K. R. A. H.

[CHANCERY DIVISION.]

1954 *Jan.* 18; *Feb.* 1, 8.

Upjohn J.

* *In re* LUPKOVICS. *Ex parte* THE TRUSTEE *v.* FREVILLE.

[No. 29 of 1953.]

Bankruptcy—Debt—Attachment—Order for debt due from Crown to be paid to creditor's solicitors and held by them for six months—Undertaking by solicitors pursuant to order—Whether "attach-"ment . . . completed . . . receipt of the debt"—Husband and wife—Loans by wife for husband's business—Judgment for wife—Whether character of transaction altered so as to enable wife to

prove in competition with other creditors—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *ss.* 36 (2), 40 (1) (2)—*Crown Proceedings Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 44), *s.* 27 (1).

Husband and Wife.

In 1948 and 1950 a wife advanced sums of money to her husband, a doctor, for the purposes of his practice. In July, 1952, judgment was entered for her against him for £5,550 and costs. Under the National Health Service Act, 1946, £2,786 was due to the husband from the Ministry of Health. On the wife's seeking, in the Queen's Bench Division, pursuant to section 27 (1) of the Crown Proceedings Act, 1947, an order that it be paid to her, the master in October, 1952, ordered that £2,786, less seven guineas being the amount of the Ministry's costs, be paid, on the terms that the £2,786 be retained by the wife's solicitors for six months from October 31, 1952, they undertaking to indemnify the Ministry for that period against any claim in respect of that sum by a trustee in bankruptcy of the husband. Accordingly, £2,778 (being £2,786 less the costs) was paid to the wife's solicitors. On January 2, 1953, a bankruptcy petition was presented, and on March 4 a receiving order made, against the husband.

The husband's trustee in bankruptcy claimed that the sums which the wife had advanced to him were gifts and not loans: alternatively, that, under section 40 of the Bankruptcy Act, 1914,[1] she was not entitled to retain against the trustee the benefit of the attachment of the debt of £2,786 due from the Ministry of Health, as the attachment was not completed at the date of the bankruptcy.

Held, (it being established on the facts that the advances by the wife were loans and not gifts), (1) that the payment to the solicitors on the terms of the master's order did not constitute a "receipt of "the debt" within section 40 (2) of the Bankruptcy Act, 1914, as the solicitors held the money as stakeholders or trustees, as security for the benefit of the Ministry of Health; with the result that the attachment was not completed before the date of the receiving order;

George v. *Tompson's Trustee* [1949] Ch. 322; [1949] 1 All E.R. 554 considered:

(2) that proceedings under section 27 (1) of the Crown Proceedings Act, 1947,[2] were proceedings by way of attachment for the

[1] Bankruptcy Act, 1914, s. 40 (1): "Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

"(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

[2] Crown Proceedings Act, 1947, s. 27 (1): "Where any money is payable by the Crown to some person who, under any order of any court, is liable to pay any money to any other person, and that other person would, if the money so payable by the Crown were money payable by a subject, be entitled under rules of court to obtain an order for the attachment thereof as a debt due or accruing due, or an order for the appointment of a sequestrator or receiver to receive the money on his behalf, the High Court may, subject to the provisions of this Act and in accordance with rules of court, make an order restraining the first-mentioned person from receiving that money and directing payment thereof to that other person, or to the sequestrator or receiver."

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purposes of section 40 of the Bankruptcy Act, 1914. Attachment, although not defined in the Act of 1914, was not a term of art confined to attachments coming strictly under Order 45. It was just as appropriate to proceedings under section 27 (1) of the Act of 1947. The intention of that provision was to put the judgment creditor in the same position vis-à-vis the Crown as vis-à-vis any other debtor of the bankrupt—namely, the position of being able to prevent the judgment debtor from obtaining payment of the debt and to secure payment of it to himself; so that the sum of £2,778 must be paid to the trustee;

(3) that the advances made by the wife to the husband, being for the purposes of his business and so leaving her, prima facie, deferred to other creditors under section 36 (2) of the Bankruptcy Act, 1914, were not changed in their character by the judgment obtained by her in 1952 so as to entitle her on that judgment to compete with other creditors; so that her claim must be deferred.

In re Slade [1921] 1 Ch. 160 distinguished.

Observations of Cozens-Hardy M.R. in *In re Van Laun* [1907] 2 K.B. 23, 30, applied.

Motion.

By this motion the trustee in bankruptcy of a medical practitioner claimed a declaration that moneys advanced to the bankrupt by his wife for the purposes of his practice were gifts and not loans. Alternatively, he claimed that, having regard to section 40 (1) of the Bankruptcy Act, 1914, the wife was not entitled to retain against him the benefit of the attachment of a debt due to her husband from the Ministry of Health.

The facts are fully stated in the written judgment of Upjohn J.

J. G. K. Sheldon for the trustee.

K. Diplock Q.C. and *N. MacDermot* for the wife.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

1954. February 8. Upjohn J. delivered the following written judgment: By this motion the applicant, the trustee of the estate of Nicholas Lupkovics, whom I will refer to as "the "bankrupt," makes a number of claims against the respondent, Ruth Margaret Freville, who is the wife of the bankrupt although she has now changed her name by deed poll. I will refer to her as "the wife."

The bankrupt and the wife married in Budapest in 1937 and came to England shortly after the outbreak of war in 1939. The bankrupt is a doctor and practised for a time in Swindon, but in 1948 he went with the wife to Plymouth and set up there in partnership with a Dr. Bradlaw at the premises known as No. 73 Embankment Road, Plymouth. The bankrupt and the wife purchased and resided at a house known as Compton Lodge, Plymouth. In that year and admittedly for the purpose of the bankrupt's medical practice, the wife advanced to the bankrupt

£4,500, and the first question that arises on the motion is whether that sum was advanced by way of loan or by way of gift. Later, in 1950, the wife advanced to the bankrupt £800 for the purchase of a large Ford car which was also to be used for the purposes of his medical practice. A similar question arises as to the £800.

About the end of 1951 or possibly the beginning of 1952 the bankrupt was joined as co-respondent in a divorce suit brought by a Mr. Paterson against his wife, in which Mr. Paterson claimed substantial damages against the bankrupt. Unfortunately Mr. Paterson was a patient of the bankrupt, and this not unnaturally led Dr. Bradlaw to dissolve partnership with the bankrupt. The terms of the dissolution were contained in a written agreement dated May 17, 1952, whereby the partnership was dissolved with effect from March 31, 1952, and by clause 2 thereof it was provided that the bankrupt would take over No. 73 Embankment Road, Plymouth, and would assume sole liability for £2,638 1s. 10d., being the amount then due by the partnership to Lloyds Bank, Ld., on March 31, 1952, in connexion with that property. The effect of that term of the agreement appears to have been misunderstood at the wife's private examination. The bankrupt continued to live with the wife at Compton Lodge, and on June 3, 1952, the wife issued a writ against the bankrupt claiming two sums, one of £4,750 alleged to have been lent to the bankrupt on May 1, 1948, and one of £800 alleged to have been lent on September 25, 1950. Those sums admittedly represent the sums of £4,500 and £800 that I have already mentioned, the claim for the additional £250 appearing in the writ being mistaken. No appearance was entered and judgment was duly entered against the bankrupt for £5,550 and costs on July 16, 1952.

On August 29, 1952, the bankrupt left the wife. He put up a notice in the surgery at Embankment Road saying that patients should get another doctor and the trustee admits that, apart from the liability to Lloyds Bank in connexion with that property, he left no debts in the locality. Thereafter the evidence as to his movements is somewhat obscure. The wife apparently knew that he was living with Mrs. Paterson at an address in Cheviston Gardens, London, but she herself must have left Compton Lodge some time in September and gone to stay with an aunt in Worthing and after that, apparently, she has been earning her living working at one or more jobs. We know that later on—probably in January, 1953—the bankrupt was in Brixton Prison, for the wife visited him there: and that is really the sum total of the evidence before me as to the movements of the bankrupt after he left the wife in August, 1952.

To complete the history, on October 8 and 17, 1952, respectively there were made at the wife's instance garnishee orders absolute directing the executive council for Plymouth to pay to the wife £144 14s. 1d. and £14 4s. 7d. due by them to the bankrupt and those sums were duly paid to the wife. There was a further substantial sum of £2,786 due to the bankrupt from the

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Ministry of Health, under the provisions of the National Health Service Act, 1946, and the regulations made thereunder, on his retirement from practice, which took place, at latest, on August 29. Pursuant to section 27 of the Crown Proceedings Act, 1947, the wife sought to obtain a direction that that sum should be paid to her. On October 29, 1952, the matter came before a Queen's Bench master and a good deal of evidence was filed thereon. On that day an order was made directing payment of the said sum of £2,786 (omitting shillings and pence) less the Ministry's costs, seven guineas, but on the terms that the sum of £2,786 should be retained in the hands of the wife's solicitors for six months from October 31, 1952, they undertaking to indemnify the Ministry for that period against any claim by a trustee in bankruptcy of the bankrupt in respect of that sum. I shall have to refer in detail to that order at a later stage. Pursuant to that order, £2,778 (i.e., £2,786 less £7 7s. costs) was paid into the joint names of two partners in Messrs. Field, Roscoe & Co., solicitors, and invested by them in gilt-edged securities which they hold pending the decision of this case. On January 2, 1953, a bankruptcy petition was presented against the bankrupt and on March 4, 1953, a receiving order was made and the applicant trustee was duly appointed the trustee of the estate.

The first question that I have to determine is whether the £4,500 and the £800 advanced to the bankrupt by the wife in 1948 and 1950 were gifts or loans.

[His Lordship then held, after considering the evidence, that both the £4,500 and the £800 were loans from the wife to the bankrupt, and continued as follows:] It follows therefore that the judgment obtained on July 16, 1952, was—at all events as to £4,500 and £800—valid, and the attachments in respect of the sums of £144 and £104, having been completed before the bankruptcy, cannot be re-opened.

With regard to the sum of £2,786, different considerations arise. Counsel for the trustee submitted that the wife is not entitled to retain the benefit of the payment made to her solicitors pursuant to the order of October 29 on two grounds, both arising under section 40 of the Bankruptcy Act, 1914, which I will now read.

[His Lordship read section 40 (1) and (2) and continued:]

First, counsel says that at the date of the order the wife had notice of an available act of bankruptcy by the debtor. The available act relied on is contained in section 1 (1) (*d*) of the Act of 1914. That paragraph is in these terms: [His Lordship read section 1 (1) (*d*) and continued:] It is said that on October 29 the wife knew that the bankrupt was absenting himself with intent to defeat or delay his creditors. [His Lordship dealt with the evidence as to that matter and, on it, held, first, that the court could not infer that the bankrupt had gone, and remained, away from Compton Lodge with that intent and, secondly, that if he did remain away with that intent, the evidence did not show

that she knew that that was why he did so. His Lordship then continued:] In my judgment, on the facts of this case, the trustee fails on this point.

The second ground submitted by counsel for the trustee was that the attachment was not completed before the date of the receiving order because there had been no receipt of the debt within the meaning of section 40 (2) for, by the terms of the order of October 29, the sum of £2,786 or investments representing the sum remained in the hands of the wife's solicitors at that date. He referred me to *George* v. *Tompson's Trustee*,[1] where Wynn-Parry J. reviewed the earlier authorities and held that where the judgment creditor had an absolute and indefeasible title to money in court but had, through no fault of his own, not obtained actual payment out before the bankruptcy, the attachment was not complete.

I must now read the order of October 29: "Upon hearing the "solicitors for the judgment creditor and counsel for the Minister "of Health and upon reading the affidavits of Arthur James "Francis Danielli and James Austin filed herein And on the "judgment creditor's solicitors undertaking to hold the sum of "£2,786 for six months from October 31, 1952 and to indemnify "the said Minister for that period against any claim by a trustee "in bankruptcy of the judgment debtor in respect of the said "sum It is ordered that the judgment debtor be restrained "from receiving from the Ministry of Health the sum of £2,786 "And it is further ordered that the said Ministry of Health (after "deducting therefrom £7 7s. their assessed costs of this appli-"cation) do on November 1, 1952 pay to the said judgment "creditor or if the judgment creditor is resident outside the "scheduled territories as defined by the Exchange Control Act, "1947, or would receive payment of the said sum on behalf of a "person so resident into court unless the Treasury's permission "under the said Act has been given unconditionally or upon con-"ditions which have been complied with £2,786 the debt due "from the said Ministry of Health to the said judgment debtor "And that the judgment creditor's costs of this application be "taxed and added to the judgment debt and be retained out of "the money recovered by the said judgment creditor under this "order and in priority to the amount of the judgment debt. . . ."

The first submission of counsel for the wife on that order was that there was an unconditional order to pay £2,778 to the wife preceded by a separate collateral arrangement between the solicitors of the wife and the Ministry to which the wife was no party whereby the wife's solicitors held, apparently, an entirely different sum of £2,786 on the terms of the order. I reject that argument. It is perfectly plain that the arrangement between the parties—that is, the wife, the Ministry and her solicitors—was that she was to be paid £2,778, but that that sum was to remain

[1] [1949] Ch. 322; [1949] 1 All E.R. 554.

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in her solicitors' hands until April 3, 1953, as security for any claim that might be made against the Ministry by a possible trustee in bankruptcy of the bankrupt. The difference of seven guineas is a matter de minimis.

Counsel for the wife has a further point. He says that the words "benefit of the execution" in section 40 (1) refer, not to the fruits of the execution, but only to the charge remaining under the still subsisting execution for the balance of the debt: see *In re Andrew, ex parte Official Receiver*[2]; and he says that the order has been complied with, that there has been payment, that the Ministry have been discharged of their indebtedness to the bankrupt and that there is nothing on which the "benefit of the execution" can operate: but, having regard to the words of subsection (2), he still has to say, and does say, that the attachment has been completed by receipt of the debt; and that is really the whole question which I have to determine.

Did the order of October 29 and payment to the solicitors in pursuance thereof constitute a receipt of the debt? That must mean, in my view, receipt of the debt by the creditor or her duly authorized agents. In my judgment, there is no receipt of the debt until—at all events as between the judgment creditor, the judgment debtor and the garnishee—there has been an unconditional payment to the judgment creditor or her duly authorized agents. In this case there has been a payment to the judgment creditor or her duly authorized agents, but they are bound to hold the sum not solely as her agents but, as stakeholders or trustees, as security for the benefit of the Ministry of Health. If, instead of payment to the wife's solicitors, payment into court for six months had been ordered, *George* v. *Tompson's Trustee*[3] would have been directly in point. If, instead of payment being made to the wife's solicitors, it had been made to third parties as stakeholders, I cannot see how the wife could have said that there was receipt of the debt. It can make no difference that payment was made to her solicitors, they receiving the money not solely as her agents but as stakeholders or trustees, holding it in medio to meet a possible claim against the garnishee. In my judgment, there was no receipt of the debt while the money or investments representing the same remained in the solicitors' hands on the terms of the order, and therefore the attachment was not completed before the date of the receiving order.

The next point taken by counsel for the wife was this: He said that the proceedings between the wife and the Ministry of Health were not proceedings by way of attachment at all. The argument is a dangerous one, for, if the proceedings were not an attachment, it would seem that the trustee could claim the debt from the Ministry as being due to the bankrupt and that, although the bankrupt is restrained by injunction from receiving it, it would

[2] [1937] Ch. 122.

[3] [1949] Ch. 322; [1949] 1 All E.R. 554.

not necessarily preclude the trustee from doing so. However that may be, counsel said, and rightly, that these proceedings were taken under section 27 (1) of the Crown Proceedings Act, 1947. The sidenote to that section is: "Attachment of moneys payable "by the Crown." The section provides: [His Lordship read section 27 (1) and continued:] Apparently, before 1947, there was no means of attaching a debt due from the Crown: see Robertson's Civil Procedure by and against the Crown, at p. 611. In my judgment, however, proceedings under section 27 (1) are proceedings by way of attachment for the purposes of section 40. Attachment is nowhere defined in the Bankruptcy Act, 1914, but it is not, in my judgment, a term of art confined to attachments arising under Order 45. It is equally appropriate to include proceedings under section 27 (1) of the Crown Proceedings Act, 1947—a section clearly intended to put the judgment creditor in the same position vis-à-vis the Crown as any other debtor of the bankrupt, i.e., to prevent the judgment debtor from obtaining payment of the debt and to secure payment to himself, the difference in the form of order obtained being due to the privileges and immunities of the Crown. This submission fails and, in my judgment, the wife must pay £2,778 to the trustee.

The last point taken by counsel for the wife was this. He admits that the sums in question were originally advanced by the wife to the bankrupt for the purposes of his business and that, therefore, she is prima facie, under section 36 (2) of the Bankruptcy Act, 1914, deferred to other creditors; but he submits that, having regard to the judgment that she obtained in July, 1952, she has improved her position and is entitled to prove in competition with other creditors on that judgment and he relied on *In re Slade*.[4] That was a very different case. Originally a married woman had advanced £1,000 to her husband for his farming business. Some years later the husband and wife entered into an arrangement whereby, in consideration of the payment of the original sum, he entered into a bond to pay her £40 per annum for her life. Years afterwards the husband died and his estate was administered in bankruptcy, and Sargant J. held that the widow or her assignee could prove for the annuity in competition with the other creditors on the simple ground that the original loan had long since been put to an end and that at the time of the bankruptcy she was in the position of a person entitled to an annuity of £40 per annum from her husband and his estate. In this case there was no change whatever in the nature of the arrangement between husband and wife, and she merely became a judgment creditor in respect of the original debt. It is clearly settled in bankruptcy law that there is no merger of the original debt in a judgment debt, and the trustee in bankruptcy is entitled to go behind the judgment to investigate the nature and grounds of the debt. Cozens-Hardy M.R. expressed the bankruptcy law on the

[4] [1921] 1 Ch. 160.

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point in a sentence in *In re Van Laun*[5]: "I cannot bring myself "to believe that what I may call the judgment cases are anything "more than illustrations of the principle that the court has a "right and a duty to investigate the nature and the grounds of "the debt."

Investigation in this case shows two things: first, that the debt was for £5,300 and not for £5,550; and, secondly, that it was a debt created by way of loan for the purposes of the bankrupt's business.

Accordingly, in my judgment, the balance of this debt is deferred to the claims of other creditors after deduction of the sums of £144 and £104.

Order accordingly.

Solicitors: *Wedlake, Letts & Birds; Field, Roscoe & Co.*

K. R. A. H.

[5] [1907] 2 K.B. 23, 30.

[COURT OF APPEAL.]

C. A.

1954 *July* 26.

Jenkins and Hodson L.JJ.

* MAERKLE and Another *v.* BRITISH CONTINENTAL FUR CO. LD.

[1953 M. 4414.]

MAERKLE *v.* SAME.

[1953 M. 4415.]

Trading with the Enemy—Custodian of Enemy Property—Litigation—Rights vesting in custodian—German partnership—Action by partners against London agents for proceeds of sale of goods—Money in hands of custodian—Claims in conversion, breach of trust and for declaratory relief—Whether actions maintainable—Trading with the Enemy Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 89), *s.* 7—*Trading with the Enemy (Custodian) Order,* 1939 (*S.R. & O.* 1939, *No.* 1198), *arts.* 1, 2, 5—*Trading with the Enemy (Custodian) (No.* 2) *Order,* 1945 (*S.I.* 1945, *No.* 887), *art.* 1—*Distribution of German Enemy Property Act,* 1949 (12, 13 *&* 14 *Geo.* 6, *c.* 85), *s.* 1—*Distribution of German Enemy Property (No.* 1) *Order,* 1950 (*S.I.* 1950, *No.* 1642), *art.* 18 (1) (3)—*Trading with the Enemy (Custodian) Order,* 1951 (*S.I.* 1951, *No.* 153), *arts.* 1, 4, 7.

The two plaintiffs in the first action were German nationals carrying on business in partnership at Leipzig at the outbreak of war. The first plaintiff in that action was the sole plaintiff in the second. In the first action the plaintiffs alleged that the defendants as their London agents, had purchased in 1939 a number of Persian lambskins for the account of the plaintiffs for which the plaintiffs had paid. Subsequently, it was alleged that the defendants had sold the lambskins in Canada and had accounted to the Canadian Custodian of Enemy Property for $59,000, whereas the price for the

skins was in fact $79,000. The plaintiffs claimed on account of all sales of the skins, damages for breach of trust, for the breach of the contract of bailment and in conversion and, further, a declaration that the defendants had not truly accounted to the Canadian Custodian of Enemy Property in respect of the sale of the skins. In the second action the plaintiff alleged that the defendants had in 1935 received moneys for the use and benefit of the plaintiff, and as trustee for him, and that the defendants in the accounts which they had rendered showed a number of payments amounting to £7,199 6s. 6d. as having been made which, in fact, had not been made, or that the payments had been made fraudulently. The plaintiff claimed damages for conversion or breach of trust, a declaration that the defendants had converted the sum of £7,199 6s. 6d. to their own use and an order requiring the defendants to pay that sum to the Custodian of Enemy Property in the United Kingdom. On the application of the defendants, Wynn-Parry J. made orders in both actions striking out the two statements of claim. On appeal:—

Held, (1) that there might be claims in tort of certain kinds, the rights of action in respect of which would not vest in the Custodian of Enemy Property under the trading with the enemy legislation, but the rights in question in the two actions were essentially proprietary in their origin, arising as they did out of contracts or trusts which conferred interests in the nature of property upon the plaintiffs, and that such claims were caught by the legislation, and that the claims of the plaintiffs were maintainable by the custodian and by no one else.

(2) That the actions should not be allowed to go forward for the purpose of obtaining declaratory relief in proceedings to which the custodian was not a party; that such relief could confer no tangible benefit on the plaintiffs and might be productive of embarrassment as between the defendants and the custodian in any litigation or negotiation which might thereafter take place between them upon the subject-matter of the two actions.

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536 distinguished.

Decision of Wynn-Parry J. affirmed.

APPEALS from two orders of Wynn-Parry J.

The following statement of facts is taken from the judgment of Jenkins L.J.

The plaintiffs in the first action were Frank Maerkle and Rudolf Tenzler; the plaintiff in the second action was Maerkle alone. The defendants in both cases were British Continental Fur Co. Ld. In the first of the two actions, 1953 M. 4414, the plaintiffs, by their statement of claim, stated that they carried on a partnership at Leipzig in Germany in 1939. They further alleged that the defendants were the London agents of the plaintiffs, and that in or about the year 1939 the defendants purchased, as agents for and on behalf of the plaintiffs and others, 12,666 Persian lambskins, approximately 40 per cent. of which were bought for the account of the plaintiffs. The statement of claim went on to allege in paragraph 3 that at the outbreak of war in 1939 these skins had not been delivered by the defendants to the plaintiffs, although full payment had been made by the plaintiffs to the vendors of the skins. None of the skins had been delivered

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at the outbreak of war. By paragraph 4 the statement of claim alleged that something in the nature of a statement of account was rendered by the defendants to the first-named plaintiff in or about 1948, and this purported to show that the proceeds of sale of the lambskins in question had been paid over to the Canadian Custodian of Enemy Property. In paragraph 5 it was alleged that the defendants had failed to account to the plaintiffs or to the Canadian Custodian of Enemy Property in respect of the lambskins in question, and there was a specific complaint to the effect that the skins were shown as having been sold for 59,000-odd Canadian dollars, whereas the true price was 79,000-odd Canadian dollars.

In respect of this transaction the plaintiffs claimed: "1. That "an account be ordered to be taken of all sales by the defendants "of the 12,666 lambskins. . . . 2. That on the taking of such "account and after deduction of such sums less contra accounts "as were paid by the defendants to the Canadian Custodian of "Enemy Property an order be made for payment by the defen-"dants to the Canadian Custodian of Enemy Property or the "United Kingdom Custodian of Enemy Property for and/or on "behalf of the plaintiffs of such sums as may be found to be "due and owing on the taking of such account together with "interest thereon at the rate of 4 per centum per annum" as therein mentioned. "3. Damages for breach of trust. "4. Damages for breach of the contract of bailment. 5. Damages "in conversion. 6. A declaration that the defendants have not "truly accounted to the Canadian Custodian of Enemy Property "in respect of the sale of the said 12,666 lambskins, and/or that "a true account of the sale of such skins is $79,468·76 as "pleaded, and/or that the defendants have converted the sum of "$19,600 to their own use of which 40 per centum, namely "$7,840, represented the share of the plaintiffs."

In the second action, 1953 M. No. 4415, Maerkle alleged by his statement of claim that "In or about 1935 when the defen-"dants were the London agents for the plaintiff who carried on "business in Germany it was orally agreed between the plaintiff "and one Buttman for and/or on behalf of the defendants that "the defendants should receive and retain certain moneys and/or "trade credit balances in favour of the plaintiff for the plaintiff's "use and benefit and as trustees for the plaintiff and that a "record of such said moneys and/or balances should be kept "under the style 'B. Buttman "B" Account.'"

The statement of claim went on to allege that moneys were received by the defendants in pursuance of this agreement, and that the defendants, in an account which they submitted, showed a number of payments as having been made out of the moneys in question when no such payments had in fact been made, and these allegedly fictitious payments were said to amount to £7,199 6s. 6d., those being payments which were never in fact made by the defendants, and it was alleged that

the payments were made fraudulently and in breach of trust. It was also put as a conversion of the sums in question to the defendants' own use.

In a paragraph introduced by amendment, by way of alternative, the plaintiff said that he would contend "that his right "to repayment of the sum of £7,199 6s. 6d. had and received "by the defendants to his use and benefit vested in the Custo-"dian of Enemy Property for the United Kingdom by virtue of "article 1 of the Trading with the Enemy (Custodian) Order, "1951 (S.I. 1951 No. 153)" and that the defendants as alleged in the preceding paragraphs "failed to disclose or declare such "right to the said custodian pursuant to article 1 of the Trading "with the Enemy (Custodian) Order, 1939, and that the plaintiff "has been thereby occasioned damage in that he has been "deprived of his interest in the said moneys (including his "interest thereon) whether such interest in the said moneys be "adjudged to be or to have been complete or suspensory, and "claims that the defendants be ordered to pay forthwith to the "said custodian the sum of £7,199 6s. 6d. and/or interest "thereon at the rate of 4 per centum per annum."

The claim in the prayer was: "1. Damages in conversion. "2. Damages for breach of trust. 3. A declaration that the "defendants have converted the sum of £7,199 6s. 6d. to their "own use as alleged or, 4. An order requiring the defendants as "trustees for and/or on behalf of the plaintiff to pay the sum of "£7,199 6s. 6d. together with interest thereon at the rate of 4 "per centum per annum as from September, 1939, until the "date of payment (inclusive) forthwith to the Custodian of "Enemy Property for the United Kingdom. 5. Further or other "relief," and, "6. Costs."

The defendants applied to have the statements of claim struck out. Wynn-Parry J. held that having regard to the relevant provisions of the trading with the enemy legislation as between the plaintiffs and the defendants the plaintiffs had ceased to have any interest in the subject-matter of the transactions referred to in the two statements of claim, and that, as between the plaintiffs and the Custodian of Enemy Property their interest consisted only of the right to participation in any distribution or distributions which might be made under the provisions of the Distribution of German Enemy Property Act, 1949, the custodian having the duty (to the exclusion of the plaintiffs) of swelling the funds at his disposal by pursuing any rights which the plaintiffs had against the defendants. It followed that if the actions were allowed to proceed the plaintiffs could not obtain any order for the payment of any sums to themselves. Further, he held that it would be wrong to allow the claims to proceed with a view to orders being made for payment of any sums by the defendants to the custodian and he did not consider it proper

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to allow the actions to proceed for the limited purpose of allowing the plaintiffs to obtain the declarations which they sought.

The plaintiffs appealed.

Alan Campbell for the plaintiffs.

C. A. Settle for the defendants.

The following cases were cited in argument: *Guaranty Trust Co. of New York* v. *Hannay & Co.*[1]; *Nordisk Insulinlaboratorium* v. *Gorgate Products Ld.*[2]; *Reuter (R. J.) Co. Ld.* v. *Mulhens*[3]; *Hugh Stevenson & Sons Ld.* v. *Aktiengesellschaft für Cartonnagen Industrie.*[4]

Jenkins L.J. These are appeals from two orders of Wynn-Parry J. made on May 20, 1954, ordering the statement of claim in each of the two actions to be struck out as disclosing no reasonable cause of action.

The question in each case is the same, namely, whether the subject-matter of the claim has become vested under the trading with the enemy legislation in the Custodian of Enemy Property, with the result that the actions are not maintainable by the plaintiffs.

[His Lordship stated the facts and continued:] The objection taken by the defendant company to the statements of claim (the objection which succeeded before the judge) was that the subject-matter of the claim in both cases was vested in the Custodian of Enemy Property, so that the plaintiffs were not in a position to maintain any action in respect of those claims.

The judge, in the course of his judgment, fully reviewed the relevant statutory provisions bearing upon the vesting of what may be compendiously described as enemy debts. His review was, I think, accepted by Mr. Campbell for the plaintiffs as an adequate review of the relevant provisions, although he joined issue with the judge as to the effect of those provisions in their application to the claims here in question.

After referring to the various statutory provisions the judge said: "Upon that review of the relevant statutory provisions it "appears to me to follow inevitably that as between the respec-"tive plaintiffs on the one hand, and the defendants on the other "hand, the plaintiffs have ceased to have any interest whatso-"ever in the property which was the subject-matter of the "transactions referred to in the respective statements of claim "and that as between the plaintiffs on the one hand, and the "Custodian of Enemy Property on the other hand, their interest "consists only of the right to participate in any distribution or "distributions which may hereafter be made under the provisions

[1] [1915] 2 K.B. 536.

[2] [1953] Ch. 430; [1953] 2 W.L.R. 879; [1953] 1 All E.R. 986.

[3] [1954] Ch. 50; [1953] 3 W.L.R. 789; [1953] 2 All E.R. 1160.

[4] [1918] A.C. 239; 34 T.L.R. 206.

"of the Distribution of German Enemy Property Act, 1949, "the Custodian of Enemy property having the duty (to the "exclusion of the plaintiffs) of swelling the funds at his disposal "by pursuing any rights which the respective plaintiffs had against "the defendants in regard to the property the subject-matter of "the transactions in the respective statements of claim as he may "be advised."

Mr. Campbell submitted that, comprehensive as the language of these statutory provisions may be, some limit must, nevertheless, be placed upon that language as regards the character of the property to which it applies, and he said that the claims to which these two actions relate are not property of such a character as to be caught by the vesting provisions in this legislation. He submitted that the sums claimed are in the nature of damages for tort; he said that they are personal claims, and at one stage in his argument he contended that they were not assignable. I cannot accept Mr. Campbell's argument. It may be that there are claims in tort of certain kinds the rights of action in respect of which would not vest in the custodian. That may well be so, but the rights here in question seem to me to be essentially proprietary in their origin, arising, as they do, out of contracts or trusts which conferred interests in the nature of property upon the plaintiffs. It seems to me that claims of this kind are clearly such as to be caught by the legislation.

I am fortified in that view by the very wide definition of "property" contained in the Trading with the Enemy Act, 1939, s. 7 (8) (*b*), which is in these terms: "The expression 'property' "means real or personal property, and includes any estate or "interest in real or personal property, any negotiable instrument, "debt, or other chose in action, and any other right or interest, "whether in possession or not." I hope I will not be regarded as being disrespectful to Mr. Campbell's argument if I do not go in detail through the provisions which were carefully reviewed by the judge; I am content to adopt his view of the legislation and his conclusion as to its effect in the present cases.

A second argument of Mr. Campbell should be dealt with, and that was this, that even if these rights or claims were vested in the custodian the plaintiffs were, nevertheless, entitled to maintain the first action for the purpose of obtaining a declaration in the form set out in paragraph 6 of the prayer to the statement of claim. In support of that contention (which by parity of reasoning was equally applicable to the declaratory relief sought in the second action) Mr. Campbell relied on the case in the Court of Appeal of *Guaranty Trust Co. of New York* v. *Hannay & Co.*[1] That was an entirely different kind of case, but it was cited by Mr. Campbell as authority for the proposition that a declaration can be made even though the party seeking it has no cause of action against the party against whom the declaration is

[1] [1915] 2 K.B. 536.

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sought. The case was of this nature: The defendants brought an action against the plaintiffs in America to recover the amount of a bill of exchange paid by the defendants in reliance on a forged bill of lading. It was admitted that the law of England applied to the case. The plaintiffs brought an action in England claiming a declaration to the effect that they did not, by presenting the bill of exchange for acceptance with the bill of lading attached, represent that the bill of lading was genuine, and that they were not bound to repay the amount of the bill of exchange; and it was held by the majority of the court that the plaintiffs' claim for a declaration in those terms was free from objection, although they had no cause of action against the defendants in the proceedings in which the declaration was claimed.

That is an entirely different case from the present one, and although it is authority for the proposition that in some cases a declaration may be made, although the party seeking it has no cause of action, it by no means follows that in every case where a party has no cause of action he can maintain a claim for a declaration.

In dealing with this part of Mr. Campbell's argument, the judge seems to have misapprehended some observations which Mr. Settle, for the defendants, attributed to himself. The judge treated this claim for a declaration as made with a view to assisting possible proceedings in Germany, or any proceedings that were contemplated in Germany, by the plaintiffs. In fact, as I understand the position, there never was any intention on the part of the plaintiffs to take any such foreign proceedings. Except for his reference to foreign proceedings, the judge gave no reason for refusing the plaintiffs' claim to declaratory relief. The granting of such relief, as the only relief in an action, is always a matter for discretion, and it has been said, I think, that such discretion should be sparingly exercised.

In the present case, treating the matter as res integra, I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief of the kind sought. If it is the case that the whole of the plaintiffs' right, title and interest in the subject-matter of these actions has passed to the custodian, then the claims which the plaintiffs now seek to assert are, in truth, claims maintainable by the custodian, and no one else, against the defendants, subject to whatever defences the defendants may have. They are claims which the custodian may, or may not, see fit to litigate between himself and the defendants; they are claims which might, or might not, be compounded or compromised between the defendants and the custodian.

In those circumstances, I cannot think that it would be right to allow either of these actions to go forward for the purpose of obtaining declaratory relief in proceedings to which the custodian is not a party. The plaintiffs' interest in such relief could only be described as nebulous, for the only advantage (if one may call

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it such) that Mr. Campbell claims might be achieved by such relief is that it might increase the prospect of his clients ultimately participating in any surplus that the custodian might have on hand after all prior claims had been disposed of. That, Mr. Campbell admitted, is no more than a spes; it is not a right or enforceable interest; it is at most a possibility. I cannot therefore think that it would be right to allow these actions to go forward merely for the purpose of obtaining relief of that kind, which could confer no tangible benefit on the plaintiffs, and might be productive of much embarrassment as between the defendants and the custodian in any litigation or negotiations which may hereafter take place between them upon the subject-matter of these two actions.

For these reasons, in my view the judge came to a right conclusion, and I would dismiss these appeals.

HODSON L.J.—I agree.

Appeals dismissed.

Solicitors: *Crawley & de Reya; Theodore Goddard & Co.*

B. A. B.

[COURT OF APPEAL.]

* BATES v. STONE PARISH COUNCIL.

[1951 B. No. 1185.]

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July 14, 15, 16, 29.
Somervell, Birkett and Romer L.JJ.

Licensor and Licensee—Dangerous premises—Child—Unaccompanied by adult—Public recreation ground—Child injured by fall from chute—Concealed danger—Whether licensee or trespasser—Liability of local authority.

Damages—Personal injuries—Jury—Summing up—"No sum of money "can compensate."

The plaintiff, then three and a half years of age, was permitted by his mother to go to the children's playground in a recreation ground provided by the local parish council, accompanied only by another child of six years. In the playground was provided a chute or slide, the use of which necessitated ascending stairs to a platform which was about 12 feet from the ground. After making several descents with the other child the plaintiff went up by himself and while sitting on the platform fell through a space some 13½ inches square between the upright and horizontal rails on the side of the platform, suffering injuries which resulted in permanent blindness. Some thirteen years previously a boy of four years had fallen from the platform when the rails were in the same condition. Additional rails had then been added as a measure of safety, but in the interval the additional rails had either rusted or broken away and had not been replaced. At the trial of the action the jury found that the plaintiff was a licensee and that the council, having knowledge of the danger, was liable. They awarded the plaintiff £17,500 damages.

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On appeal the council contended that the licence to use the playground did not apply to very young children unless accompanied by a competent guardian; that the plaintiff was in the circumstances a trespasser and the council was not liable.

Held, that although, in certain circumstances, a licence to young children to enter on property on which there is a source of potential danger is assumed to be conditional on their being accompanied by a competent guardian, in the present case it was clear from the council's own evidence that no restriction had been placed on the admission to the playground of children, however young and whether accompanied or not; that the plaintiff entered the playground as a licensee and did not become a trespasser when he went on to the chute; and that the council knowing of the dangerous quality of the aperture through which the plaintiff fell were liable in damages.

Held, further, that the damages awarded were unreasonably high and should be reduced.

Latham v. *R. Johnson & Nephew Ld.* [1913] 1 K.B. 398; 29 T.L.R. 124 considered.

Appeal from Cassels J. sitting with a jury.

The plaintiff, an infant, sued by his father for damages for personal injuries, against the Stone Parish Council. The defendants had, some years previously, established a recreation ground for the use of inhabitants and visitors. In a part of the ground were appliances for children, including a swing, a turntable and a chute or slide. There was uncontrolled access from the road. On January 23, 1947, the plaintiff, then three and a half years of age, went, with his mother's permission, in the company of another child just over six years of age, to this area. The chute was of a type said to be in general use, with stairs, a platform about 12 feet from the ground, and a descending slide. The plaintiff, having descended two or three times with the other child, went up by himself, and while sitting down on the platform, preparatory to sliding down the chute, in some unexplained way fell through an aperture some 13½ inches by 13½ inches, between the upright and horizontal rails on the side of the platform. He fell on his head and sustained injuries which resulted in his becoming permanently blind.

The action was tried by Cassels J. and a jury and on March 31, 1954, the jury found the defendants liable and assessed the damages at £17,500.

The following were the questions, agreed by counsel for the parties, to the jury and their answers:—

1. Did the infant plaintiff fall from the platform and sustain injuries? Yes.

2. Was the infant plaintiff in the children's section of the recreation ground with the permission of the defendants? Yes.

3. Was the infant plaintiff a trespasser when he went on the slide? No.

4. Was the slide by reason of the gap in its then state at the side of the platform a dangerous equipment for children's amusement? Yes.

5. (a) Was the slide an allurement to the infant plaintiff? Yes.

5. (b) Was the infant plaintiff allured? Yes.

6. If answers to 4 and 5 are "Yes" was the slide a danger to the infant plaintiff which he would not appreciate? Yes.

7. Did the defendants know that the slide was dangerous? Yes.

8. If "No" to 7 ought they to have known? —

9. If the answer to 4 and 6 is "Yes" had the defendants given sufficient warning of the danger? No.

10. Had the defendants taken any steps to protect the infant plaintiff from danger? No.

The defendants appealed on the grounds that the judge had misdirected the jury on the question of liability and damages, and that the award should be set aside or reduced as unreasonably excessive.

F. W. Beney Q.C. and *Neil Lawson* for the defendants.
R. C. Vaughan Q.C. and *R. Graham Dow* for the plaintiff.

In addition to the authorities mentioned in the judgments the following were cited: *Hawkins* v. *Coulsdon and Purley Urban District Council* [1]; *Jenkins* v. *Great Western Railway Co.* [2]; *Cooke* v. *Midland Great Western Railway of Ireland.* [3]

Cur. adv. vult.

July 29. The following judgments were read:

SOMERVELL L.J. shortly stated the facts and continued: The defendants appeal on the ground that the judge misdirected the jury on the question of liability and damages, and also on the ground that the award of damages should be set aside as one which no reasonable jury properly directed could have arrived at.

I will deal first with the alleged misdirection as to liability. It is relevant to this issue that in 1934, just after the slide had been installed, a boy aged four had fallen from this platform with the rails as they were when the present accident happened. The circumstances remained obscure. He may have been pushed through in a tussle with another child. Anyhow, it showed that small children might fall through this gap 12 feet above the ground. It was dealt with by the then parish council and the makers supplied additional rails, which made it impossible for a child to slip through. These additional rails either rusted or broke away at some date, which remained uncertain, some years before the present accident.

Mr. Beney submitted, first, that there was no proper direction with regard to the second and third questions put to the jury, namely, 2: "Was the infant plaintiff in the children's section

[1] [1954] 1 Q.B. 319; [1954] 2 W.L.R. 122; [1954] 1 All E.R. 97.
[2] [1912] 1 K.B. 525.
[3] [1909] A.C. 229; 25 T.L.R. 375.

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of the recreation ground with the permission of the defendants?" 3: "Was the infant plaintiff a trespasser when he went on to the slide?"

By paragraph 5 of their defence the council alleged that the plaintiff was a trespasser, on the ground that he was not in the custody of or under the control of a competent person. The principle on which this is based was stated by Lindley J. in *Burchell* v. *Hickisson*.[1] The plaintiff in that case, a boy of four, fell through a gap in railings on the side of the steps leading up to the defendant's front door. He was accompanied by his sister, who was twelve, to whom, of course, the gap was obvious. Lindley J. said: "There could be no duty on the part of the "defendant towards the plaintiff further than that the defendant "must take care no concealed danger exists. The plaintiff was, "no doubt, too young to see or guard against any danger, but "the logical way of considering the matter is to consider it alter-"natively in this way: the defendant never invited such a person "as the plaintiff to come unless he was taken care of by being "placed in charge of others, and if he was in charge of others "then there was no concealed danger. In other words, there was "no invitation to the plaintiff if he was not guarded, and if "guarded, then there was no trap."

In *Latham* v. *R. Johnson & Nephew Ld.*[2] Farwell L.J. said: "I am not aware of any case that imposes any greater liability "on the owner towards children than towards adults: the "exceptions apply to all alike and the adult is as much "entitled to protection as the child. If the child is too young "to understand danger, the licence ought not to be held to extend "to such a child unless accompanied by a competent guardian. "See *Burchell* v. *Hickisson*,[3] *Schofield* v. *Mayor, etc., of Bolton*,[4] "and *Stevenson* v. *Corporation of Glasgow*."[5] Hamilton L.J. said[6]: "The child must take the place as he finds it and take "care of himself; but how can he take care of himself? If his "injury is not to go without legal remedy altogether by reason "of his failure to use a diligence which he could not possibly "have possessed, the owner of the close might be practically "bound to see that the wandering child is as safe as in a nursery. "The way out of the dilemma was found in *Burchell* v. "*Hickisson*[3] by deciding that the circumstances may evidence "the attachment of a condition to the licence or permission to "enter, namely, that the child shall only enter if accompanied "by a person in charge capable of seeing and avoiding obvious "perils and thus of placing both himself and his charge in the "position of an ordinary licensee both able and bound to look "after himself." He then cites the passage I have quoted from *Burchell's* case[3] and concludes: "Logically this principle is

[1] (1880) 50 L.J.C.P. 101, 102.
[2] [1913] 1 K.B. 398, 407; 29 T.L.R. 124.
[3] 50 L.J.C.P. 101.
[4] (1910) 26 T.L.R. 230.
[5] 1908 S.C. 1034.
[6] [1913] 1 K.B. 398, 414.

"applicable to all cases of infirmity or disability and not to "infants only."

In *Coates* v. *Rawtenstall Borough Council*,[7] a child of three and a quarter had an accident on a slide similar to that in the present case. The defendant council contended that the recreation ground was provided for children of school age only, and that the plaintiff was a trespasser. This court decided that as the plaintiff was accompanied by a competent guardian, a boy of fourteen, he was a licensee. I have dealt with these cases because, in my view, the principle is an important one. A wholly undue burden would be placed on the provision of facilities for the young, whether by local authorities, institutions, or private individuals, if they were held liable in damages because some of those facilities were a danger to very small unattended children. If a man put up a diving board he is not, I think, by the fact of opening it to the public, "inviting" small unattended children who cannot swim to climb up it. It, of course, depends on the circumstances whether the defendant can or cannot rely on this limitation.

Mr. Beney submitted that the matter had not been left to the jury. The difficulty in the defendants' way, however, arose from the evidence of the present chairman of the council, Mr. Roberts, and the action of the defendants' predecessors in 1934. Having read all Mr. Roberts' evidence I think the judge was justified in treating it as negativing any limitation on the defendants' invitation. In other words, their policy was to admit all children whether young and unattended or not. The groundsmen, if they saw very young unattended children approaching or using the slide, prevented them and did their best to return them home. The groundsmen had other things to do and if the plaintiff was a licensee in the ground it seems to me impossible to hold he became a trespasser when he got on the slide.

The other difficulty arises out of the policy pursued by the defendant council in 1934. When the small boy fell off the slide, they might, of course, have decided to exclude unattended children under, say, five, or make it clear that such children were not there with their permission. They pursued a different policy. By stopping up the hole through which only a very small child would be likely to fall they provided some evidence for the policy as indicated in Mr. Roberts' evidence. In view of this evidence, though he did not formally withdraw the issue from the jury, the judge was, I think, justified in indicating, as he did, that substantially the defendants' own evidence and action precluded them from maintaining the limitation on which they sought to rely.

Mr. Beney further submitted that there was misdirection as to the answers to questions 4 and 7 which read as follows: 4. "Was the slide by reason of the gap in its then state at the

[7] [1937] 3 All E.R. 602.

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"side of the platform a dangerous equipment for children's "amusements?" 7. "Did the defendants know that the slide "was dangerous?" This raises, inter alia, the question of the defendants' knowledge or ignorance of the accident in 1934. The then clerk had retired, the present clerk was not called. The then chairman was still a member of the council and was not called. The accident and the action taken as a result of it is fully recorded in the minutes. In these circumstances, I would have thought that the defendants knew or must be taken to know of the accident of 1934. I do not think it would be right to lay down, as a matter of principle, that a council must be taken to know all the past contents of its minute book.

Mr. Beney said that the judge did not refer to the fact that there had been no accidents since the unknown date when the extra rail disappeared. I do not think it was necessary for him to do so. Once one reaches the position that very small and unattended children were permitted access to this slide I think the judge was justified in directing the jury as he did on these two questions, to each of which the jury answered "Yes."

That leaves the question of damages. Could a jury properly directed reasonably have given such a sum. The judge properly directed the jury as to the plaintiff's chances of being trained and earning his living. He also referred them to the medical reports which indicate the possibility of future trouble. He adopted Mr. Vaughan's submissions for the plaintiff, which were not before us, and this had relevance to one passage which, I think with respect, is open to criticism: "How right everybody "has been in this case when they have said to you (as, indeed, "I say to you) that no amount of money can restore that boy's "sight." Although he follows this by referring to and emphasizing what is done for the blind today, I think that sentence, without some cautionary words, might well have been taken to mean in effect that no figure for the blindness in itself would be too high. If that sentence did not mislead the jury then I think the figure cannot stand on the other ground. Both parties agreed that if we came to the conclusion that a new trial ought to be ordered on this ground we should ourselves assess the damages. We think the proper figure is £9,000.

Birkett L.J. I agree with the judgment which has just been delivered by my Lord. The appeal to this court is against the finding of liability, and against the amount of damages awarded. It was natural and inevitable that all the proceedings in the court below should be coloured by the disaster which had overtaken this small boy of three and a half years. Because of this accident, he had lost his sight without hope of recovery; and this accident with this lamentable consequence, was alleged to be the result of the negligence of a local authority, the Parish Council of Stone. Quite apart from any questions of fact or law by which the case was to be decided, it is easy to understand the instinctive

sympathy for a small boy upon whom such a grave calamity had fallen, and it was proper that all the proceedings in the court below should be subjected to a critical examination at the hands of Mr. Beney on behalf of the parish council.

I am bound to express my own deep regret that this small boy should have been allowed to go to the recreation ground at all, accompanied only by another small boy of some six years of age. A boy of six could not be expected to be a proper or a competent guardian, and to a child of three and a half most things in this world take on an aspect of danger if he is not protected against them. To reach the recreation ground from the plaintiff's home required the two little boys to cross two public highways with all the dangers of modern traffic, and that fact by itself, I should have thought, would have been enough for a careful and thoughtful parent to forbid the small boy to go unless he were in watchful and careful hands. But the fact remains that the infant plaintiff was allowed to go in the care of this boy of six, and it was the alleged negligence of the parish council that was alone in question.

When all the evidence had been given, the judge formulated a series of questions for the jury which were agreed by counsel on both sides. No objection, therefore, can be taken to the form of the questions, but objection is taken by Mr. Beney to the summing-up in relation to some of them. Questions 2 and 3 were designed to elicit the jury's view as to the status of the infant plaintiff at the time of the accident in relation to the defendant council. Question 2: "Was the infant plaintiff in "the children's section of the recreation ground with the per-"mission of the defendants?" Question 3: "Was the infant "plaintiff a trespasser when he went on the slide?" The defendants had pleaded, and the judge drew the attention of the jury to that pleading, that the infant plaintiff was a trespasser when he used the slide in that at that time he was not under the control of a competent guardian.

Mr. Beney complained that the judge had failed to direct the jury on this all-important matter. His submission was that the child at the time of the accident was not a licensee on the recreation ground, but a trespasser, inasmuch as the licence granted by the defendants to young children was limited to young children who were at the time they entered the recreation ground in the care of a competent guardian. That such a limited licence can exist is plain from the cases already cited by my Lord, but the important words for the decision of this point in the present case seem to me to be the words of Hamilton L.J. in *Latham* v. *R. Johnson and Nephew Ld.*,[8] when he said: "The child must "take the place as he finds it and take care of himself; but how "can he take care of himself? If his injury is not to go without "legal remedy altogether by reason of his failure to use a diligence

[8] [1913] 1 K.B. 398, 414.

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"which he could not possibly have possessed, the owner of the "close might be practically bound to see that the wandering child "is as safe as in a nursery. The way out of the dilemma was "found in *Burchell* v. *Hickisson*[9] by deciding that the circum-"stances may evidence the attachment of a condition to the "licence or permission to enter, namely, that the child shall only "enter if accompanied by a person in charge capable of seeing "and avoiding obvious perils, and thus of placing both himself and "his charge in the position of an ordinary licensee both able and "bound to look after himself." It is the circumstances of the particular case which must be examined to see if they do evidence the attachment of a condition or not.

The evidence has been read to this court at some length, and it was discussed before the jury in relation to the questions that had been formulated. The judge had stated the point raised in the defendant's pleading and he had discussed with some fullness the evidence given by Mr. Roberts, the chairman of the parish council. Nobody apparently had suggested that this particular point should be incorporated in the two questions, in any more specific way, and it seems to me that the point was fairly before the jury when they made their answers. Indeed, it seems to me that the jury on the evidence could not have answered otherwise. There do not appear to have been any printed regulations calling attention to this point; there was no notice of any kind limiting the entry into the recreation ground, which was open to the highway, and certainly no prohibition of the entry of young children; no circular had ever been sent to parents limiting entry to the recreation ground to those young children who were in charge of a competent guardian; and the jury were entitled to regard the evidence of Mr. Roberts, the chairman of the council, as indicating that the council had never sought to limit the entry of young children in the manner now suggested, although he did say that the council relied on the parents not to allow young children to come to the recreation ground.

But the jury were also entitled to consider the events of 1934. In circumstances which are a little obscure, a small child had actually fallen through this very small gap at the top of the chute. Whether the child crawled through or was pushed through or fell through matters little, but the fact remained that on this very chute, at this very place, a small child had fallen through the gap which then existed. And the jury was entitled to consider what the council did on that occasion. There was no circular, no notice, no prohibition, but a horizontal bar was fixed in position so that a child could no longer fall through the gap. To the jury this could only mean that the policy of the council at that time was to make provision for small children, and children so small that they might fall through the gap unless the

[9] 50 L.J.C.P. 101.

horizontal bar prevented them. There was no evidence before the jury that that policy had ever been changed. In my opinion the evidence was all one way, and the jury in their answers to questions 2 and 3 properly decided that on the day of the accident the plaintiff was a licensee and not a trespasser. I do not think that Mr. Beney's submission that the judge misdirected the jury upon this issue is well founded.

There were many other criticisms of the summing-up made by Mr. Beney. For example, he complained that the judge had said nothing about "foreseeability." Could the defendant council have foreseen that a small child of three would be on the platform of the chute when he was unaccompanied? Could they have foreseen that the boy would put his head through this small gap and slip, or be jostled or pushed so that he fell? Was there any danger on the chute which they ought to have foreseen? These and similar questions were raised by Mr. Beney, but if the agreed questions are examined it will be seen that whilst nothing is said about "foreseeability" in the questions, nevertheless the questions cover the point. If questions 4 and 7 are taken together, the one asking whether the slide was dangerous because of the gap, and the other asking whether the defendants knew of the danger, and the jury answering both questions in the affirmative, the question of "foreseeability" answers itself. For if you permit young children unrestricted entry to the recreation ground, with no limitation as to age or any other thing, and if in fact there is a chute that is dangerous and you know of the danger, then you must be taken to foresee that an accident may take place.

But Mr. Beney urged that there had not been a proper direction to the jury on the important question of the knowledge of the defendant council of the danger existing. It was a remarkable circumstance that a similar accident had taken place in 1934, and that a horizontal bar had been inserted to prevent a similar accident happening. That horizontal bar had vanished and since 1941 at least it had not been in its place, and the gap through which the infant plaintiff in this case fell was the self-same gap through which the small boy fell in 1934. Mr. Beney's complaint was that the judge should have told the jury that there had been no accident since 1934, and no accident therefore after 1941 when the bar was missing, and it was for the jury to consider whether the council could reasonably have foreseen that an accident of this kind would take place after all those years of immunity. To this he added the submission that the judge should have told the jury, on the question of knowledge, that actual knowledge of the danger must be proved and that knowledge was not to be taken as proved merely from the minutes of the council in 1934, but must be shown as knowledge of the clerk to the council or the groundsman or some other responsible person.

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Although the point is not free from difficulty I think the judge was right on the facts of this case in directing the jury as he did when he said: "And so far as one can attribute "knowledge to a council, well, may we not say that you can "ascertain the knowledge of the council by looking at their "minutes? Look at what they have recorded in their minutes "with regard to the accident in 1934; and look what was the "result of the action which was taken of improving the condition "of the slide by putting on that extra horizontal bar on each side "which was there to be seen by any member of the council "who happened to pass by." The knowledge of this council as recorded in its official minutes of twenty years ago must be regarded, I think, as the knowledge of the council when dealing with the same subject-matter today. It is also relevant that the then chairman of the council was still a member. In my opinion, the verdict of the jury and the judgment founded thereon ought not to be disturbed so far as the liability of the parish council is concerned.

There remains the important question of damages, and by consent of the parties we have been asked to assess the damages if in our opinion the sum awarded ought not to stand. Mr. Beney submitted that the sum of £17,500 was a sum that no reasonable jury, properly directed, could give. In one or two earlier appeals in this court I have spoken of the difficulties that the assessment of damages creates. The difficulties which face an appellate court when the damages have been assessed by a jury are more difficult still. There are no means of knowing with certainty what were the considerations which entered into the jury's calculation, by what feelings they were influenced, or whether the verdict is a compromise verdict or not. The evidence in the case, the summing-up, and the amount awarded are the only guides. There is the further difficulty, of course, that according to our procedure no specific figures may be mentioned to the jury, and no minimum figure or maximum figure may be indicated. Counsel must content themselves by asking for "substantial" or "heavy" or "moderate" or "small" damages as the occasion warrants. A jury is without experience in the assessment of damages and has no experience of comparable cases; and words like "substantial" or "moderate" do not help them very much. To all this is added the fact that the jury is being asked to assess in money that which is not strictly measurable in money at all. It is quite true to say as a general observation that there is no sum of money that can compensate for the loss of sight or the loss of limbs or for the loss of health and general well-being. But such a general observation without careful qualifications might mislead a jury. The duty of the jury is to consider the evidence in the case and then to award a reasonable sum by way of compensation, and not by way of punishment.

There are two passages in the summing-up of the judge that may well have led the jury astray. After reading from the

medical reports the judge said: "Those are, you may think, "terrible reports. You may find it difficult to get out of your "minds the memory of that little man, the boy as he was led "into this court, and he sat down upon that seat not knowing "where he was, not seeing anything or anyone. I would not try "to add to the submissions which have been made to you by "Mr. Vaughan on behalf of the plaintiff because I could not do "it anything like so well. We have no need to look for glowing "words in order to have for ourselves a picture of the conse-"quences to that small boy, at the age of three and a half, his "sight taken from him; and if he grows to manhood's stature, he "will be a blind man—a blind man. How right everybody has "been in this case when they have said to you (as, indeed, I say "to you) that no amount of money can restore that boy's sight."

It is true that the judge then spoke of the boy's prospects and the remedial agencies actively working for the welfare of the blind; but there was no cautionary word to the jury after the use of the words "no amount of money can restore that boy's sight." It is impossible, as I have said, to be certain what the jury took into consideration, and whether they took into consideration things they ought not to have done or omitted considerations which it was their duty to take into account. But when the figure of £17,500 is looked at and examined I am led to the conclusion that one of those things happened, and that the figure of £17,500 is much too high. At one stage of the argument Mr. Beney asked us to look at the sum as if it were invested in 4 per cent. Consols at their present price, or if the interest were allowed to accumulate until the boy reached the age of twenty-one. If that is done it might appear that the jury took no account of the fact that the boy might grow up to be a most useful citizen earning a good livelihood when adequately trained, but however the sum is viewed, in my opinion the figure is too high, and I would substitute the figure of £9,000.

ROMER L.J. The principal point upon which the defendants seek to rely in this appeal on the issue of liability is that at the time when the infant plaintiff met with his very unfortunate accident he was not a licensee upon their premises and was not, therefore, entitled to the rights which the law attaches to that status. The defendants' contention is that the only licence which they granted to children who were too young to be able to appreciate danger was to enter the recreation ground in the company and care of some competent guardian. As an alternative way of putting their case they argued that even if children of immature perception had unconditional permission to enter the recreation ground itself the condition requiring the presence of a guardian qualified their licence to go upon the chute.

The defendants' complaint before us was that these submissions were not fully put to the jury in the judge's summing-up, and that the jury accordingly did not have them sufficiently in

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their minds when they considered the questions as to trespass which were formulated for their decision. The judge did in fact refer twice to the question of the plaintiff being accompanied by a guardian. The relevant passages in the summing-up were as follows: "The defendants plead that the infant plaintiff was a "trespasser when he used the slide in that at the time he was "not under the control of a competent guardian. The defendants "say that they owed him no duty and were not in breach of any "duty"; and "There were no notices which parents could have "read that children under a certain age were not allowed unless "accompanied by an elder." Nevertheless, in the later stages of the summing-up the case does seem to have been presented to the jury rather from the standpoint that the plaintiff's status, when he entered the recreation ground, was that of an unqualified licensee and that, upon that hypothesis, nothing that happened afterwards could convert him into a trespasser. For example, the judge, at one point towards the end of the summing-up, said: "I have endeavoured to explain to you that once you are on the "land by permission you do not become a trespasser when you "step on to something which is there."

It is, moreover, to be observed that although a number of citations from reported cases were read to the jury none of them was upon the point of whether a licence to infant children should in some circumstances be regarded as being conditional upon their being accompanied by a guardian. It may well be, therefore, that the jury did not have this point very clearly in their minds. As against this they had their attention specifically directed to the evidence which was relevant to the matter, and upon which they would necessarily have founded their conclusion upon the defendants' submissions if those submissions had been put to them in plain and unequivocal terms. In my opinion that evidence showed beyond question that no condition of the kind suggested by the defendants attached to the permission which they gave to infant children to enter upon the recreation ground.

Before reverting to that evidence, however, I would like to say a word or two about the legal principle itself which the defendants sought to invoke and to utilize as a defence in these proceedings. The question was considered by this court in *Latham* v. *R. Johnson and Nephew Ld.*,[10] in which an infant plaintiff sought to recover damages in respect of an injury which she had sustained while playing on the land of the defendants upon which they permitted children to play. This court held that there being neither allurement nor trap, nor invitation to the plaintiff, nor dangerous object placed upon the land, the defendants were not liable. In the course of his judgment Farwell L.J. said[11]: "I am not aware of any case that imposes any greater "liability on the owner towards children than towards adults: "the exceptions apply to all alike and the adult is as much

[10] [1913] 1 K.B. 398. [11] Ibid. 407.

"entitled to protection as the child. If the child is too young "to understand danger, the licence ought not to be held to "extend to such a child unless accompanied by a competent "guardian." This last proposition would, at first sight, appear to be one of general application and unrelated to the facts of any particular case. This, however, was not, in my opinion, what the Lord Justice intended to convey. He cited three cases in support of his statement, namely, *Burchell* v. *Hickisson*,[12] *Schofield* v. *Mayor, etc., of Bolton*,[13] and *Stevenson* v. *Corporation of Glasgow*.[14] Of these cases the last does not warrant any such general principle as might be inferred from Farwell L.J.'s proposition, whilst in the first two the conditional nature of the licences which were in question was deduced from the particular circumstances which were established at the trial.

In my opinion the Lord Justice meant no more than that when a landowner allows the public to come upon property of his on which there is a source of potential danger to infants then, if the circumstances reasonably permit of it, the court would assume that, so far as infants were concerned, the licence to enter is conditional upon their being accompanied by a competent guardian. This view of what Farwell L.J. intended is confirmed by the fact that in *Latham's* case [15] the jury had found on the evidence that there was no invitation to the plaintiff (an infant aged between two and three) to go upon the defendants' land unaccompanied, and also assimilates the Lord Justice's statement with the observations of Hamilton L.J. in the same case and which my Lord has cited in his judgment. It is plain that, in the view of Hamilton L.J. the question whether a permission which is granted to very young children to enter upon land should be regarded as being subject to the condition that they should be accompanied by some responsible person falls to be determined in accordance with the circumstances of each particular case.

Approaching the matter, then, from this standpoint, I can see no evidence to support the view that the licence which the defendants undoubtedly gave to children to enter upon the recreation ground was qualified, so far as infants of three or four years old were concerned, by the condition that they should be accompanied by a responsible person. There is no evidence that unaccompanied infants were ever turned off the recreation ground or from the children's playground itself by reason merely of their age. The evidence of the groundsmen, when taken as a whole, proves no more than that young children who were by themselves were turned off if they were seen on or in close proximity to the chute. The evidence of the chairman of the council, Mr. Roberts, on the other hand (which was laid very fairly before the jury in the summing-up) shows that children

[12] 50 L.J.C.P. 101.
[13] 26 T.L.R. 230.
[14] 1908 S.C. 1034.
[15] [1913] 1 K.B. 398.

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of all ages were welcomed to the recreation ground, from whence they could proceed easily enough into the playground, which was expressly provided for their entertainment. He said that no attempt was made to regulate who did or did not enter the recreation ground, that there was access from there into the children's section, and that it had never been the policy of the council to stop anybody from going into that section.

It further appeared from Mr. Roberts' evidence that in 1948 the council decided to earmark about 1 acre of the recreation ground for the use of the younger children, including quite small children of three or four, and a notice board was put up saying in effect that that area was reserved for young children only. The notice board, however, eventually became rotten and was taken down. In these circumstances, and having regard also to the safeguards for small children in respect of the chute which the council put in hand after the accident in 1934, it seems to me to be clear that no case was made out on the evidence to support a case of conditional licence to children such as the plaintiff, and that the jury could not have come to a contrary conclusion if the matter had been put to them even more specifically than it was.

With regard to the defendants' alternative point, namely, that even if the licence to infants to enter upon the recreation ground and playground was unconditional they nevertheless had no licence to use the chute except under responsible supervision, there are, I think, two answers. The first is that there is no evidence, in my opinion, to warrant any such assumption. The evidence of the groundsmen, to which I have already referred, is quite insufficient for the purpose and there is no other. No notice boards were erected for the information of the parents of infants prohibiting the use of the chute by young children except under parental or other competent supervision nor were any other steps taken to indicate that the apparatus was for the use of older children only. Moreover, as already observed, precautions were taken in 1934 to ensure the safety of small children on the chute.

The second answer, which is associated with the first, is that in the absence of evidence (in which, of course, I include circumstances) leading to a contrary conclusion the court would, in my judgment, presume that if the owner of a children's playground unconditionally permits children of all ages to enter upon it, and knows that they do so, he intends his permission to extend to the use by the children of apparatuses which he had provided on the ground for their amusement; for such apparatuses are "allure-"ments" to all children old enough to use them, or to try to use them, and it is indeed because they are allurements that they are there at all. This view is in conformity with the decision and reasoning of this court in *Gough* v. *The National Coal Board.*[16] In that case the defendants operated a colliery tramway which

[16] [1954] 1 Q.B. 191; [1953] 3 W.L.R. 900; [1953] 1 All E.R. 1283.

ran over their land and they permitted children to enter on the land. The infant plaintiff did so and went for a ride on one of the moving trucks. He fell off it and was injured. It was argued for the defendants that although (as the judge found) the plaintiff was a licensee over the whole land he lost that status when he climbed upon the truck and eo instanti became a trespasser. Singleton L.J. expressed himself upon that point as follows [17]: "Mr. Lloyd-Jones' submission that the plaintiff became a tres-"passer when he got on to the truck appears to me to be answered "by a passage from the judgment of du Parcq L.J. in *Holdman* "v. *Hamlyn*,[18] where the Lord Justice said: 'It was, indeed, "'argued that the infant plaintiff was a trespasser. The truth "'is, however, that he was an invitee, at any rate down to the "'moment when the threshing machine proved an irresistible "'temptation. If the boy strayed beyond the strict limit "'imposed by the terms of the invitation, it was because of the "'failure of the defendant's agent to guard him against a "'dangerous allurement, and, if he can properly be called a "'trespasser at all the trespass was a natural and probable result "'of the negligence of the defendant's agent. A defendant who "'has lured an invitee into a forbidden area cannot thereafter "'treat him as a trespasser.' An examination of the authorities "leads me to the conclusion that if an occupier allows children "of tender years on his land, and if he has thereon something "which is, to his knowledge, attractive to them and which is "dangerous, he must take reasonable care to protect them from "the danger." Birkett L.J. expressed a similar view upon the point and Hodson L.J. said [19]: "Once the child is a licensee "on the land, the question of trespassing on an object on the "land does not, in my opinion, arise. The trap or concealed "danger will often be an object on the land, but I cannot con-"ceive that the licence to go on the land is to be taken to exclude "the thing which, being an allurement to children, is a concealed "danger for them."

It appears to me that the application of the law as so formulated by the Lords Justices to the facts and circumstances of the present case is destructive of the contention that the plaintiff became a trespasser from the moment he mounted the ladder of the chute notwithstanding that he had previously been a licensee.

I agree with my brethren in thinking that the defendants cannot be acquitted of knowing the dangerous quality of the aperture in the chute through which the plaintiff fell. The mere fact that the minutes of a parish council contain an entry which had been minuted many years before does not necessarily fix the council with knowledge of the subject-matter of the entry. In the present case, however, two gentlemen who were members of

[17] [1954] 1 Q.B. 191, 200.
[18] [1943] K.B. 664; [1943] 2 All E.R. 137.
[19] [1954] 1 Q.B. 191, 208.

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the council when the accident in 1934 occurred were still members in 1950 but neither of them gave evidence at the trial, although one of them was, it seems, in court. Moreover, the evidence of the present clerk, who was appointed in 1946, was not made available to the jury. In these circumstances the defendants cannot, in my opinion, legitimately complain of the jury's finding that the defendants knew of the danger nor is there any ground for impeaching the judge's summing-up upon the point.

On the question of liability I only desire to say in conclusion that had it not been for the accident in 1934 and the defendants' knowledge, or presumed knowledge of it, the plaintiff would, in my judgment, have had no ground of action. The evidence shows that the possibility of an accident happening such as that which unfortunately did occur would not have presented itself to the mind of any reasonably prudent person who was unaware of the previous mishap. And it would, in the long run, be disadvantageous in the extreme to the public and to children in general if such a person, or body of persons, were to be held liable for an accident of so improbable and unforeseeable a nature as that which befell the plaintiff; for the prospect of being sued for heavy damages (insurable, perhaps, but only at considerable cost) would in all probability result in the disappearance altogether of amenities which many local authorities and private persons voluntarily provide for the entertainment and amusement of children. "It is impossible," said Farwell L.J. in *Latham's* case,[20] "to "hold the defendants liable unless we are prepared to say that "they are bound to employ a groundkeeper to look after the "safety of their licensees, and the result of such a finding would "be disastrous, for it would drive all landowners to discontinue "the kindly treatment so largely extended to children and others "all over the country." That which the Lord Justice envisaged as disastrous in 1913 would at least be equally so to-day when the dangers of the streets, which in many cases would become the substitutes for playgrounds, considerably exceed such perils as exist in chutes and swings.

I agree entirely with what my brethren have said with regard to the general damages which the jury awarded. The court is, I think, for the reasons stated in the judgments which have been delivered, justified in setting that part of the verdict aside and the damages should be revised to the sum of £9,000.

Appeal as to liability dismissed. Appeal as to damages allowed. Award reduced to £9,000.

Solicitors: *William C. Crocker; Kinch & Richardson, for T. G. Baynes & Sons, Dartford.*

A. W. G.

[20] [1913] 1 K.B. 398, 407.

[CHANCERY DIVISION.]

* BAMBRIDGE v. INLAND REVENUE COMMISSIONERS.

1954
May 21, 24, 25; *June* 16.

Harman J.

Revenue — Income tax — Transfer of assets to company incorporated abroad—Death of transferors—Settlement of shares in company—General bequest of shares—Liability of beneficiary to tax—"Associated operation"—"In relation to any of the assets transferred"—Finance Act, 1936 (26 *Geo.* 5 & 1 *Edw.* 8, *c.* 34), *s.* 18 (1), (2).

In 1933 the appellant's father and mother transferred certain assets to Kamouraska Investments Ld., a company incorporated in Canada. By two identical settlements, dated January 12, 1934, each of them transferred certain shares and debentures in Kamouraska to trustees on trust to pay the income from each settlement to the settlor during his (or her) life, and on the death of the settlor to pay the whole income to the other spouse during his (or her) life and on the death of the surviving spouse to pay the whole of the income to the appellant during her life. The settlements were revocable.

The appellant's father died on January 18, 1936, without having revoked his settlement. Her mother revoked her settlement on June 16, 1937. She died on December 19, 1939, and by her will, dated December 6, 1938, the appellant became entitled under a general bequest to a life interest in her residuary estate, which included the shares and debentures in Kamouraska formerly comprised in her mother's settlement.

The Crown claimed that the income of Kamouraska was deemed to be the appellant's income for income tax purposes by section 18 of the Finance Act, 1936:—

Held, (1) that the appellant was liable to tax in respect of the securities under her father's settlement, since her rights were derived from the settlement which was an "associated operation" within the meaning of section 18 (2), and the father's death was merely an incident leading to the falling into possession of the rights; (2) that she was not liable to tax under section 18 in respect of the securities received under her mother's will, since, although a will might be an "associated operation," and a specific bequest of the securities would have been an operation "in relation to" such securities, a general bequest could not be so described.

Congreve v. *Inland Revenue Commissioners* [1948] W.N. 197; [1948] 1 All E.R. 948; 30 T.C. 163 applied.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant, Mrs. Elsie Bambridge, appealed against assessments to income tax under Schedule D for the years 1948–49 and 1949–50, and to assessments to surtax for the same years, on the ground that these assessments incorrectly included the income of a Canadian company, Kamouraska Investments Ld. It was not denied that the appellant had power to enjoy the income of Kamouraska during the relevant financial years, and the sole question in issue was whether the power had devolved on her in such a manner as to come within section 18 of the Finance

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Act, 1936,[1] and thus constitute the income of Kamouraska her income for all purposes of the Income Tax Acts.

The following facts appeared from the case stated: In 1915 the appellant's father (the late Rudyard Kipling) and her mother formed Sussex Investment Co. Ld., a company incorporated in the Province of Nova Scotia, Canada, to which they sold certain investments then held in trust for them respectively by the Royal Trust Co. of Montreal in the Province of Quebec as bare trustees. On December 14, 1933, the appellant's father and mother sold their shares in Sussex to Kamouraska Investments Ld., a company formed by them in that year and incorporated in the Province of Prince Edward Island, Canada.

On January 12, 1934, they entered into identical settlements, made in accordance with the law of the Province of Prince Edward Island, under which each of them transferred certain shares and debentures in Kamouraska to trustees on trust to pay the whole income of the settlement to the settlor during his (or her) life, and on the death of the settlor to pay the whole income to the other spouse during his (or her) life, and on the death of the surviving spouse to pay the whole of the income to the appellant during her life. The trustees had a discretionary power to raise capital for the benefit of the tenant for life for the time being. The appellant had a general power of appointment over the trust funds with remainder to next-of-kin; and the settlements were revocable by deed by the settlors with the consent of the trustees.

[1] Finance Act, 1936, s. 18: "For "the purpose of preventing the avoid- "ing by individuals ordinarily resi- "dent in the United Kingdom of "liability to income tax by means of "transfers of assets by virtue or in "consequence whereof, either alone or "in conjunction with associated "operations, income becomes payable "to persons resident or domiciled out "of the United Kingdom, it is hereby "enacted as follows:—(1) Where "such an individual has by means of "any such transfer, either alone or "in conjunction with associated "operations, acquired any rights by "virtue of which he has, within the "meaning of this section, power to "enjoy, whether forthwith or in the "future, any income of a person "resident or domiciled out of the "United Kingdom which, if it were "income of that individual received by "him in the United Kingdom, would "be chargeable to income tax by "deduction or otherwise, that income "shall, whether it would or would "not have been chargeable to income "tax apart from the provisions of this "section, be deemed to be income of "that individual for all the purposes "of the Income Tax Acts: . . . (1B) "The last two foregoing subsections "shall not apply if the individual "shows in writing or otherwise to the "satisfaction of the Special Commis- "sioners either—(*a*) that the purpose "of avoiding liability to taxation was "not the purpose or one of the pur- "poses for which the transfer or "associated operations or any of them "were effected; or (*b*) that the trans- "fer and any associated operations "were bona fide commercial trans- "actions and were not designed for "the purpose of avoiding liability to "taxation."

"(2) For the purposes of this sec- "tion an associated operation means, "in relation to any transfer, an "operation of any kind effected by "any person in relation to any of the "assets transferred or any assets "representing, whether directly or "indirectly, any of the assets trans- "ferred, or to the income arising from "any such assets, or to any assets "representing, whether directly or "indirectly, the accumulations of in- "come arising from any such assets."

On January 18, 1936, the appellant's father died without having revoked his settlement, and the income from his settlement became payable to the appellant's mother during her life.

On June 16, 1937, the appellant's mother revoked her settlement. She died on December 19, 1939, and under her will dated December 6, 1938, the appellant became entitled under a general bequest to a life interest in her residuary estate which included shares and debentures in Kamouraska to which her mother had been absolutely entitled at the date of her death by virtue of the revocation of her settlement made in 1934.

Since the death of her mother the appellant had become entitled to income from Kamouraska from two sources: (A) under her father's settlement made in 1934 which remained unrevoked at his death, and (B) under her mother's will.

It was contended for the appellant that even if it be admitted that the transactions by her father and mother constituted transfers of assets and associated operations within the meaning of section 18 of the Finance Act, 1936, there remained an essential preliminary to her ability to enjoy the income of these assets, namely, in the case of source (A) the death of both of her parents during her lifetime, and in the case of source (B) the death of her mother during her lifetime. It was argued that death was not an associated operation within the meaning of section 18 (2), and that the chain of events was broken and the section no longer applied. Alternatively, it was argued that in the case of source (B), the will of the appellant's mother was not an associated operation and that even if source (A) were within the section, source (B) was not.

The Crown admitted that death of a person was not an associated operation but contended that the deaths of the appellant's parents were merely points in time in which previously associated operations affected the appellant and brought her within the section in place of the deceased.

The commissioners held that that view was correct, and that the appeal failed with regard to the income arising from source (A). They further held that the definition in section 18 (2) "an "operation of any kind effected by any person in relation to any "of the assets transferred" was wide enough to include the making of a will, and as it had not been shown as required by section 18 (1B) (*a*) that the purpose of the will was not to avoid liability to tax, the appeal in respect of income from this source failed also.

No cases were cited in argument other than the case referred to in the judgment.

Roy Borneman Q.C. and *Roderick Watson* for the appellant.

John Pennycuick Q.C., *Sir Reginald Hills* and *J. H. Stamp* for the Crown.

Cur. adv. vult.

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BAMBRIDGE v. INLAND REVENUE COMMISSIONERS.

June 16. HARMAN J., reading his judgment after stating the facts: The appellant's father died before the passing of the Finance Act, 1936, but nevertheless his estate became liable to surtax under section 18 of that statute for the last year of his life. The appellant's father for the last year of his life and the appellant's mother during her lifetime were admittedly charged to tax under section 18 (1) of the Act of 1936 as having acquired rights by means of a transfer of assets within the mischief of the section.

On her mother's death the appellant became entitled to the income from both sources but it never occurred to her, or apparently to the Crown, that she came within the mischief of section 18 until after the decision in 1948 of the House of Lords in *Congreve* v. *Inland Revenue Commissioners*.[1] That case decided, in circumstances very different from the present, that a person may acquire rights "by means of" a transfer within the meaning of the section although the transfer was not made by himself or his agent or anyone whom he could influence to make it. It is argued by the Crown, therefore, that the appellant has acquired rights by means of transfers made by each of her parents, and as those rights admittedly confer on her the power to enjoy the income or part of the income of Kamouraska, the Crown maintain that she can properly be charged as being entitled to the appropriate portions of the income of that company. This contention has been upheld by the commissioners. Having regard to the decision in the House of Lords to which I have referred it is not open to the appellant to argue that she may not be liable by reason of the transfers made by her parents; moreover, she does not deny that the settlement made by her father was an associated operation within the meaning of the section.

As to the father's securities, the only point on this appeal is whether the appellant can be said to have acquired rights "by "means of" the transfer and the settlement. She argues that these are not the only events, but that to them must be added the death of her father without revoking the settlement and the death of her mother, and that these events are not associated operations. Death, avers Peter Pan, is an awfully big adventure, but the Inland Revenue has not yet claimed that it is not an associated operation. It is said, however, that the two deaths are merely events bringing the interest into possession, and that it was not by means of them that the appellant acquired the rights. In my judgment that contention is right. The appellant acquired her rights in the assets in question immediately the settlement of 1934 was made. It is true that she did not enjoy them in possession till the death of the survivor of her parents, and that during her father's

[1] [1948] W.N. 197; [1948] 1 All E.R. 948; 30 T.C. 163.

life she might have lost them by the exercise of his power of revocation, but the events were not means by which she acquired the rights. Indeed, the section seems to go further, speaking as it does of rights to enjoy "whether forthwith or in the future." What these words mean I have been unable to understand, but the subsection in my judgment avails to catch the appellant's interest under her father's disposition.

As to the mother's securities the position seems to me to be quite different. The settlement she made was no doubt an associated operation, but as that was revoked it is out of the picture altogether. The only means by which the appellant acquired rights to her mother's securities was by her mother's will. No doubt the will may be an associated operation having regard to the definition in subsection (2), but it will be observed that to be effective the associated operation must be "an "operation of any kind effected by any person in relation to any "of the assets transferred." Can this will be said to have been made "in relation to any of the assets transferred"? I think not. If it had contained a specific bequest of these securities that would no doubt have been in relation to them, but a mere general bequest does not seem to me properly to be described as made "in relation to" any assets that happen to fall within it because they belong to the testator at his death. If the Crown were right, a will made before the date of the original transfer would needs be classed as an associated operation, which seems to me to be absurd.

In my judgment, therefore, so far as the enjoyment by the appellant of these securities is derived through her mother's will, she is not taxable on the income of them by virtue of section 18 of the Finance Act, 1936.

I therefore dismiss the appeal so far as income from the property emanating from the appellant's father is concerned, and I allow it so far as income from her mother's securities is concerned.

Appeal dismissed as to the securities from the father's settlement, and allowed as to the securities under the mother's will. Case remitted to commissioners for adjustment of the amount.

Solicitors: *Field, Roscoe & Co.; Solicitor of Inland Revenue.*

I. G. R. M.

[PROBATE, ETC., DIVISION.]

1954
June 23.

Lord Merriman P. and Davies J.

* GRAINGER *v.* GRAINGER.

Husband and Wife—Maintenance—Justices—Second marriage of husband — Maintenance for first wife — Second wife's capabilities — Possibility of letting rooms.

Husband and Wife—Justices—Appeal to Divisional Court—Exhibits—Provision.

A wife, who had previously been granted an order for maintenance by a court of summary jurisdiction, later divorced her husband but continued to rely upon the existing order. The husband married his former housekeeper, who had bought on mortgage a house of some size. On the husband's application to the justices for a reduction of the maintenance order, he alleged that he could not afford the payments and did not want his second wife to go out to work. The justices reduced the wife's order from £3 10s. to £3 a week:—

Held, that in the circumstances, there was no reason why the second wife, if she remained at home, should not exercise her skill as a housekeeper and help to reduce the expenses of the home by letting surplus rooms, and that there was no reason further to reduce the amount which the justices had ordered after careful consideration.

Per curiam: Relevant documents put in evidence before the justices should be made exhibits on appeal.

Appeal by a husband from an order of the Mortlake justices, dated March 16, 1954.

In December, 1949, the justices found the husband guilty of wilful neglect to maintain his wife and two children and ordered him to pay a weekly sum in all of £2 10s. The order was subsequently varied as to amount, and on March 2, 1951, it was increased to the weekly sums of £3 10s. for the wife and 10s. for each child. On May 28, 1953, the marriage was dissolved on the ground that the husband had deserted the wife, and in August, 1953, the husband married a woman who, he said, had been his housekeeper. His second wife had obtained on mortgage a house of some size in which they lived. The husband, who was in arrears under the order, applied for a variation, alleging that his own means had decreased and his former wife's had increased, and referring to his remarriage. By their order of March 16, 1954, the justices reduced the maintenance payable to the wife, who was in bad health, from £3 10s. to £3 a week. The husband appealed.

At the hearing before the justices reliance was placed in evidence on certain documents, including the mortgage deed, the terms of which were stated to preclude the granting of subtenancies in the second wife's house, and a signed certificate as to the husband's wages. These documents were not, however, exhibited to the notes of evidence provided for the hearing of the appeal.

F. Irwin for the husband.
Miss C. Colwill for the wife.

LORD MERRIMAN P., after referring to the nature of the appeal, continued: Since the variation in March, 1951, the wife obtained a decree of divorce on the ground of desertion by the husband. That decree was made absolute on May 28, 1953, and the husband has remarried. He has married a woman who, according to his evidence, had been employed as a housekeeper. This woman has obtained, on mortgage from the local authority, a house said to be worth £1,000, and to have been acquired cheap because it was large. That combination of circumstances suggests that, as there are three or four surplus rooms in the house, it might be possible to make a more profitable use of the house than at present by creating, for example, subtenancies so as to enable the new wife to exercise her skill as a housekeeper, with some reduction in the overhead expense of living in this establishment and to that extent, no doubt, indirectly relieving the husband of the financial anxieties which have been caused by having to support the ex-wife and the new wife.

It is said that this is a most dangerous doctrine. But it seems to me to be merely a common-sense comment on the realities of this particular case. I am not conscious that I am laying down any doctrine; I am merely considering the matter from the point of view which appeared to commend itself to the justices, who gave very careful consideration to the whole matter. We are not convinced by the husband, who admittedly had run into arrears and was pleading inability to pay, when he says that he did not approve of his wife being in work, but wanted her in the home, and I think that the justices realized as well as we do that there were ways in which she could remain in the home and still do work which would be useful in the circumstances.

In that connexion, we were confronted with an argument which induces me to make another comment. Admirable as are the note and the statement of the justices' reasons, I regret that there is one defect which crops up much too often. We are told, in response to the usual inquiries made by the registrar, that there were no exhibits in this case. The fact is that a considerable number of documents were referred to, including the mortgage deed. It is now suggested that the terms of the deed prohibit any use of the house in the way I have mentioned. It would have been very much better to have been able to see the document itself. This we should have been able to do if it had been made an exhibit, as it should have been if anything turned on it. As it is we shall have to leave that matter in the obscurity in which it at present rests.

[His Lordship referred also to the absence of even a copy of a signed certificate about the husband's wages and to the absence of a letter showing his indebtedness to the bank, both of which were said to have been produced and shown to the justices.]

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Lord Merriman P.

The other outstanding matter is that the former wife is in a very bad state of health. She has already lost one lung, and half the other is threatened, so much so that the children have been boarded out by the county council at Dr. Barnardo's Home at Tunbridge Wells, and she is not even allowed to see them. For the same reason she herself has to live in a separate flat from her parents. I suppose her mother is able to look after her to some extent, but she cannot have anyone actually living with her, and the justices sum the whole situation up by saying that they felt that in view of her state of health her need was as great as ever, and nobody could dispute that proposition. Quite rightly they have said, and, indeed, this is not challenged, that there is no sort of ground for reducing the figure in respect of the two children, which goes, in effect, to their maintenance at Dr. Barnardo's Home, as does also the amount received from the county council.

So the sole question is whether the justices ought to have done more than they have done in reducing the amount payable in respect of the wife herself from £3 10s. to £3. They came to the conclusion, after careful consideration, that that was the most that could reasonably be expected by way of reduction in the circumstances. It seems to me to be impossible to say, looking at their statement of reasons, that there is any question of principle in respect of which they have gone wrong, and I do not think that there is any ground on which we can say that the conclusion to which they came was anything but justified. It is a case in which, very wisely, the maintenance order has been allowed to stand notwithstanding the divorce, and nobody suggests that it ought to have been revoked or discharged altogether; nor, in fact, was there any application to that end. It is simply a question of examining the figures resulting from the present state of things—the former wife's ill-health and the fact that the husband has married again. There is no reason for saying that the justices have not come to a just conclusion, and this appeal fails.

DAVIES J. I entirely agree.

Appeal dismissed.

Solicitors: *Pritchard, Englefield & Co. for Blackburn & Co., Fleetwood; Musson & Co. for Robbins & Fearnley, Richmond, Surrey.*

J. B. G.

[COURT OF APPEAL.]

* HEISLER v. ANGLO-DAL LD.

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June 16, 17, 18, 30.

Somervell, Birkett and Romer L.JJ.

[1952 H. No. 4789.]

Sale of Goods — F.O.B. — Construction of contract — Undertaking by vendor to furnish "a guarantee" — Third-party guarantee not furnished—Personal guarantee given by vendor—Whether a good discharge of contractual undertaking.

Guarantee. Contract—Construction—Meaningless term.

The plaintiff contracted to sell to the defendants 300 tons of aluminium ingots, to be delivered at Antwerp within thirty days of the defendants establishing a confirmed, irrevocable, transferable and divisible letter of credit for the goods. The written contract provided that the plaintiff would undertake to furnish the defendants with a ten per cent. guarantee to deliver the goods to the defendants' forwarding agents at Antwerp as soon as he received confirmation that the necessary letter of credit would be established in his favour. By letter dated October 20, 1952, the defendants' bankers wrote that they had received instructions to open the necessary letter of credit on condition that they received from the plaintiff within fourteen days a sum equivalent to ten per cent. of the value of the goods. Following negotiations the plaintiff gave in writing a personal guarantee to pay to the defendants ten per cent. of the value of the goods should he fail to deliver the 300 tons of aluminium ingots. At the same time he asked for a confirmation of the letter of credit. The defendants, contending that they were entitled to a bank or third-party guarantee, did not provide the confirmation of the letter of credit:—

Held, that on the true construction of the contract the plaintiff's undertaking to furnish the defendants with a guarantee was satisfied by the personal guarantee contained in his letter; and that the defendants, having failed to provide confirmation of the letter of credit, were in breach of the contract.

Nicolene Ld. v. *Simmonds* [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822 considered.

APPEAL from Devlin J.

By a written contract dated October 7, 1952, the plaintiff agreed to sell and the defendants to buy 300 metric tons of aluminium, which at that date was in Norway and apparently owned by a Swedish company. The ultimate purchaser, on whose behalf the defendants were acting, though not as agents in the legal sense, was a concern in Poland, referred to as Impex Metal. The contract was as follows: "It is herewith agreed that we have "sold to you and you have bought from us 300 (three hundred) "metric tons of aluminium ingots of 99.5 per cent. A1 minimum, "consignment to arrive in Antwerp within thirty days from your "establishing the confirmed irrevocable transferable and divisible "letter of credit for 300 metric tons of aluminium ingots at $718 "(seven hundred eighteen U.S. dollars) per metric ton f.o.b. "Antwerp. We undertake to furnish you with a 10 per cent. "(ten per cent.) guarantee that we will deliver the goods to your

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"forwarding agents in Antwerp as soon as we receive confirmation "from your bankers that the necessary letter of credit, valid not "less than six weeks, will be established in our favour in free "transferable U.S. dollars. You undertake to establish your con-"firmed irrevocable transferable and divisible letter of credit in "free U.S. dollars, validity not less than six weeks, containing "the following stipulation: Payment to be released against (1) "official weight certificate to be contrasigned by P.S.A.L. in Ant-"werp; (2) works certificate that the ingots are of 99.5 per cent. "A1 minimum and contrasigned by P.S.A.L. Antwerp; (3) con-"firmation of P.S.A.L. evidencing actual shipment of the goods "from the port: (4) part shipments allowed. You guarantee that "your forwarding agents in Antwerp will load the goods as soon "as possible after arrival, that they will receive the goods on "arrival and store them in their warehouse until they can be "loaded, and that you will extend the letter of credit should there "be any delay in Antwerp."

On October 20, 1952, the Midland Bank wrote to the defendants a letter confirming that they had received cable instructions from Narodowy Bank Polski, Warsaw, to open in the defendants' favour, on account of Impex Metal Katowice, the required credit, valid for six weeks, for 215,400 U.S. dollars conditional upon the bank receiving from the plaintiff within fourteen days 21,540 U.S. dollars representing ten per cent. goods value as full delivery guarantee, valid ten weeks, and to be forfeited unconditionally in buyers' favour in case of non-delivery. Following negotiations between the plaintiff and a Mr. Ettinger, on behalf of the defendants, the plaintiff sent to the defendants what purported to be a guarantee in the following terms: "We herewith guarantee to "deliver 300 metric tons of aluminium ingots of 99.5 per cent. "A1 minimum to your forwarding agents in Antwerp and under-"take to pay to you the amount of $21,540 (twenty-one thousand "five hundred and forty U.S. dollars) which is ten per cent. of the "amount we have sold the goods to you if we default to deliver "the 300 tons. For and on behalf of the Metex Company, J. "Heisler." In a covering letter the plaintiff asked for a confirmation of the letter of credit.

In reply the defendants demanded from the plaintiff an agreed bank guarantee within the next four days, but the plaintiff did not provide a third-party guarantee. The defendants relied on his refusal so to do as an anticipatory breach of contract which, they alleged, they accepted.

In an action brought by the plaintiff against the defendants for damages for breach of contract, Devlin J. found for the plaintiff, holding that the personal guarantee given by the plaintiff satisfied the term of the contract and that the defendants were in breach of the contract in failing to provide a confirmation of the letter of credit.

The defendants appealed.

D. N. Pritt Q.C. and *L. J. Solley* for the defendants.
G. Glynn Blackledge Q.C. and *F. G. Paterson* for the plaintiff.

Cur. adv. vult.

June 30. The following judgments were read:

SOMERVELL L.J., having begun to state the facts, continued: The defendants had, of course, no right to demand from the plaintiff, on any view, a deposit of $21,540, and it would appear that the defendants were not in a position to make this deposit themselves. It was, I think, contemplated by the defendants that the credit which would be opened in their favour by Impex would be in terms which would enable them to transfer the benefit of it to the plaintiff in accordance with the contract, and it may be that the plaintiff intended to transfer it to his sellers.

The result of the letter of October 20, 1952, was a conversation between the plaintiff and Mr. Ettinger, on behalf of the defendants, and I will cite the judge's findings as to this conversation: "Discussion arose on that point and I think "it is plain that neither side was talking in terms of suing "the other. Both sides at that stage were anxious to get "the business going. It is quite true—this is common ground "now and I think it was common ground then—that Mr. "Heisler could not be obliged to provide his guarantee until "he got the *pre avis* (confirmation); but neither side, as I "have said, was talking in terms of suing each other and each "was concerned to find a way out. The way they thought was "a way out at that stage was for Mr. Heisler to say in effect: "'All right. In order to help this business along I will give you "'a guarantee without the *pre avis*'. It is important perhaps to "see exactly what words were used. I accept Mr. Heisler's "account of what he said to be substantially true, and he put "it in this way: he pointed out in the discussion that what "Impex Metal appeared to be requiring was not a guarantee "but a deposit, and Mr. Ettinger, I think, agreed with that. "Then Mr. Heisler said in evidence: 'I said immediately that "'this was not according to the contract and Mr. Ettinger "'agreed. . . . But, both he and I—I have to say he acted "'always very fair and helpful if he could—wanted to get the "'business through and we wanted to help each other; we did "'not want to fight each other. Finally I agreed, in order to "'help him to get the letter of credit, or first the *pre avis* of the "'letter of credit, established in my favour, to let him have "'the letter of guarantee as it was understood in the terms of the "'contract'. Then later he said: 'I agreed to send on to Anglo-"'Dal immediately my letter of guarantee in order to have the "'*pre avis* of the letter of credit established, but I made it clear "'immediately that I did it only . . . , to show him that I was "'willing to help.'"

In the result the plaintiff sent along what purported to be a

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guarantee in these terms: "We herewith guarantee to deliver 300 "metric tons of aluminium ingots of 99.5 per cent. A1 minimum "to your forwarding agents in Antwerp and undertake to pay to "you the amount of $21,540 (twenty one thousand five hundred "and forty U.S. dollars) which is ten per cent. of the amount we "have sold the goods to you, if we default to deliver the 300 tons. "For and on behalf of the Metex Company, J. Heisler." This was sent with a covering letter in which the plaintiff said that having fulfilled his part of the contract he must now ask for confirmation of the credit. Three days later, on October 27, the defendants wrote back maintaining that they were entitled to a bank guarantee which would enable them to fulfil the conditions of the opening of the letter of credit. They demanded an agreed bank guarantee within the next four days.

Pausing there, that raises the point of construction which is the first point to be decided. Four possible views emerge as to the meaning of the second paragraph of the contract. The plaintiff maintains that the document which he signed fulfilled the terms of that paragraph with regard to the document to be furnished. The defendants maintain in the letter which I have cited that they were entitled to a guarantee either by a joint stock or merchant bank. A third construction was that in any event the word "guarantee" implied an undertaking by some third party, not necessarily a bank. The fourth suggestion was that assuming a third party was intended the absence of any indication as to the nature of the third party made it uncertain and therefore unenforceable.

The defendants, as against the plaintiff's construction, relied on the word "guarantee". It was also submitted that if the undertaking was to be by the plaintiff it was quite unnecesary to provide for the furnishing of a further document; the contract itself could have provided that the plaintiff should pay the 10 per cent. if there was a failure to deliver the goods, the defendants having fulfilled their obligations as to the credit. It was submitted on behalf of the plaintiff that if a bank guarantee had been required it would have been so stated, and if a third-party guarantee other than by a bank the defendants would necessarily have stipulated expressly about the financial standing of the third party. Mr. Pritt, for the defendants, relied on the provisions of the Exchange Control Act, 1947, as supporting his argument that the parties must be taken to have intended a guarantee from a banker or an authorized dealer within that Act.

The judge held that the plaintiff's construction succeeded, and I have come to the conclusion that he was right. The word "guarantee" is often used in other than its legal sense. An example of the word meaning simply an undertaking by the contracting party can be found in *Barker* v. *M'Andrew*.[1] Devlin J. said: "Again I think one has to bear in mind that commercial

[1] (1865) 18 C.B.(N.S.) 759, 773.

"men do not look at these things quite from the lawyer's point "of view. To a lawyer to say: 'I guarantee that I will perform "'my contract' is quite worthless, but a commercial man would "regard the guarantee, perhaps furnished in a proper form of "letter, as having some value as underlining, as it were, the "promise that had been undertaken. He does not think in terms "of damages, liquidated damages, penalty clauses and the rest "of it; he says to himself 'I have got it in writing and if for any "'reason these goods do not come forward I will get 10 per cent. "'of their price,' and he may well think that is a valuable "thing."

I have quoted this passage as it concerns the strongest argument against this construction, namely, that the form of a separate document adds nothing to what could have been provided in the contract. On the other hand, I think that there are greater difficulties in the way of the defendants' contention that one should imply the word "bank" before the word "guarantee". It is one thing for a party to undertake a liability in the nature of a penalty—although I am not considering its enforceability—and a different and far more onerous undertaking to produce a bank guarantee for the equivalent of the sum of £7,000. I agree with the judge that if the plaintiff's construction was not a possible one, the provision may well have been void for uncertainty. On that view, however, I find difficulty in holding that the other terms of the contract would have remained operative. I think that the uncertainty of this provision would have voided the whole agreement.

We were referred to *Nicolene Ld.* v. *Simmonds*,[2] where certain words were disregarded as meaningless, leaving the remainder of the contract as operative and binding. I cannot think that this case could come under that principle. If it is uncertain it is so because it is impossible to decide from the words used what is the document which the parties intended should be produced. That some document was to be produced is clear. I also think it is clear that it is an important element in the bargain as a whole, and therefore there would be no contract at all because the parties had not agreed on the essential terms. (See Denning L.J.'s judgment.[3]) On the view I take on the construction this point does not arise.

Mr. Pritt, on behalf of the defendants, then submitted that the "guarantee" was valueless because the payment of the dollars referred to would require Treasury permission and the condition of permission should have accompanied the document. I am not satisfied that contractually such permission had to accompany the document, but I am clear that the point cannot now be taken. It was not taken in the correspodence at the time, and in the letter which I have read the defendants demanded the bankers' or

[2] [1953] 1 Q.B. 543; [1953] 2 W.L.R. 717; [1953] 1 All E.R. 822.

[3] [1953] 1 Q.B. 551.

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approved guarantee, but were not raising the question of Treasury sanction. Mr. Pritt relied on the principle which will be found stated by Greer J. in *Taylor* v. *Oakes, Roncoroni & Co.*[4]: "It is a "long established rule of law that a contracting party, who, after "he has become entitled to refuse performance of his contractual "obligations, gives a wrong reason for his refusal, does not thereby "deprive himself of a justification which in fact existed, whether "he was aware of it or not."

This rule is, however, subject to a proviso. If the point not taken is one which if taken could have been put right, the principle will not apply. This has, I think, clear application here. The plaintiff was producing his document before he was under any obligation to do so. If the defendants had accepted it subject to the provision of a Treasury permission it might have been obtained; further, the plaintiff could have said that he was not bound to produce any guarantee until the defendants obtained from the bankers confirmation of the letter of credit. It is doubtful if they could ever have done so, but if they had this might itself have assisted the plaintiff in getting Treasury permission. I think, therefore, assuming the point was a good one, that it fails on the ground that it was not taken and is not one which can now be relied on. A further answer was suggested by Mr. Blackledge for the plaintiff. He submitted that a contract to pay a sum in foreign currency in England could on its true construction be fulfilled by the payment of the equivalent in sterling. He relied in the first instance on an old case, *Willshalge and Davidge's* case.[5] It is perhaps worth noting that in the report of this case in the English Reports the word "demand", four lines from the end, should be "divide". The case decides that the payer can elect whether he will discharge his obligation in the foreign currency of the contract or in the equivalent sterling. This prima facie principle will be found stated by Bankes L.J. in *Anderson* v. *Equitable Life Assurance Society of the United States.*[6] On this view the undertaking would be an undertaking to pay dollars or sterling at the option of the plaintiff and no Treasury permission would be required.

For the reasons I have given it is unnecessary to express an opinion upon this line of argument. The principle, which I think is primarily a rule of construction, was understandable at a time when foreign exchange was normally freely obtainable. It may well be related to the well-known fact that if a sum in foreign currency is not paid a writ can only claim the equivalent in sterling. It may well require, as I think, reconsideration as a prima facie rule if and so long as the foreign currency in question is not freely obtainable. It may well defeat the intention of a purchase to construe contracts in those circumstances as giving the payer an option to pay in sterling.

[4] (1922) 127 L.T. 267, 269; 38 T.L.R. 517.

[5] (1586) 1 Leon. 41.

[6] (1926) 134 L.T. 557, 562; 42 T.L.R. 302.

I should perhaps have stated that it was suggested below that the "guarantee" was illegal as an undertaking, and Devlin J., I think, accepted this position. Before us this point was abandoned and the provisions of the Exchange Control Act were examined in more detail than they were below. The argument before us proceeded not on the basis of the undertaking itself being illegal but that if there had been default, and the dollars had become payable, permission from the Treasury would have had to be obtained before payment could have been made.

For those reasons I think that the judge was right in his conclusion that the plaintiff had established a breach of contract by the defendants; and it becomes unnecessary to consider the later correspondence in any detail, or the other points which would have arisen if I had taken a different view of the construction of the contract. Both parties continued to maintain their positions as stated in the letters to which I have referred. The plaintiff, who was obviously anxious that the deal should go through, produced an insurance cover against all risks in case that would help, but ultimately the defendants on November 18 informed the plaintiff that their principals were no longer interested. The plaintiff, who had done all or more than all he was required to do, therefore establishes a breach. It seems clear that the defendants were in fact never in a position to confirm the credit in accordance with the terms of the contract, but they relied on the plaintiff's refusal to produce a bank or third-party guarantee as an anticipatory breach which they allege they accepted. The plaintiff sought to answer this by alleging that this breach, if any, was never accepted and he could himself rely on the defendants' failure to get the required confirmation. On the view which I take it is unnecessary to consider the somewhat intricate arguments which would have had to be considered if the case had turned on these issues. I would dismiss the appeal.

BIRKETT L.J. I agree with the judgment which has just been delivered by my Lord. I have also had the opportunity of reading in advance and considering the judgment about to be delivered by Romer L.J., and with that judgment I agree. I therefore do not desire to add a judgment of my own.

ROMER L.J. It is common ground between the plaintiff and the defendants that the written contract which was signed on October 7, 1952, embodied, comprehensively and finally, the mutual rights and obligations of the parties in relation to the sale and purchase of the 300 tons of aluminium ingots which they had been discussing for some days previously; no terms or provisions were left for further negotiation or were the subject of any collateral oral bargain. From this it follows that the intentions of the parties respectively must be ascertained, and can only legitimately be ascertained, by construing the language of the document in which those intentions were expressed. No extraneous evidence

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of intention can be admitted in the performace of this task whether such evidence be proffered in the form of oral statements, of letters, or of earlier draft forms of contract which had been submitted by either side for the consideration of the other. It is, however, permissible to note, as one of the surrounding circumstances in which the document was signed, that it was in fact the final outcome of earlier discussions and of the exchange of earlier drafts; its language was deliberate and empirical.

The most important question of construction which arises on the contract is whether the guarantee which the plaintiff undertook to furnish to the defendants meant, or at all events included, the guarantee of the plaintiff himself or whether the undertaking could only be effectually discharged by the production of a guarantee by some third party. The defendants have urged various reasons in support of the latter alternative. First they say that the ordinary, prima facie, meaning of "guarantee" in relation to the performance of a contract is the assumption of liability for its non-performance by someone other than the performer. Secondly, it is contended that the undertaking in this agreement to "furnish" a guarantee tends to attract this prima facie view. Thirdly, the defendants argue that if all that was intended was the plaintiff's own personal undertaking it could very well have been given in the contract itself and that this element, coupled with the production of a separate document which the agreement apparently envisaged, affords further proof that the suretyship of a third party was intended. Fourthly, it is suggested that the plaintiff's own unsupported guarantee would add nothing to the obligation which was imposed on him by the contract itself and would therefore give the defendants nothing in the way of an additional security for the performance of that obligation. And, finally, they say that the guarantee involved the exercise of a power which is possessed by banks, but which the plaintiff did not himself possess, namely, a power to acquire and dispose of dollars; and that this consideration is relevant to the construction of the document.

I doubt whether the first of the above reasons is of any considerable significance. Although among lawyers the word "guarantee" would normally (though not always) imply the promise of some third person, the parties to this contract were not lawyers but were commercial men, as Devlin J. in the course of his judgment pointed out. But, further than this, the expression "guarantee" is used in the last paragraph of the contract in the sense of a personal undertaking, for the defendants "guaran-"teed" that they would extend their letter of credit should there be any delay in Antwerp. Then, as regards the fifth reason, our attention was not directed to any evidence which showed that the plaintiff could not procure the necessary dollar credit and, on the contrary, it is reasonably clear that he could have procured it once the defendants' letter of credit had been opened. I do not

think, therefore, that this is an element which is of much assistance in the interpretation of the contract.

However, the considerations upon which the defendants rely are undoubtedly deserving of weight, at all events collectively, the assessment of which can only be determined by comparing them with the points upon which Mr. Blackledge for the plaintiff relied. The first of these is that if the parties in this carefully negotiated contract had intended that the guarantee of some third party should be procured they would surely have indicated who that third party was to be. Not only, however, was the agreement silent as to this, but it gave no indication as to the class from which he was to be drawn. He might be (1) any responsible person nominated by the plaintiff; (2) any responsible person nominated by the plaintiff and approved by the defendants; (3) any "authorized dealer" within the meaning of the Exchange Control Act, 1947; (4) any similar dealer of whom the defendants approved. There may be other categories as well but, even assuming that those which I have mentioned are exhaustive, the plaintiff argues that it is difficult to explain why none was mentioned if any of them were in fact in contemplation.

The second point upon which the plaintiff relies emerges from and is in a sense dependent upon the first. If, it is said, two interpretations of an expression in a document are both reasonably acceptable but one gives rise to uncertainty in its effect and the other does not, the courts will adopt the latter in preference to the former. This principle, which I accept, is applied to the present case as follows. The interpretation of guarantee as meaning the guarantee of the plaintiff himself is reasonably acceptable and leads to no uncertainty in its result; but assuming that it is construed as meaning the guarantee of some third party then, even on the assumption that such construction is also reasonably acceptable, its adoption would involve so great a degree of uncertainty (that is, as to the identity of the guarantor) as might bring about the complete annihilation of the contract. The Court, so the plaintiff contends, should therefore accept the first interpretation and reject the second.

In my judgment the guarantee provision was so important an ingredient in the agreement as a whole, in that it constituted an inseparable part of the consideration moving to the purchasers, that its invalidity would vitiate the entire contract. There may very well be cases in which there are two considerations for a promise and in which the promise will remain binding notwithstanding that one of the considerations fails. Such cases would, however, in general be limited to contracts where the consideration which fails is both subordinate to and severable from the other, and it cannot be said that the contract now in question comes within that category. I am accordingly of opinion that the principle which Mr. Blackledge invokes should be applied and a construction be given to the word "guarantee" which will preserve the agreement rather than one which will destroy it.

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In the result I have arrived at the same conclusion as my Lord, namely, that the arguments in favour of the view that the guarantee which is mentioned in the agreement meant the personal guarantee of the plaintiff considerably outweigh the defendants' arguments to the contrary, and in my judgment the judge came to a correct decision upon this point.

Upon the other matters also which were argued before us, I am in entire agreement with the judgment which my Lord has delivered and there is nothing that I can usefully add to what he has said upon them; and I agree with my brethren that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors: *Harold Miller & Co.; Alfred Bieber & Bieber.*

A. W. G.

[QUEEN'S BENCH DIVISION.]

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July 20, 21.
Pilcher J.

*RICHMOND AND OTHERS *v.* McGANN.

Landlord and Tenant—Act of 1951—*Residence—By member of tenant's family—"In right of the tenancy"—Tenant holding over after expiry of long lease—Daughter occupying house under oral agreement and paying rent—Occupation not "in right of the tenancy" —Leasehold Property (Temporary Provisions) Act,* 1951 (14 *&* 15 *Geo.* 6, *c.* 38), *s.* 2 (1) (*a*).

The defendant, who was the assignee of the remainder of a long lease of a dwelling-house, held over after the expiry of the lease in 1950. She did not occupy the house herself but since 1946 her daughter had lived there under the terms of an oral agreement with her and had paid her an economic rent. On a claim by the freeholders against the defendant for a sum in respect of dilapidations:—

Held, that the defendant's daughter was not occupying the house "in right of the" defendant's tenancy within the meaning of section 2 (1) (*a*) of the Leasehold Property (Temporary Provisions) Act, 1951, and, accordingly, the defendant was not entitled to the protection of the Act and was liable for dilapidations.

ACTION.

On October 9, 1851, the then freeholders of 65, Gloucester Crescent, Regents Park, granted a long lease to head lessees for the term of 99 years at £7 4s. a year. On June 23, 1883, the head lessees granted a sublease from March 25, 1880, for 70 years less three days at the rent of £10 a year.

Some time in 1940 the defendant, Mrs. Margaret Agnes McGann, a neighbouring boarding-house keeper, acquired the top part of the premises in order to lodge some of her guests. In 1942 her daughter, a Mrs. Lewis, began to live in the upper part of 65, Gloucester Crescent, and paid the defendant the weekly

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[Reported by G. D. BLACK, Esq., Barrister-at-law.]

rent of 30s. By May 3, 1945, a Miss Butler had acquired the head lease of the premises which was due to expire on March 25, 1950. In November, 1946, a firm of house agents sold or purported to sell to the defendant for the sum of £150 what she believed to be the tag end of a long lease which still had some three and a half years to run. From November 9, 1946, until the present day, the defendant allowed Mrs. Lewis to occupy the whole house at an increased weekly rent of £2 1s.

Early in July, 1947, the then freeholders, who had no knowledge of the existence of any sublease, attempted to serve on Miss Butler a schedule of dilapidations. Miss Butler, however, could not be traced and eventually the plaintiffs, the present freeholders of 65, Gloucester Crescent, got in touch with the defendant; and as a result of certain documents which she produced they thereafter accepted rent from her in accordance with the terms of the head lease, which was the only lease of which they were aware.

After the lease had expired on March 25, 1950, the plaintiffs, having served on the defendant a schedule of dilapidations, took proceedings against Mrs. Lewis for possession. They obtained judgment against her, which was never executed, and brought a claim for £967 2s. 7d. in respect of dilapidations against the defendant.

The defendant denied that she was the legal assignee of the lease and, in the alternative, claimed the protection of sections 2 and 5 of the Leasehold Property (Temporary Provisions) Act, 1951,[1] on the grounds that although she herself was not occupying the premises her daughter, Mrs. Lewis, had been residing on the premises immediately prior to and since the expiry of the lease.

Frank Whitworth for the plaintiffs.
John Plume for the defendant.

[1] Leasehold Property (Temporary Provisions) Act, 1951, s. 2: "(1) "Where a tenancy was granted for "a term of years certain, being a "term exceeding twenty-one years "and expiring on a date (herein-"after referred to as 'the date of con-"'tinuation') before the commence-"ment of this Act, and—(*a*) imme-"diately before the date of continua-"tion the tenant or a member of his "family was residing in a dwelling-"house comprised in the property in "right of the tenancy, and (*b*) at all "times during the period beginning "with the date of continuation and "ending with the commencement of "this Act there was residing in the "dwelling-house in question some "person being either the former "tenant or a member of the former "tenant's family, and (*c*) at all times "during the period mentioned in the "last foregoing paragraph at which "any such person was residing in "the dwelling-house in question he "was residing there either not in "right of any tenancy or agreement "or in right of a tenancy or agree-"ment (whether express or implied) "which [fulfilled certain conditions] ". . . the next following subsection "shall have effect.

"(2) The tenancy shall be deemed "not to have expired on the date of "continuation but to have continued "until the commencement of this "Act, and subject to the provisions "of this part of this Act shall con-"tinue thereafter, as if it had been "granted for a term expiring at the "end of the period of two years "beginning with the commencement "of this Act but otherwise (save as "hereinafter provided) on the terms "and subject to the conditions of the "tenancy."

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PILCHER J. stated the facts and continued: I have come to the conclusion on the evidence that Mr. Whitworth's contention is right, that is, that there being here admittedly an equitable assignment of this lease to the defendant, she is precluded and estopped from alleging as against the plaintiffs that she had not in fact got a legal assignment which would carry with it the liability to pay the dilapidations which were due at the end of the long lease.

That being so, I have to consider the provisions of the Leasehold Property (Temporary Provisions) Act, 1951, which I have not found at all easy to understand. It is an Act which makes temporary provision for the protection of occupiers of residential property against the coming to an end of long leases. Section 1 of the Act concerns the continuation of an expiring long tenancy where the tenant himself is in occupation. Section 2 makes provision for a tenant holding over after the expiry of a long tenancy. Section 5 provides: "(1) While a tenancy continues by "virtue of section one or section two of this Act, or while before "the date of expiry the tenant under a tenancy granted for such "a term as is mentioned in the said section one, or a member "of the tenant's family, is residing in a dwelling-house comprised "in the property in right of the tenancy, then—(*a*) the landlord "shall not be entitled, by action or otherwise, to enforce any "right of forfeiture or re-entry in respect of any failure to comply "with a term or condition of the tenancy, or to bring any action "against the tenant for damages in respect of such a failure."

On the assumption then that the defendant has a legal assignment of the balance of this long lease which expired on March 25, 1950, I must consider whether or not on the facts this particular lease has been extended by this Act so that it has not yet come to an end and the defendant's liability to pay dilapidations has not yet arisen. It also governs the position of Mrs. Lewis to some extent, because she has a judgment against her which the plaintiffs obtained, giving them possession of this house. That judgment has not yet been executed and, of course, if her mother's lease has been extended by the Act it cannot be executed. The section with which I am concerned is section 2.

[His Lordship read section 2 (1) and (2) of the Act, and continued:] If, then, the defendant can satisfy me that Mrs. Lewis was occupying this house at all material times in right of her, the defendant's, tenancy, she has gone some way towards establishing that her tenancy has not expired, but has been extended, and that the plaintiffs are not entitled, at any rate for the moment, to claim from her the sum in respect of dilapidations which is the subject-matter of this action. The material words from my point of view are contained in section 2 (1) (*a*). The defendant, who was the tenant, was not herself residing in the premises, although her daughter, Mrs. Lewis, was so residing throughout the material period. Now was she residing

in this house "in right of the tenancy," which must mean in right of her mother's tenancy?

The first thing to be remembered is, that at all material times Mrs. Lewis was, to put it in ordinary language, her mother's tenant. She held a rent book. She was paying £2 1s. a week rent, which was quite a reasonably substantial rent. In those circumstances, can it be said that she was a member of her mother's family residing in her mother's dwelling-house in right of her mother's tenancy? At first glance, I should have thought that it was very difficult to say so. She was, so it would seem, her mother's tenant and was not a member of her mother's family residing in her mother's house in right of her mother's tenancy. Section 7 of the Act is concerned with the situation of sub-tenants and protects them, in appropriate circumstances, from being turned out. I find it quite impossible to say that Mrs. Lewis, who held this rent book under an oral agreement with her mother, but lived there for years paying her mother an economic rent—a rent at least which I estimate to be economic—was residing in her mother's house in right of her mother's tenancy. I think the exception of clause 2 (1) (*a*) finds its place in this Act to protect persons like wives or children or, it may be, other relatives, who are permitted by the tenant to whom they are related to live in the tenant's own premises when the tenant himself is absent, and not to protect persons like Mrs. Lewis who are paying their mother, who for this purpose is the legal assignee of the remainder of the lease, an economic rent under a rent book for the occupation of her mother's premises.

Consequently, I have come to the conclusion, without proceeding any further with the requirements of section 2, that the defendant really here fails *in limine* on subsection (1) (*a*) because, not only does the defendant have to satisfy me that she comes within subsection (1) (*a*), but she also has to satisfy me that she fulfils the requirements of (*b*), (*c*) and (*d*); (*b*) she admittedly fulfils, and probably (*d*); but I feel very grave doubt whether she does not fail, or would not fail, in satisfying me that she fulfils the provisions of (*c*), and for very much the same reason that she does not fulfil the provisions of (*a*).

I have, therefore, come to the conclusion that the defendant is not protected in respect of this lease by the provisions of this Act. I think that the plaintiffs are entitled to claim from her dilapidations.

Judgment for the plaintiffs.

Solicitors: *Wigram & Co.; Woodham Smith, Borradaile & Martin.*

[LIVERPOOL ASSIZES.]

1954
June 9, 10, 24;
July 2.

Pearson J.

* BUTTERWORTH *v.* KINGSWAY MOTORS; HAYTON, THIRD PARTY; KENNEDY, FOURTH PARTY; RUDOLPH, FIFTH PARTY.

[1952 B. 225.]

Sale of Goods—String contract—Repudiation—Failure of consideration—Recovery of purchase price—Goods subject to hire-purchase agreement—Vendor having no title at time of sale—Rescission by purchaser—Sale by hirer followed by further re-sales—Subsequent exercise of option to purchase by hirer—Perfection of title—Transmission of ownership—Implied condition that vendor has right to sell—Breach—Damages—Measure—Whether duty owed by defendants to third party to mitigate damage.

Damages—Sale of goods—String contract—Costs of legal proceedings—Whether reasonably incurred and contemplated at time of contract.

R., the hirer of a motor-car under a hire-purchase agreement with B. Ld., sold the motor-car to K., a motor dealer, on August 1, 1951, before she had paid all the instalments due or exercised the option to purchase under the hiring agreement. On August 11, 1951, K. re-sold the car at a small profit to H., a produce merchant who, so far as K. knew, required the car for his own use and not for the purpose of re-sale. H. on the same day re-sold the motor-car to a firm of motor dealers, the defendants, at a profit of £15. H. then knew that they required it for the purpose of re-sale. On August 30, 1951, the plaintiff bought the motor-car from the defendant firm for the equivalent of £1,275 on part exchange terms, and used it for several months. On July 16, 1952, the plaintiff received a letter from B. Ld., informing him that the motor-car was their property and the subject of a hire-purchase agreement between them and R. On July 17 the plaintiff wrote to the defendant firm claiming the return of the purchase price. On July 25, 1952, R. paid to B. Ld. a sum which covered the outstanding balance of instalments and exercised her option to purchase it under the hire-purchase agreement.

The plaintiff sued the defendant firm to recover back the purchase money that he had paid, as on a total failure of consideration.

The defendant firm issued a third party notice against their vendor, H., and there were similar fourth and fifth party notices issued by H. against K. and K. against R. respectively. The substance of each of the claims against the third, fourth and fifth parties was for damages for breach of the implied condition that the vendor had a right to sell.

The value of the motor-car at the date of the hearing of the action was about £450 and its value in July, 1952, was £800:—

Held, (1) that the plaintiff's letter to the defendant firm constituted a rescission of the contract of sale and the plaintiff was thereafter entitled to rescind that contract and recover back the purchase price as money paid on a consideration which had wholly failed in that the defendant firm had no title to the motor-car at the time they purported to sell it.

Rowland v. *Divall* [1923] 2 K.B. 500 applied.

(2) That when R. exercised her option to purchase the motor-car she acquired a good title as between herself and B. Ld., the owners;

[Reported by E. SOMERSET JONES, Esq., Barrister-at-Law.]

and that the title so acquired by the hirer went to feed the previously defective title of the subsequent purchasers, *Whitehorn Brothers* v. *Davison* [1911] 1 K.B. 463 applied.

(3) That in computing the loss sustained by the defendant firm in respect of the motor-car as a consequence of the third party's breach of condition of title the value of the motor-car should be taken as at the date when the defendant firm acquired their title to the motor-car, namely, in July, 1952, and, accordingly, the amount of damages recoverable by the defendant firm in respect of such loss was £475, being the difference between the purchase price recovered by the plaintiff from the defendant firm and the value of the motor-car re-acquired by the defendant firm;

(4) That the defendant firm was entitled, in addition to the sum of £475, to recover from the third party as damages the costs payable by the defendant firm to the plaintiff and the costs (taxed on a solicitor and client basis) incurred by the defendant firm in resisting the plaintiff's claim, on the ground that it was reasonable in the circumstances for the defendant firm to resist the plaintiff's claim and that they would do so was within the reasonable contemplation of the parties as a probable result of the third party's breach of condition as to title.

Hammond v. *Bussey* (1887) 20 Q.B.D. 78; 4 T.L.R. 95; *Agius* v. *Great Western Colliery Co.* [1899] 1 Q.B. 413; *Kasler & Cohen* v. *Slavouski* [1928] 1 K.B. 78 followed.

(5) That the prima facie liability of the fourth party to the third party for breach of warranty of title was the price of the motor-car, namely £1,015, but his liability should be reduced to the amount of the third party's actual loss, excluding only the loss of profit made by the third party on re-sale, since that re-sale was not in the contemplation of the parties.

ACTION.

The plaintiff, Harry Butterworth, brought this action by a specially indorsed writ issued on September 12, 1952, claiming £1,275, the price he had paid to the defendant firm in respect of a Jowett Javelin motor-car purchased by him on August 30, 1951. The transaction was one of part-exchange, the plaintiff paying £550 in cash and delivering to the defendant firm a Standard motor-car valued at £725.

The Jowett Javelin motor-car, the subject of this action, had been taken by Miss Rudolph, the fifth party, as hirer, from Bowmaker Ld. on January 3, 1951, under a hire-purchase agreement which provided, inter alia, for the payment by the hirer of a number of monthly instalments, and that, if the hirer should duly perform the terms of the agreement she should have the option of purchasing the vehicle for the sum of 10s., but, until such option was duly exercised, the vehicle was to remain the property of Bowmaker Ld. and the hirer should not have any right or interest in it other than that of hirer under the agreement; that the agreement was personal to the hirer and the rights and/or obligations of the hirer should not be assignable or chargeable by her. The fifth party paid some of the monthly payments under the hire-purchase agreement. She had not exercised the option to purchase the vehicle when, on August 1, 1951, she purported to sell it for £1,000 to the fourth party, who

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was a motor dealer. The fifth party continued thereafter to make monthly payments under the hire-purchase agreement.

On August 11, 1951, the fourth party purported to sell the vehicle to the third party at a price of £1,015. The third party, so far as the fourth party knew, required the car for his own use and not for the purpose of re-sale. The third party on the same day purported to sell the vehicle to the defendant firm for the price of £1,030.

In all these transactions each of the vendors acted in good faith believing they had a right to sell the vehicle.

The plaintiff made full use of the vehicle from August 30, 1951, until July 16, 1952, when he received a letter from Bowmaker Ld. informing him that they were the owners of the vehicle and requiring him to deliver up possession of it to them. At the same time Bowmaker Ld., without prejudice to their claim, gave the plaintiff an opportunity to acquire title to the vehicle for the sum of £175 14s. 2d. On July 17, 1952, the plaintiff's solicitors wrote to the defendant firm claiming the return of the price paid by the plaintiff, on the ground that the defendant firm had had no title at the time of the purported sale. On July 23, 1952, Bowmaker Ld. wrote to the plaintiff's solicitors stating that they had received from the fifth party a cheque dated July 25, 1952, which, if met, would be sufficient to discharge their interests and enable them to release the vehicle to the plaintiff: the cheque was met on July 25, 1952.

The plaintiff's solicitors again wrote to the defendant firm's solicitors on August 9, 1952, requesting the return of the purchase price and seeking instructions with regard to the return of the vehicle. August 14, 1952, Bowmaker Ld. wrote to the plaintiff's solicitors informing them that the fifth party's cheque had been met and that their "interests in this case and in [the vehicle] is "completed." On two further occasions the plaintiff's solicitors wrote to the defendant firm's solicitors requesting instructions on the disposal of the vehicle which the plaintiff had ceased to use on July 16, 1952, and had not thereafter used.

There was a fall in the market value of the vehicle between 1951 and 1952 and its value in July, 1952, was assessed at £800. Its value at the date of the hearing of the action being about £450.

The defendant firm by its defence denied, inter alia, that the consideration had wholly failed and alleged that the plaintiff was and had been in undisturbed possession of the vehicle and had a good title to it. The defendant firm brought in the third party claiming to be indemnified against the plaintiff's claim and costs of the action. The substance of the defendant firm's claim against the third party was for damages for breach of the implied condition of title. The third party, making a similar claim, brought in the fourth party, who similarly brought in the fifth party.

Andrew Rankin for the plaintiff.

Fenton Atkinson Q.C. and *Anthony Carus* for the defendant firm.

Glyn Burrell for the third party.

Richard Bingham for the fourth party.

G. J. Bean for the fifth party.

The cases cited in argument are referred to in the judgment.

June 10. PEARSON J. The subject-matter of this litigation is a Jowett Javelin motor-car which was first registered in November, 1949. We have no evidence as to what happened to it between November, 1949, and about the end of 1950, but Miss Rudolph, the fifth party, became interested in it late in the year 1950. On January 3, 1951, she took it from Messrs. Bowmaker Ld. on a hire-purchase agreement containing not unfamiliar provisions.

By clause 2 the hirer agreed: "(*a*) On the signing hereof to "pay to the owners the amount of the first payment set out in "the schedule hereto in consideration of the option to purchase "granted to the hirer and referred to in clause 3 (*a*). (*b*) To pay "punctually to the owners without previous demand the amount "of the monthly payments set out in the schedule hereto so long "as the hirer shall desire to continue the hiring."

Clause 3 (*a*) is very important. It provides: "The owners "agree: (*a*) If the hirer shall duly make the said payments and "strictly observe and perform all the terms and conditions on his "part herein contined then the hirer shall thereupon have the "option of purchasing the vehicle for the sum of 10s."

Clause 4 provides: "If during the hiring the hirer shall: "(*a*) make default in punctually paying any of the hire-rents "provided by clause 2 (*b*) . . . (*d*) Fail to observe and perform "any of the terms, conditions and stipulations on his part herein "contained it shall be lawful for the owners . . . to put an end "to the hiring immediately and retake possession of the vehicle."

Clause 6 provides: "Unless and until the whole of the sums "due under clauses 2 (*a*) and 2 (*b*) hereof shall have been paid "and purchase been made under clause 3 (*a*) hereof the vehicle "shall remain the absolute property of the owners and the hirer "shall not have any right or interest in the same other than that "of hirer under this agreement."

Clause 9 provides: "This agreement is personal to the hirer "and the rights and/or obligations of the hirer shall not be "assignable or chargeable by him."

Miss Rudolph paid some of the monthly payments due under the hire-purchase agreement, but she had not paid all of them nor, of course, had she exercised the option to purchase by August 1, 1951, when she purported to sell this Jowett Javelin car to a motor dealer named Leonard Kennedy, the fourth party. The price was £1,000 and that was paid by him by means of a cash payment of £350 and the delivery of an A.C. shooting brake,

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which was valued for the purpose of that transaction at £650. That sale was wrongful because the car still belonged to Bowmaker Ld., and Miss Rudolph had no right to sell it. There was, therefore, a clear breach of the implied condition under section 12 (1) of the Sale of Goods Act, 1893.[1] It may well be that Miss Rudolph did not then realize that she was acting in an unlawful manner, but it is quite clear that she was.

On or about August 11, the fourth party, Mr. Kennedy, purported to sell this car for a little more than he had given for it—namely, £1,015—to Hayton, the third party. Hayton was a produce merchant and, so far as Kennedy knew, Hayton required the car for his own use and not for re-sale. This second transaction was again a completely wrongful sale as the car still belonged to Bowmaker Ld., so that, again, there was a breach of the same implied condition, but I find that he acted in good faith in believing he had a right to sell the car.

On the same day, August 11, Hayton, the third party, purported to sell the car for £1,030, to the defendants, Kingsway Motors, who are motor dealers, and Hayton knew that they were buying the car for re-sale. Here again, the sale was wrongful as the car still belonged to Bowmaker Ld., so that there was a breach of the same implied condition. Hayton also acted in good faith in believing that he had a right to sell the car.

After certain negotiations from about August 15 onwards, the defendants, on or about August 30, 1951, purported to sell the car to the plaintiff for £1,275, which was paid by means of certain cash payments amounting to £550 and the delivery of a Standard car which for this purpose was considered to be worth £725. Here, again, there was a wrongful sale as the car still belonged to Bowmaker Ld. and the defendants had no right to sell it, so there was a breach of the same implied condition. Here, also, the defendants acted in good faith, believing that they had a right to sell.

It appears from the registration book that the plaintiff was registered as owner on January 15, 1952. From the time of its acquisition on about August 30, 1951, until some time in July, 1952, he made full use of the car, fully believing that it was his car and that he had every right to use it. Miss Rudolph continued to make some monthly payments to Bowmaker Ld., under the hire-purchase agreement. In the end, however, she learned that she ought not to have sold the car as she had done and she informed Bowmaker Ld. of the actual position. Her conduct in those two respects, of course, affords strong evidence that she was acting in good faith and not with any intention of deceit, but it was a wrongful sale.

[1] Sale of Goods Act, 1893, s. 12: "In a contract of sale, unless the "circumstances of the contract are "such as to show a different intention, "there is—(1) An implied condition "on the part of the seller that, in the "case of a sale, he has a right to sell "the goods, and that in the case of "an agreement to sell he will have a "right to sell the goods at the time "when the property is to pass."

On July 15, 1952, Bowmaker Ld. wrote to the plaintiff in these terms: "*Re: Jowett Javelin—Regd. No. HGA 4.* We "have reason to believe that the vehicle described above is at "present in your possession and we wish to advise you that it is "our property the subject of a hiring agreement into which we "entered with a Miss G. Rudolph. Assuming our information to "be correct, we have to ask you to be good enough to arrange at "once for the vehicle to be returned into the possession of our "Liverpool office, and we shall be obliged if you will confirm that "you have given effect to our requirements. It occurs to us that "you might perhaps like the opportunity to acquire title in the "vehicle and quite without prejudice, we would be prepared to "allow you to do so in consideration of an immediate payment "of £175 14s. 2d."

If the plaintiff had been willing to enter into some arrangement on the lines suggested by Bowmaker Ld., a great deal of trouble would have been saved because no doubt it would have been possible to arrange what ultimately happened in fact, that Miss Rudolph herself would repay the outstanding balance to Bowmaker Ld. The plaintiff would then have had what he had originally bargained for at the price he originally agreed to pay, and did pay, and it would have saved a great deal of expense to everybody. On the other hand, he would have lost the chance he had in 1952 of reclaiming the full 1951 price in return for giving up this motor-car in July, 1952, by which time it had substantially depreciated in its realizable value by reason of a general fall in the market price of second-hand cars, but I do not think those considerations ultimately affect the legal issue here. I only mention them to show that I have not left out of consideration possible arguments on the grounds of hardship. In my view, the plaintiff's position is somewhat lacking in merits.

On July 17, 1952, acting very promptly in the matter, the plaintiff's solicitors wrote to the defendants: "We have been "consulted by Mr. H. Butterworth of 44, Dee Lane, West Kirby, "who informed us that he purchased a Jowett Javelin car for "£1,275 on August 30 last. We are instructed that this motor-"car was not yours to sell, and in the circumstances our client "will expect the return of the money paid." That shows that the plaintiff is claiming the repayment of the money and not wishing to retain the car. That second point becomes even more clear in later letters. On July 18 there is a reply from the defendants' solicitors to the plaintiff's solicitors: ". . . The allegation "that the Jowett Javelin car was not the property of our clients "to sell has come as a complete surprise. Our clients purchased "the car from a motor dealer. . . ."

On July 23 Bowmaker Ld. write to the plaintiff's solicitors: "*Re: Miss G. Rudolph, Agreement No.* ——: . . . Since we "wrote to Mr. Butterworth, we have received from our hirer a "post-dated cheque which, if met, will be sufficient to discharge

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"our interests and to enable us to release the vehicle to Mr. "Butterworth. The cheque in question is dated [July 25], so "we propose to write you again during the course of a day or "two."

It is understood and accepted by all counsel that in fact that cheque was made out by Miss Rudolph and made payable to Bowmaker Ld. for the outstanding amount of the hire-purchase payments and, I suppose, for the 10s. necessary to complete the purchase; and that cheque was met on or about July 25, 1952. The effect of that is that Miss Rudolph must be deemed to have exercised her option to purchase, and it follows that as between her and Bowmaker Ld. the ownership passed from Bowmaker Ld. to her. That is only as between those two parties. Bowmaker Ld. were willing to take that cheque, as they pointed out in their letter, in discharge of their interests and as enabling them to release the vehicle. They say in their letter "to release the "vehicle to Mr. Butterworth."

On August 9 there is a further letter from the plaintiff's solicitors to the defendants' solicitors, which reads: ". . . We "are now instructed to apply for the return of the purchase price, "namely, £1,275, and we should be obliged by your letting us "have your instructions with regard to the return of the motor-"car." On August 14 Bowmaker Ld. wrote to the plaintiff's solicitors: ". . . We are pleased to say that the cheque to which "we referred in our last communication has been duly met so "that our interests in this case and in the Jowett Javelin HGA 4 "is completed."

On August 22 the plaintiff's solicitors write to the defendants' solicitors again asking for the return of the purchase price and again asking for instructions regarding the return of the motor-car. On October 11, 1952, the plaintiff's solicitors write again asking for some instructions as to the disposal of the car. The plaintiff did not use the car after July 16, 1952, but the car has remained on his premises ever since that date and, most unfortunately, no arrangement was made for that car to be disposed of in July or August or later in 1952, while its price was still comparatively high.

The proceedings began with a specially indorsed writ issued on September 12. The claim was "for money received by the "defendants to the use of the plaintiff and payable by the defen-"dants to the plaintiff on a consideration which has wholly failed. "The said money, namely, £1,275, was paid by the plaintiff to "the defendants on August 30, 1951, or thereabouts, as the "consideration for the delivery by the defendants to the plaintiff "of a Jowett Javelin motor-car, registration number HGA 4, and "the consideration wholly failed by reason of the fact that the "defendants were not the owners of the said motor-car, and had "no title to the said motor-car. And the plaintiff claims the said "sum of £1,275."

Some adverse comments have been made as to the exact wording of that statement of claim, but I do not think that they are of much moment because I think that that statement of claim makes clear the substance of the plaintiff's claim: it was that the consideration had failed because the defendants had failed to sell the car to the plaintiff and, in the first instance at any rate, had no title to it.

The defence was delivered on October 27, 1952. The material pleas are paragraphs 3 and 4: "3. It is denied that the con-"sideration wholly failed as alleged or at all, on the contrary the "plaintiff is and has been in undisturbed possession of the said "Jowett Javelin, and has a good title to the said Jowett Javelin. "4. If, which is denied, the plaintiff has not a good title, then "the plaintiff accepted the said Jowett Javelin, of which he is "still in possession, and by reason of section 11 (1) (*c*) of the "Sale of Goods Act, 1893,[2] any alleged breach of any alleged "condition by the seller in the contract of sale can only be "treated as a warranty and not as a ground for rejecting the said "contract." Mr. Atkinson indicated that his argument against the plaintiff would, for the most part, be based on paragraph 3.

There was a third party notice served by the defendants against the third party claiming to be indemnified against the plaintiff's claim and costs of the action on the ground that there was an implied condition that the third party had a good title to the motor-car. There is a statement of claim in those proceedings and the defence. It is sufficient to say that, in substance, the defendants' claim against the third party is now, at any rate, for damages for breach of the implied condition that the third party had a good title. The claim is for damages because any alleged breach of the alleged condition has been reduced to a breach of warranty, either by the events which have happened or by the election of the defendants to deal with the matter on that basis. The main plea in the defence is that the title was perfected afterwards. There is a similar fourth party notice dated November 26, 1952, by the third party against the fourth party and a somewhat similar statement of claim and defence. Then there is a similar fifth party notice dated January 6, 1953, by the fourth party against Miss Rudolph.

On those facts, the first question is the relation between the plaintiff and the defendants, and a very important question is whether the plaintiff, by his letter of July 17, 1952, duly and effectually rescinded the contract of sale between him and the defendants. I hold, first, that that letter of July 17, as a matter

[2] Sale of Goods Act, 1893, s. 11: "(1) In England or Ireland—. . . (*c*) "Where a contract of sale is not "severable, and the buyer has ac-"cepted the goods, or part thereof, or "where the contract is for specific "goods, the property in which has "passed to the buyer, the breach of "any condition to be fulfilled by the "seller can only be treated as a "breach of warranty, and not as a "ground for rejecting the goods and "treating the contract as repudiated, "unless there be a term of the con-"tract, express or implied, to that "effect."

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of construction, constituted a rescission of that contract of sale. When I say "a rescission of the contract of sale," I am using the wording which was used in the Court of Appeal in *Rowland* v. *Divall*,[3] and without prejudice to the question whether it could also be put in rather a different way: that there was a fundamental breach by the defendants and the plaintiff elected to treat that breach as a repudiation of that contract of sale. I do not think that it makes any difference which way one looks at it in the end. Secondly, I hold that, on the authority of *Rowland* v. *Divall*,[3] the plaintiff was on that date entitled to rescind that contract of sale. The possible contention for the defendants that such rescission was precluded by the plaintiff's use of the car for a substantial period and the deterioration in its condition and/or depreciation in its market value during that period is answered by the reasoning of Bankes L.J.[4] in that case. Another possible contention that such rescission was precluded by the plaintiff's acceptance of the motor-car when it was delivered or after delivery is answered by the reasoning of Atkin L.J.[5]

The contention mainly relied upon by Mr. Atkinson for the defendants as against the plaintiff was that there was not a total failure of the consideration. That question he said was to be determined as at the date of the issue of the writ, and that, as at that date, the plaintiff was still in undisturbed possession of the car; there was no outstanding adverse claim against him because Miss Rudolph had paid the outstanding instalments and the hire-purchase money, and Bowmaker Ld. were willing to accept such payment in full discharge of their interest in the car and to release the vehicle to the plaintiff. The answer to that contention is that on July 17 the plaintiff was entitled to, and did, rescind the contract of sale and thereby he established, and in a sense crystallized, his right to receive repayment of the purchase price as money paid in consideration for the sale of the motor-car. He could not consistently with that claim for repayment of the purchase price also claim to retain possession of the car, but at all times it was sufficiently clear that he was not adopting any attitude of seeking to retain possession of the car. He was holding the car at the disposal of the defendants. I further hold that after he had written that letter the plaintiff was entitled to, and did, maintain his position of having no claim to possession of the car, but having a right to repayment of the purchase price. Having regard to that, whatever the general merits of his position may be, I hold that the plaintiff is in law entitled to recover, and there will be judgment for £1,275 against the defendants.

The decision which I have given on that question depends on the letter of July 17, 1952. It was argued for the plaintiff that even if that letter had never been written the position would still have been the same on the ground that there was a total failure

[3] [1923] 2 K. B. 500.
[4] Ibid. 503.
[5] Ibid. 506.

of consideration as between the two relevant parties, the plaintiff and the defendants. The contention was that even if the letter of July 17 had not been written, still the extraneous act of Miss Rudolph in paying the hire-purchase money to Bowmaker Ld., and the willingness of Bowmaker Ld. to accept that in discharge of their interest and release the vehicle to the plaintiff, would not remedy the defect in the consideration moving from the defendants. It is not necessary for me to express an opinion on that point. I feel some doubts about it because it would seem an extraordinary position if the plaintiff here, on the assumption that he had not previously defined his attitude of election on the subject, was seeking to say: "There has been a total failure of "consideration by purchase of this car, although here is the car "in my possession and I am entitled to retain it against the "world." It does not seem to me to be a reasonable conclusion. I do not express any final opinion on it because I have come to my decision in favour of the plaintiff's claim on the basis of his solicitor's letter of July 17.

The next question is as to the present ownership of the car. The various purported sales all took place at times when Bowmaker Ld. were still the owners of the car, so that all the purported sellers in this rather long chain had no title to it at the times when the sales, or purported sales, were made; but on or about July 25, 1952, Miss Rudolph acquired a good title from Bowmaker Ld. or, at any rate, made a payment to Bowmaker Ld. which extinguished their title and induced them to relinquish any claim they had to the car. I think the right view is that Miss Rudolph did acquire the title as between her and Bowmaker Ld., but I further hold on authority that the title so acquired went to feed the previously defective titles of the subsequent buyers and enured to their benefit. It is a rather curious position but I so hold mainly on the authority of the Court of Appeal decision in *Whitehorn Brothers* v. *Davison*.[6] In his judgment Vaughan Williams L.J. said[7]: "It is by reason of this event "that I have come to the conclusion that the question of larceny "by a trick becomes of no importance in this case. The title of "Bruford to the necklace was, at any rate for the time being, "perfected by that transaction, and would go to feed the title "of the defendant, his pledgee, the result being that, if the "defendant's title is not vitiated by bad faith on his part or "notice, he has a good title. . . ." Buckley L.J. said[8]: "If "Bruford had stolen it, [the necklace] he had that which is "sometimes incorrectly called a void title, but which is really no "title at all. Bruford could not then give the defendant a title." There is a passage in the judgment of Kennedy L.J.[9] which is to a similar effect. *Blundell-Leigh* v. *Attenborough*[10] (*per* Bankes

[6] [1911] 1 K.B. 463.
[7] Ibid. 475.
[8] Ibid. 481.
[9] Ibid. 486.
[10] [1921] 3 K.B. 235; 37 T.L.R. 567.

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L.J.[11] and Atkin L.J.[12]) and *Robin & Rambler Coaches Ld.* v. *Turner*[13] are also authorities on this point. Accordingly, I hold that the sales by Miss Rudolph to Kennedy, by Kennedy to Hayton, and by Hayton to the defendants were in a sense perfected on or about July 25, 1952, and that in consequence the newly acquired title of Miss Rudolph passed all along the line and caused the ownership of the car to vest in the defendants on or about July 25. The plaintiff, as I have already stated, has been holding the car at the disposal of the true owner, whoever he may be, and since July 25, 1952, the defendants have been entitled to that car.

The next set of questions is concerned with the rights of the defendants against Hayton, and Hayton against Kennedy, and Kennedy against Miss Rudolph. The defendants are entitled to claim damages against Hayton for breach of the condition as to good title to the car, but that breach of the condition is now reduced to a breach of warranty and damages can be claimed on that basis. In consequence of that breach, the defendants lost the purchase price of £1,275 but, on the other hand, they eventually acquired ownership of the car. For the value of that car which they so acquired, they must give credit in reduction of the prima facie sum of £1,275.

The next question is: At what date is the value of that car to be assessed? One possible argument for the third party would be that it was the duty of the defendants to mitigate the damage by taking all reasonable steps to dispose of the car and it would have been reasonable for the defendants at once, in July or August or thereabouts in 1952, to take the car and dispose of it at the price it would then fetch in order to avoid further depreciation. It may be that there was a duty to mitigate the damage in that way, but the argument to the contrary is formidable: namely, that the defendants at that time were faced with a difficult legal position, and they were entitled to maintain their attitude against the plaintiff that the car belonged to him and it did not belong to them and they were not liable. I think there is a possibility of a good deal of argument as to what the "reasonable" steps to mitigate the damage would be, but I think this problem can be solved much more simply.

What the defendants gained was the ownership and right to possession of that car and, when one comes to assess the value of what they gained, one should take it at the date when it was gained. That is the position here. Then one has to arrive as best one can at the proper value of that car in or about July, 1952. [His Lordship referred to the evidence and continued:] The present value of this car is something like £450 and, making the best assessment I can, I assess its value in July, 1952, at £800. Therefore, the net claim of the defendants against the third party, all questions of the parties' costs being left over, is

[11] [1921] 3 K.B. 240.
[12] Ibid. 242.
[13] [1947] 2 All E.R. 284.

£475; that is to say, the difference between the full claim of £1,275 and the £800 deducted for the value of the car, leaving a difference of £475, and the decision is that the defendants are entitled to recover that sum from the third party.

The next step in the chain is the claim of Hayton, the third party, against Kennedy, the fourth party. This is possibly complicated by the fact that so far as the fourth party knew at the time of the contract of sale, Hayton was buying for his own use and not for re-sale; but Hayton paid £1,015 for the ownership of the car and he received initially no ownership at all so there was at that time a clear breach of contract. Prima facie, his claim would be for the whole sum of £1,015 because he paid £1,015 and received nothing in exchange. In fact, subsequent events have reduced his claim. He has not suffered as much damage as that, but I think the fair view is that the subsequent events have to be taken as a whole and the effect is that his net claim against the fourth party is for £475, always leaving aside any question as to the parties' costs in this matter.

Similarly, I think the same result can be arrived at between Kennedy and Miss Rudolph. The previously mentioned complication does not exist here because Miss Rudolph knew that Kennedy was a motor dealer and was buying for re-sale. I do not think that that ultimately alters the result. Mr. Kennedy's claim against Miss Rudolph is £475, leaving aside the question of costs.

Judgment for the plaintiff with costs.

June 24. After hearing further argument on behalf of the defendants, the third party, the fourth party and the fifth party on costs as such and as items of damages for breach of warranty his Lordship reserved judgment.

Cur. adv. vult.

July 2. His Lordship read the following judgment:—For the sake of clarity, I will first set out the contents of the order to be made, and then explain the points which need explanation.

CONTENTS OF ORDER.

A. There will be judgment for the defendants against the third party for:—(1) Damages made up of (*a*) £475, (*b*) the costs payable by the defendants to the plaintiff, and (*c*) the defendants' costs of resisting the plaintiff's claim (to be taxed as between solicitor and client); and (2) The defendants' costs of the third party proceedings (to be taxed as between party and party).

B. There will be judgment for the third party against the fourth party for:—(1) Damages being the lesser of the two following amounts, namely, (*a*) £1,015, and (*b*) the aggregate of the damages and costs payable by the third party to the defendants and the third party costs of resisting the defendants' claim

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against the third party (to be taxed as between solicitor and client) less £15; and (2) The third party's costs of the fourth party proceedings (to be taxed as between party and party).

C. There will be judgment for the fourth party against the fifth party for:—(1) Damages made up of (*a*) the damages and costs payable by the fourth party to the third party, and (*b*) the fourth party's costs of resisting the third party's claim against the fourth party (to be taxed as between solicitor and client); and (2) The fourth party's costs of the fifth party proceedings (to be taxed as between party and party).

Explanation.

A. As to the judgment for the defendants against the third party, certain questions arise with regard to the items of damages (*b*) and (*c*).

The defendants were to the knowledge of the third party motor dealers buying the car for re-sale to a sub-buyer. The parties must reasonably be supposed to have contemplated, as a probable result of the breach of the condition as to title, that the sub-buyer would reclaim from the defendants the price charged by the defendants to the sub-buyer, and that the defendants would resist the claim if it were reasonable to do so. It has to be considered whether it was reasonable for the defendants to resist the plaintiff's claim. There was no evidence as to negotiations between the defendants and the third, fourth and fifth parties or any of them. I was informed, however, that a meeting was held between them or their respective solicitors, but no agreement was reached. There is no reason for attributing the blame for the failure of the meeting to any particular party or parties. The defendants had an arguable case against the plaintiff, and if they had succeeded their success would have benefited, not only the defendants themselves, but also the third party and the fourth and fifth parties. I find that it was reasonable for the defendants to resist the plaintiff's claim. Accordingly, they are entitled to charge against the third party the costs payable by the defendants to the plaintiff and the defendants' costs of resisting the plaintiff's claim, and those latter costs should be taxed as between solicitor and client: *Hammond & Co.* v. *Bussey*[14]; *Agius* v. *Great Western Colliery Co.*[15]; *Kasler and Cohen* v. *Slavouski.*[16]

B. As to the judgment for the third party against the fourth party, it was argued on behalf of the fourth party that he should not have to pay anything to the third party except perhaps nominal damages and costs, because (1) although, prima facie, he would have been liable to the third party for £1,015 (being the price or value of the car) by reason of the breach of condition or warranty as to title, in the event he has no liability on this

[14] (1887) 20 Q.B.D. 79; 4 T.L.R. 95.

[15] [1899] 1 Q.B. 413.

[16] [1928] 1 K.B. 78.

ground because eventually the title passed through the fourth party to the third party on its way to the defendants; and (2) the fourth party is not liable to the third party for the third party's actual loss, because that arose out of a re-sale which was not in the contemplation of the fourth party when he made his contract of sale with the third party, whom he knew only as a produce merchant and not as a dealer in cars. That is an attractive argument, but I think it fails for reasons which I have stated shortly in the former judgment and will now elaborate.

The fourth party sold to the third party a car worth £1,015, having no title to it. Prima facie, he is liable to the third party for £1,015. But there occurred a series of subsequent events, which were interconnected and were all outside the contemplation of the fourth party at the time of the contract and were fortuitous and extraneous so far as the fourth party was concerned. There are, I think, four conceivable views as to the effect of these subsequent events on the fourth party's liability:—(i) that all the subsequent events should be disregarded so far as the fourth party is concerned, and he is liable to the third party for £1,015; (ii) that the fourth party's liability is prima facie £1,015, but if the third party's actual loss is less than £1,015 the fourth party's liability should be reduced to the amount of the third party's actual loss; (iii) that all the subsequent events should be taken into account, and the fourth party's liability should be equal to the third party's actual loss, whether greater or less than £1,015; (iv) that the fourth party is entitled to have taken into account only that one of the subsequent events which happens to be to his advantage—namely, the eventual passing of the title through the fourth party to the third party in the course of its longer total transit—and to have all the other subsequent events left out of account.

In my judgment the fourth suggested view must be rejected. It involves an artificial selection of only one out of the connected series of subsequent events. The fourth party did not himself do anything to cure the defect of title, nor was it fully cured in fact: the third party did not acquire an absolute or clear title but only a transient title associated with a liability. The third suggested view is wrong in principle, because the fourth party's liability should not be increased by reason of matters which were outside the scope of his reasonable contemplation at the time of the contract. The first suggested view does not need to be considered, as the third party did not in his fourth party pleading ask for more than an indemnity in respect of his actual loss. In my view the second view is right, namely that the prima facie liability is for £1,015, and this cannot be exceeded, but if the third party's loss has been reduced by the subsequent events, taken as a whole, the fourth party should have the benefit of that reduction. In ascertaining the third party's actual

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loss the profit of £15, which he made by buying the car at £1,015 and selling it at £1,030, is to be deducted.

C. As to the judgment for the fourth party against the fifth party, the fifth party knew that the fourth party was buying the car as a dealer and therefore for re-sale, and the parties must reasonably be supposed to have contemplated, as a probable result of the breach of the condition as to title, that the sub-buyer would claim repayment of the price or damages from the fourth party and that the fourth party would resist the claim if it were reasonable for him to do so. In the circumstances it was reasonable for the fourth party to resist the claim of the sub-buyer who is the third party.

Judgment accordingly.

Solicitors: *Berkson & Berkson, Birkenhead; Rollo & Mills-Roberts, Liverpool; Brighouse Jones & Co., Ormskirk; Leo. Kennedy & Glover, Ormskirk; A. Halsall & Co., Birkenhead.*

[COURT OF APPEAL.]

C. A.

1954
Oct. 7.

Lord Goddard C.J., Jenkins and Morris L.JJ.

* SHAVE *v.* J. W. LEES (BREWERS) LD. AND ANOTHER.

[Plaint No. K. 322 A.]

Court of Appeal—County court—Appeal from—Damages—Assessment of—Personal injuries—Question of fact—No power in appellate court to intervene where amount considered extravagant.
Damages—Personal injuries—County court.

Where a county court judge has awarded damages, an appellate court has no power to intervene merely on the ground that it considers the amount extravagant (or inadequate) for, unless it can be shown that the judge has erred on a point of law, the adequacy or inadequacy of an award by a county court judge is a question of fact on which no appeal lies.

Henderson v. *Clifford Watmough & Co.* (1939) 161 L.T. 233 applied.

Appeal from Judge Emlyn-Jones, Warrington County Court.

On July 31, 1952, a brewer's lorry with a trailer, owned by the first defendants, J. W. Lees (Brewers) Ld., was being driven along the main road from Queensferry to Birkenhead by their servant. He switched on the lights as he drove along at about lighting-up time, and a few miles further on he stopped the lorry (a) to see that his lights were on and (b) to check his load. At that moment a motor-cycle driven by the second defendant, Frank Berry, on which the plaintiff, Joyce Shave, aged 20, was a pillion passenger, crashed into the back of the stationary vehicle. As a result of the accident, the plaintiff suffered injuries.

She brought an action against the owners of the lorry and the motor-cyclist, alleging negligence against both. By their defence the first defendants said that the trailer had exhibited a red light at all times, and alleged that the accident was caused solely by the negligence of the second defendant; the second defendant denied negligence.

The county court judge accepted the evidence of the plaintiff (a) that there was no red light on the trailer when the accident occurred; (b) that the motor-cyclist was travelling at 30 to 35 miles an hour; (c) that immediately before the accident an oncoming vehicle had dipped its headlights and the motor-cyclist had accordingly dipped his own headlight; and (d) that immediately after he had done so, the accident occurred.

The judge held that the sole cause of the accident was the fact that there was no rear light on the trailer, and that the first defendants were accordingly wholly to blame. He then considered the medical reports, which stated that the plaintiff had been rendered unconscious by the accident, had been an in-patient in hospital for three weeks and an out-patient for three months, suffering injuries to her jaw and laceration of her scalp; that she still suffered some pain in the jaw (though the prognosis was that that pain would disappear in time); and that she had a permanent disability in that she could only open her mouth 90 per. cent. The judge expressed the view that the accident was serious, and awarded the plaintiff £750 damages against the first defendants. He ordered that judgment be entered for the second defendant against the first defendants.

The first defendants, who had originally applied for the case to be remitted from the High Court to the county court, appealed, asking for judgment in their favour; alternatively, that judgment should be entered for the plaintiff against the second defendant, or against both defendants in such proportion as the court should deem just. They also appealed against the award of damages on the ground that these were on the evidence excessive and unreasonable, and asked for a new trial.

F. W. Beney Q.C. and *Godfrey Heilpern* for the first defendants.

George N. England for the plaintiff.

A. A. Edmondson for the second defendant.

The only case cited in the argument on the reported point is referred to in the judgment.

LORD GODDARD C.J. stated the facts, and said that, where a driver followed the common practice of switching on his lights while driving along and did not get down to ascertain whether or not they were working properly, he took a risk, and if an accident occurred and it were proved that there was no rear light

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(BREWERS)
LD.
Lord Goddard
C.J.

at the time, the driver of the vehicle had a heavy onus on him to satisfy the court that that state of affairs existed without any negligence on his part. The county court judge had found that the light was not on at the time of the accident; there was a case on the facts as found by him on which he was justified in finding negligence; and the court could not disturb those findings. Nor could the court disturb the finding that there was no contributory negligence on the part of the motor-cyclist. His Lordship continued:—The last point is one on which, although we have not heard the other side, it does seem that there would be a good deal to be said if it were not for a certain decision. The judge awarded the plaintiff £750 damages. Apart from the point of law, I have looked at the medical evidence, which states that this young woman suffered from some concussion but was only in hospital for three weeks. The only other damage was some injury to her jaw, which results in her being able to open her mouth not more than 90 per cent. The agreed medical report states that she suffers no difficulties as a result of that disability. It seems to me that the sum of £750 was a wholly excessive amount. I think it is a pity that the judge, probably out of sympathy for a young woman who, I dare say, was a good-looking young woman, should give such excessive damages. If this case had been tried in the High Court, a High Court judge would probably have given £100, or £150 at the outside and, so far as I have heard at present, that would have been ample. I have read the very clear medical reports, and I do not think that counsel for the other parties could have persuaded me that there was any ground for suggesting that this was a very serious case, or that this girl would not have been well compensated by the sum I have mentioned. But unfortunately in *Henderson* v. *Clifford Watmough & Co.*[1] this court decided that in these cases of excessive or inadequate damages, unless it can be shown that the judge has gone wrong on a point of law, the question as to what somebody should receive as compensation for injuries, pain and suffering, and so on, is a pure question of fact. Mr. Beney, with the frankness that always distinguishes him in any case which he is arguing, called the attention of the court to this case, which he admitted put a difficulty in his way. He could not get over that difficulty. The court in *Henderson's* case[1] would have overcome the difficulty if they could, because it is obvious from the report that the court there took the view that the damages awarded to the injured plaintiff in that action were inadequate.

In the present case it is the other way round: the damages awarded to this young woman are extravagant; but as the court said it could not interfere in the case of inadequate damages because it was a mere question of fact, it follows here that we cannot interfere because the damages are extravagant. If it could have been shown that the judge had taken something into

[1] (1939) 161 L.T. 233.

account by mistake or had considered some matter which he ought not to have taken into account, or of which there was no evidence, that would have been different; but here he has said: "I have "heard all the evidence about it; I have read the medical reports, "which speak for themselves; I think it is a very serious acci-"dent; and £750 is proper compensation." However much we regret it, we cannot interfere. This judgment must stand and the appeal must be dismissed with costs.

JENKINS L.J. I agree, and have nothing to add.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Gibson & Weldon for John Whittle, Robinson & Bailey, Manchester; Robert Davies & Co., Warrington; Browne, Sturgess & Wheeler, Warrington.*

M. M. H.

[COURT OF APPEAL.]

* BOCOCK v. ENFIELD ROLLING MILLS LD.

C. A.
1954
July 12.
Singleton, Denning and Morris L.JJ.

[1953 B. No. 1138.]

Damages—Personal injuries—Jury—Assessment of damages by jury—Limits of power by appellate court to intervene.

An appellate court will not interfere with the verdict of a jury as to damages unless it is satisfied that the verdict is so clearly out of all proportion to the facts as to show that the jury have wholly failed to perform their duty.

Mechanical and General Inventions Co. Ld. v. *Austin and Austin Motor Co. Ld.* [1935] A.C. 346 and dictum of Lord Wright in *Davies* v. *Powell Duffryn Associated Collieries Ld.* (*No.* 2) [1942] A.C. 601, 616; 58 T.L.R. 240; [1942] 1 All E.R. 657 applied.

APPEAL from McNair J. and a jury.

The plaintiff, Leslie Robert Bocock, was employed by the defendants in their rolling mills as a "catcher." His work, which was difficult and required agility and skill, consisted in catching red-hot copper rods with a pair of tongs as they passed through one set of rollers on to a slope, and putting them through another set of rollers. On June 4, 1952, while he was standing near the rollers, something unusual happened and a red-hot rod jumped out and caught the plaintiff's left ankle. He suffered serious injuries to his ankle and foot and his hands were burned. The Achilles tendon of the left foot became virtually useless and he had had to undergo a number of painful operations,

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Mills Ld.

involving skin grafting, which had in turn led to an infection of the right leg with the danger of future osteoarthritis in that leg.

At the time of the accident, the plaintiff was 25 years old, and earned nearly £18 a week. At the time of the hearing of the action on April 29, 1954, nearly two years later, he was employed by the defendants as a checkweighman at £8 15s. a week. He had to walk with a stick and his leisure activities had been considerably curtailed. He would never be fit to return to his former work, though he was reasonably sure of keeping his present occupation.

The agreed out-of-pocket loss (including loss of wages) up to the time of the trial of the action was £1,100. The action was heard by McNair J. with a jury, and as liability was admitted, the only issue for the jury was the amount of damages. The judge, at the conclusion of his summing-up, said: "When you "have . . . arrived at your figure, also bear in mind that it ought "to bear some relation in the scale of damages to the damages "which would be awarded for the really grave serious injuries, or "the more serious injuries, such as the loss of limbs and the "loss of eyes."

The jury assessed the total damages at £3,850 (including the out-of-pocket expenses). The Court of Appeal was asked on behalf of the plaintiff to direct a new trial on the ground that the judge had misdirected the jury and that the damages were so low, having regard to the nature of the plaintiff's injuries, that the verdict could not stand.

D. P. Croom-Johnson for the plaintiff.
Bernard Caulfield for the defendants.

The cases cited in argument are referred to in the course of the judgment.

Singleton L.J. stated the facts, referred to the specific criticisms of the summing-up, and continued: Mr. Croom-Johnson submits that the judge's concluding remark was an unfortunate one for him to make use of at the end of his summing-up. Everyone knows that recently there have been some very large awards of damages for personal injuries. It appears to me that the judge is saying no more to the jury than this: "This "is a serious injury, but you ought to bear in mind there are more "serious injuries. Be reasonable to both sides." He had pointed out again and again the seriousness of the injury. I cannot see any sign of misdirection in the summing-up of the judge.

Thus I come to the point which Mr. Croom-Johnson made first, which is that the damages, £3,850, are so low in relation to the injuries which this man suffered that this court ought to direct a new trial. Let me say that I think the damages are low; I feel

that if I had been sitting alone as a judge of first instance I should have given considerably more. At the same time it has been said more than once that a judge sitting by himself is not in as good a position to assess damages as are twelve members of a jury. They have an opportunity of discussing the matter among themselves, and though they may not have great experience in the matter, twelve heads should be better than one. When a trial is by jury issues of fact are for the jury. The amount of damages to which an injured person is entitled is a question of fact, a serious question of fact, most difficult for judge or for jury. Quite often in this court there is an appeal on damages against a judgment of a judge sitting alone. In such a case, while it is the duty of this court to remember that the judge sees and hears the witnesses, and while his decision on facts ought not to be lightly interfered with, the court does sometimes think it right to take steps to adjust the matter, and to say what the damages should be.

The position is different when the trial is by jury; it has always been so regarded; and this court ought to take care not to do anything to lessen the importance with which verdicts of juries are regarded. The Annual Practice for 1954 in the notes under Ord. 58, r. 4, at p. 1254, sets out the practice quite clearly and accurately: "The Court of Appeal will not set aside "the verdict of a jury as to the amount of damages unless "satisfied that it is out of all proportion to the facts"; and the authority cited in support is *Mechanical and General Inventions Co. Ld.* v. *Austin and Austin Motor Co. Ld.*[1] Towards the end of the headnote appear these words[1]: "When it "is decided that a case is to be tried by a jury, that tribunal "is the only judge of the facts, and no appellate tribunal can "substitute its finding for that of the jury. The appellate court "has a revising function to see, first, whether there is any "evidence in support of the issue found by the jury; and, "secondly, whether the verdict can stand as being one which "reasonable men might have come to."

The House of Lords reversed the judgment of the Court of Appeal and restored the verdict of the jury on one part of the case. Lord Sankey said[2]: "The jury were the proper constitu-"tional tribunal to assess the damages and it is impossible to "say they have gone so wrong that their assessment must "be set aside. It is not a case merely for nominal, but for "substantial damages of which the jury were the judges."

Lord Wright said[3]: "The objection in *Wood* v. *Gunston*[4] "was that the damages were excessive, and a new trial was there "ordered. The use of the phrase 'miscarriage of juries' is "significant. It indicates what there must be to justify the "appellate court in interfering with or controlling the verdicts of

[1] [1935] A.C. 346, 347.
[2] Ibid. 358.
[3] Ibid. 374.
[4] (1655) Style 466.

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Singleton L.J.

"juries." Later Lord Wright referred[5] to some words of Lord Halsbury (in *Metropolitan Railway Co.* v. *Wright*[6]) on juries' verdicts: "If their finding is absolutely unreasonable, a court "may consider that that shows that they have not really per-"formed the judicial duty cast upon them; but the principle must "be that the judgment upon the facts is to be the judgment of "the jury and not the judgment of any other tribunal"; and Lord Wright himself added[7]: "Lord Halsbury in these valuable "observations is, I think, going back to the test applied in *Wood* "v. *Gunston*,[8] which was whether there was a miscarriage of "the jury. Thus the question in truth is not whether the "verdict appears to the appellate court to be right, but whether "it is such as to show that the jury have failed to perform their "duty. An appellate court must always be on guard against the "tendency to set aside a verdict because the court feels it would "have come to a different conclusion."

In *Davies* v. *Powell Duffryn Associated Collieries Ld.* (*No. 2*),[9] Lord Wright considered cases in which the Court of Appeal should, or ought to, interfere with a judgment on damages of a judge sitting by himself, and said[10]: "There is an obvious difference "between cases tried with a jury and cases tried by a judge alone. "Where the verdict is that of a jury, it will only be set aside if "the appellate court is satisfied that the verdict on damages is "such that it is out of all proportion to the circumstances of the "case. . . ."

Though I think the damages given in the present case were low, I am not able to say that the verdict was out of all proportion to the facts. It was for the jury to assess the damages; it is not for this court so to do. If a plaintiff in a case of this kind asks for a jury and obtains one, he may expect to have some advantages, or he would not ask for a jury. There may be disadvantages, too, though I am far from saying that a jury is not a proper tribunal for a case of this kind. Mr. Croom-Johnson told this court that the plaintiff desired a jury on the issue of liability. That was on a question as to whether or not negligence at common law was proved with regard to the defendants' system of work. I should have thought that a judge would be every bit as good as a jury for a plaintiff in such a matter. In fact, the issue of liability was not fought. The only issue before the judge and jury was the amount of damages. The jury were properly directed, and they assessed the damages. They might have given more; but if a party chooses to have a jury, he ought to be bound by the assessment of the jury of the damages unless it can be said that the verdict is out of all proportion to the facts. I find it quite impossible to say that in this case, and though I could wish that the damages had been

[5] [1935] A.C. 346, 375.
[6] (1886) 11 App.Cas. 152, 156.
[7] [1935] A.C. 346, 375.
[8] (1655) Style 466.
[9] [1942] A.C. 601; 58 T.L.R. 240; [1942] 1 All E.R. 657.
[10] [1942] A.C. 601, 616.

more, I feel that it is the duty of this court to say that the appeal should be dismissed.

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BOCOCK v. ENFIELD ROLLING MILLS LD.

DENNING L.J. I agree.

MORRIS L.J. I agree.

Appeal dismissed.

Solicitors: *Amphlett & Co.; Hair & Co.*

M. M. H.

[COURT OF APPEAL.]

* EASTAUGH AND OTHERS *v.* MACPHERSON.

C. A.
1954
Oct. 6.
Evershed M.R., Hodson and Romer L.JJ.

[Plaint No. K. 742.]

Landlord and Tenant—Notice to quit—Ambiguity—To vacate "by" specified date—Validity.
Words and Phrases.

A tenant received the following letter from his landlords: "At "a recent meeting the executive committee reviewed the question "of your tenancy of the small office . . . which we agreed you should "rent until March 31, 1954. After some discussion it was decided "that, as we now need the accommodation which you occupy, we "have to terminate the arrangement and I must ask you, therefore, "to accept three months' notice to vacate the office by the date (i.e., "March 31, 1954 . . .":—

Held that, on the true construction of the document as a whole, the words "vacate . . . by" March 31 required the tenant to give up possession on or before that date, that the notice was not ambiguous, and it was accordingly valid.

APPEAL from Judge Blagden sitting at Westminster County Court.

The plaintiffs, members of the Executive Committee of the London Diocesan Council for Moral Welfare (suing on their own behalf and on behalf of all other members) sought possession by these proceedings of a small office or cubicle at 38, Grosvenor Hill, Berkeley Square, London, which was let to the defendant, Dr. Macpherson, on a yearly tenancy commencing on April 1, 1953, and liable to be determined by three months' notice on either side expiring at the end of any year. On December 23, 1953, the following letter had been sent on behalf of the plaintiffs to Dr. Macpherson: "At a recent meeting the Executive "Committee reviewed the question of your tenancy of the small "office at 38 Grosvenor Hill, which we agreed you should rent "until March 31, 1954. After some discussion it was decided "that, as we now need the accommodation which you occupy,

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"we have to terminate the arrangement and I must ask you, "therefore, to accept three months' notice to vacate the office "by the date (i.e. March 31, 1954). Yours sincerely." The county court judge held that the notice in requiring the tenant to vacate "by" March 31 was a bad notice, since it required him to have left not later than midnight on the night of March 30/31. The plaintiffs appealed.

Raymond Phillips for the plaintiffs.
The defendant appeared in person.

No case other than the case referred to in the judgment was cited in argument.

EVERSHED M.R. The only point which we are called upon to decide is a curious one with regard to the meaning and effect of an alleged notice to quit consisting of a letter addressed on behalf of the plaintiffs to the defendant, Dr. Macpherson, on December 23, 1953. [His Lordship referred to the facts and continued:] Judge Paton at the trial took the point that the word "by" immediately before "the date (i.e., March 31, 1954)" must mean that this notice called upon the defendant to have left the office not later than midnight on March 30/31, 1954; in other words, it purported to cut off the last day of the tenancy and, therefore, it was a bad notice.

In his judgment the judge gave an example or two, though he said that he did not think they were much help because they were rather examples of the use of the word in relation to a particular point of time. He said: "If I say 'I hope to have "'finished my list by 4.30' that must mean 'I hope I won't "'be sitting one moment after 4.30'." But I venture to think he misled himself by looking up in Chambers's dictionary the word "by" and quoting what must have been the use of the word in relation to place and not to time: Thus the meaning given, he said, for "by" was "at the side of; near to". He continued: "Fusing these definitions would make it equivalent "to 'on the near side of', that is, exclusive of, or before, "March 31, 1954." We were referred by Mr. Phillips to the definition in the Shorter Oxford Dictionary and in relation to time the definition given by the lexicographers is: "in the course "of, at, in, or on"; and the example given is: "by day" or "by night", which is perhaps not very helpful in this case. But later appears "on or before: not later than: within". As a matter of definition, therefore, I should be inclined to think that "by the date" ought to mean on or before the date. In any case, however, this phrase must be construed in the light of the letter as a whole. It is conceded by Dr. Macpherson that the sense of the first paragraph is that the tenancy should continue up to and including March 31. In light of that, when the treasurer in the very next sentence speaks of "vacating the

"office by the date (i.e., March 31, 1954)" I must confess it seems to me clear beyond all reasonable doubt that he is stating that he is giving notice to determine the tenancy on the date when it was liable to be determined, namely, March 31. He is, in other words, saying: "Accept three months' notice to "vacate the office on or before March 31." The view that I take finds support in the view taken of a somewhat similar use of language by the majority of the Court of Appeal of the province of British Columbia in *J. H. Munro* v. *Vancouver Properties Ld.*[1] We must, as I have said, construe this particular document and I think, with all respect to Judge Paton, that it has to be read in the sense which I have stated.

Dr. Macpherson says fairly enough: "The judge took one "view and you are inclined to take another. That at least shows "there is a measure of ambiguity." In one sense, no doubt, that is true. But when it is said that a notice must be unambiguous, it means, of course, unambiguous when properly construed. The construction which we place upon it must prevail over the construction which the judge took, and the construction which we place upon it makes it an unambiguous notice. We are thankful to Dr. Macpherson for his help, but I fear there is no answer to the plaintiff's claim. I think, therefore, that the appeal must be allowed and that an order as asked for should have been made.

HODSON L.J. I agree and have nothing to add.

ROMER L.J. I also agree.

Appeal allowed.

Solicitors: *Ellis, Bickersteth, Aglionby & Hazel.*

E. D.

[1] [1940] 3 Weekly Western Reports 26.

[COURT OF APPEAL.]

* GREEN *v.* HERTZOG AND OTHERS.

[1953 G. No. 366.]

C. A.
1954
Oct. 8.
Lord Goddard C.J., Jenkins and Morris L.JJ.

Partnership—Dissolution—Accounts—Procedure—Claim by former partner to recover moneys lent to partners or partnership—No cause of action at common law—Moneys recoverable only by taking of accounts—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 44.

After a partnership business had been wound up, one of the partners brought an action at common law to recover from two of her former partners and the personal representative of a third

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GREEN
v.
HERTZOG.

deceased partner the total, or alternatively three-fourths of sums advanced by her to the partnership, which she claimed as money lent by her to the partners or the partnership:—

Held, dismissing the appeal, that the action to recover money lent was misconceived. No action could lie against the partners individually since the liability of partners was joint; and money lent to a partnership of which the person advancing the money was a partner could be recovered only in proceedings for taking accounts in accordance with the provisions of the Partnership Act, 1890, s. 44.[1]

Richardson v. *Bank of England* (1838) 4 My. & Cr. 165 applied.

Decision of Oliver J. affirmed.

APPEAL from Oliver J.

On September 14, 1948, the plaintiff, Rachael Green, entered into partnership with the defendants, Sydney Hertzog and Sam Friedlander, and with one Maurice Glass, who died in January, 1951. The partnership deed provided: "On the termination of "the partnership by any means whatever the partners shall be "entitled to share in the assets of the partnership equally not-"withstanding that the amount of capital each shall have "contributed shall have been in different amounts." The capital was contributed in different amounts, the plaintiff bringing into the partnership on its formation a capital sum of £700.

Clause 3 of the partnership deed provided: "Should it at any "future time be found expedient or necessary for further moneys "to be provided by the partners for the purpose of carrying on "the partnership business any moneys so provided by the partners "shall be treated as a loan by the partner providing the same "and such loan money shall carry interest at the rate of . . . per "cent. per annum from the date of each loan respectively." At various dates in 1949 and 1950 the plaintiff provided other sums of money amounting in all to £2,350.

In March, 1953, the plaintiff brought an action against the defendants Hertzog and Friedlander and against Doris Glass as the personal representative of the deceased partner Glass, in which she claimed repayment of the balance of unsecured loans made by her to the defendants, namely, £2,350, less a repayment of £350 with which she credited them. She alleged that the sums in question had been loans to the first and second defendants and

[1] Partnership Act, 1890, s. 44: "In settling accounts between the "partners after a dissolution of part-"nership, the following rules shall, "subject to any agreement, be "observed: (*a*) Losses, including "losses and deficiencies of capital, "shall be paid first out of profits, "next out of capital, and lastly, if "necessary, by the partners individu-"ally in the proportion in which they "were entitled to share profits: (*b*) "The assets of the firm including the "sums, if any, contributed by the "partners to make up losses or defi-"ciencies of capital, shall be applied "in the following manner and order: "1. In paying the debts and liabili-"ties of the firm to persons who are "not partners therein: 2. In paying "to each partner rateably what is "due from the firm to him for "advances as distinguished from "capital: 3. In paying to each part-"ner rateably what is due from the "firm to him in respect of capital: "4. The ultimate residue, if any, "shall be divided among the partners "in the proportion in which profits "are divisible."

the deceased partner, or alternatively, were loans to the firm, and she claimed £2,000 money lent, or alternatively £1,500 money lent. By their defence, the defendants claimed that the sums alleged to be money lent were investments in the partnership; that on the death of Glass, the partnership had been wound up, the assets had been valued at £1,969, and that one-fourth of that sum had been paid to the widow of the deceased partner; that on February 24, 1951, a new partnership had been formed between the plaintiff and the first and second defendants which had failed in September, 1952, and that accountants had been instructed to wind it up and to pay the partnership debts, the balance of assets (if any) to be divided equally between the plaintiff and the first and second defendants.

Oliver J. held that the sums claimed by the plaintiff were not loans to the partners or the partnership, but capital investments; but he concluded that overriding all the matters of fact as to whether the sums advanced by the plaintiff were loans or not was the matter of law that the plaintiff could not succeed in an action for money lent to a partnership of which she was one of the partners, or against any individual in that partnership. He concluded his judgment by saying: "Whichever way one looks at it, "this action is bound to fail. . . . The present action is miscon- "ceived and the plaintiff must lose. . . ." The plaintiff appealed.

B. B. Stenham for the plaintiff.
A. Logan Petch for the first and second defendants.
G. H. Spafford for the third defendant.

Counsel for the plaintiff referred to *Richardson* v. *Bank of England.*[2]

LORD GODDARD C.J. stated the nature of the claim, read the clauses of the partnership deed set out above, and continued: The partnership deed thus provided that if more money was found to be required for the partnership and one partner was willing to find some money, it was not to be treated as part of the original capital which would have to be shared irrespective of the amounts found by each partner, but was to be treated as a loan.

Mr. Stenham, with a courage which I somewhat envy, argued before us that a partner cannot lend money to a partnership of which he is a partner; but the case to which he called our attention—*Richardson* v. *Bank of England*[1]—seems to be exactly to the contrary. Although the words "creditor" and "debtor" are used, there are no creditors or debtors in the ordinary acceptance of those terms, because the liability of partners is joint. Therefore, if money is lent or advanced to a partnership of which the person advancing the money is a partner, he is advancing some of that money to himself, and the only way in which that money

[2] (1838) 4 My. & Cr. 165.

[1] (1838) 4 My. & Cr. 165.

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Lord Goddard C.J.

can be recovered is by taking the accounts of the partnership. The Partnership Act, 1890, by section 44 (2) [2] expressly provides for that.

Oliver J., who heard the case and dismissed it, did in his judgment say that he thought that these moneys were "investments." I do not quite know what that means. If he meant simply that the plaintiff was increasing her capital in the business, so that she would only be entitled on winding up to be treated, so far as the capital account is concerned, as if she had found only the original £700, I do not think I could agree with it. But the difficulty is that he dismissed the action finally by saying: "Whichever way one looks at this action it is miscon-"ceived."

In my judgment, too, it is a misconceived action. There is no common law claim here for money lent: it is a loan by one partner to the partnership; it is money lent to the partnership, and section 44 (2) of the Partnership Act, 1890, shows how that money is to be reclaimed and dealt with. There must be a taking of the accounts, and, if it be shown that there is enough money in the partnership accounts to repay the plaintiff the money that she has advanced, or some of it, after the creditors of the partnership have been paid, she will get that money in priority to the others.

Reliance was placed on clause 3 in the partnership deed, and the plaintiff brings this action for the full amount of the moneys which she says she lent to the defendants. But in circumstances like this, it was not a loan to the defendants personally in the sense that they were making themselves personally liable. It was a loan—money put into the partnership assets to be treated as an advance to the partnership irrespective of the capital. This ought to have been an action for taking the accounts. The plaintiff might have been able to show that she advanced this money, and she would then be entitled to receive such money as there was up to the amount of her share of the sums which she had advanced, in priority to the other partners. But, in my judgment, it is impossible to say that a common law action for money lent lies against the partners in this case, and therefore, though on rather different grounds from those which Oliver J. found, this court dismisses the appeal.

The judge said that whichever way one looked at the case the action was misconceived. With that I agree. We have not heard the other side, and, therefore, we are not saying whether the judge was right or not in the views which he expressed with regard to the loans, for whether these were loans or advances of capital this action will not lie. Of course, this court, in dismissing this action, cannot say anything which would bind a court hereafter, but, as at present advised, I am bound to say that I think that a different form of action may still be brought in which the

[2] See note on p. 1310.

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accounts of this concern can be investigated and gone into. It would have to be brought in the proper division and on proper pleadings, asking for a proper order in a partnership action. So far as this action is concerned, I am quite convinced that, on whatever grounds the judge dismissed it, he was right in dismissing the action, and this appeal fails.

JENKINS L.J. I quite agree and have nothing to add.

MORRIS L.J. I also agree.

Appeal dismissed.

Solicitors: *Stafford Clark & Co. for Faber & Co., Birmingham; Alec Woolf & Turk for Franklin & Co., Manchester; Manches & Co. for John H. Franks, Manchester.*

M. M. H.

[QUEEEN'S BENCH DIVISION.]

*JONATHAN CAPE LD. *v.* CONSOLIDATED PRESS LD.

1954
Oct. 6.

Danckwerts J. (sitting as an additional judge of the Q.B.D.).

[1952 J. 5544.]

Copyright—Infringement—Assignment—Agreement for partial assignment—Exclusive right to publish work in "volume form"—Defendants' publication of whole work in single issue of weekly periodical—Periodical a "volume"—Assignees' right to sue without joining owner of copyright—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *ss.* 1 (2), 2 (1), 5 (2), (3).

By an agreement dated April 16, 1951, between the plaintiffs and the author of a literary work, the plaintiffs acquired the exclusive right to publish the work in "volume form." The serial rights were not included under this part of the agreement and were referred to elsewhere. The defendants published substantially the whole work in one issue of a weekly periodical with paper covers owned by them:—

Held, (1) that the defendants' periodical was a publication "in "volume form," which expression was used in the agreement to distinguish between publication as a whole and publication by instalments as a serial, so that the plaintiffs' rights had been infringed by the defendants;

(2) That on the true construction of the agreement the plaintiffs were partial assignees of the author's copyright, and were entitled by section 5 (2) of the Copyright Act, 1911, to sue the defendants without joining the author.

Quaere: whether a licensee under the copyright would be entitled to sue without joining the author.

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British Actors Film Co. Ld. v. *Glover* [1918] 1 K.B. 299; 34 T.L.R. 162 referred to.

ACTION.

By an agreement dated April 16, 1951, made between the plaintiffs, Jonathan Cape Ld., of the first part, and Miss Anita Loos, of the other part, the plaintiffs acquired the right to publish a work by her entitled "A Mouse is Born." The material parts of the agreement provided: clause 1: "The author [Miss Anita "Loos] hereby agrees to grant to the publishers, [Jonathan Cape "Ld.] their successors and assigns, the exclusive right to print "and publish an original work, or any part or abridgment thereof, "provisionally entitled 'A Mouse is Born' in volume form during "the legal term of unrestricted copyright in the English language "throughout the British Commonwealth and Empire as con-"stituted at January 1, 1947, and all territories at that date "under mandate, also Egypt, but excluding the Dominion of "Canada, the rest of the world other than the United States of "America, its dependencies, the Philippine Islands and Canada "to be an open market." Clause 2 provided a warranty in regard to the nature of the work and there were provisions for royalties and the issue of cheaper editions.

The other relevant clauses were: clause 12: "Within the "territories covered by this agreement the publishers shall act "as the author's agents for the sale of the first serial rights (i.e. "publication of instalments in several issues of a newspaper, "magazine or periodical prior to publication in volume form) in "the said work. If they shall obtain any offer for the sale of such "rights they shall forthwith submit the same to the author for "approval and in the event of the author accepting any such "offer and entering into an agreement in writing for the sale or "licence of any such rights the publisher shall be entitled to a "commission . . . on the sums received by the author under such "agreement."

Clause 13: "Within the territories covered by this agreement, "all rights of serialization subsequent to publication in volume "form, all broadcasting, television or microphotographic repro-"duction rights, the right to license publication of extracts or "abridgments in other books or in periodicals and the right to "perform the said work or any substantial portion thereof by any "gramophone record or similar contrivance shall be controlled "jointly by the author and the publishers."

Clause 15: "The publishers shall have entire control of the "publication; and all details of the production including choice of "materials, design of jacket and other embellishments shall be at "their sole discretion."

Clause 17: "The publishers undertake that the name of the "author shall appear in its customary form with due prominence "on the title page and on the binding of every copy of the said "work issued by the publishers or their agents."

Clause 19: "If, in the opinion of the publishers, any extra "editorial work is necessary before the book is ready to be set up "in type, and if the author is unable to undertake this work or "arrange for it to be done, then the publishers shall be at liberty "to employ a competent editor to do the work. Any fee payable "to such an editor shall be paid by the author provided always "that the author shall approve the choice of such editor and the "amount of the fee in question."

Clause 21: "Should the publishers at any time by themselves "or anyone acting on their behalf wilfully fail to fulfil or comply "with any of the conditions accepted by them in this agreement "or should they go into liquidation, other than voluntary "liquidation or a members' winding up, this agreement shall "thereupon determine and the author be free to license any "other person to print and publish the said work, notwith-"standing anything to the contrary contained or implied in any "part of this agreement."

The defendants, Consolidated Press Ld., a company incorporated under the laws of the Commonwealth of Australia, published in the issue of July 2, 1952, of the "Australian "Women's Weekly," a periodical owned by them, substantially the whole of the work which was the subject of this agreement.

The plaintiffs claimed that the defendants' publication of the work was an infringement under the Copyright Act, 1911,[1] of the rights which they had acquired in the work under the agreement of 1951. They asked for a declaration that their rights had been infringed and an inquiry as to damages.

K. E. Shelley Q.C. and *Dennis Lloyd* for the plaintiffs.
L. G. Scarman for the defendants.

[1] Copyright Act, 1911, s. 1: "(2) "For the purposes of this Act, 'copy-"'right' means the sole right to "produce or reproduce the work or "any substantial part thereof in any "material form whatsoever, to per-"form, or in the case of a lecture to "deliver, the work or any substantial "part thereof in public; if the work "is unpublished, to publish the work "or any substantial part thereof. . . ."

S. 2: "(1) Copyright in a work "shall be deemed to be infringed by "any person who, without the con-"sent of the owner of the copyright, "does anything the sole right to do "which is by this Act conferred on "the owner of the copyright. . . ."

S. 5: "(1) Subject to the provi-"sions of this Act, the author of a "work shall be the first owner of the "copyright therein . . . (2) The owner "of the copyright in any work may "assign the right, either wholly or "partially, and either generally or "subject to limitations to the United "Kingdom or any self-governing "dominion or other part of His "Majesty's dominions to which this "Act extends, and either for the "whole term of the copyright or for "any part thereof, and may grant "any interest in the right by licence, "but no such assignment or grant "shall be valid unless it is in writng "signed by the owner of the right in "respect of which the assignment or "grant is made, or by his duly autho-"rised agent . . . (3) Where, under "any partial assignment of copyright, "the assignee becomes entitled to any "right comprised in copyright, the "assignee as respects the right so "assigned, and the assignor as "respects the rights not assigned, "shall be treated for the purposes of "this Act as the owner of the copy-"right, and the provisions of this Act "shall have effect accordingly."

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Cases referred to in argument: *British Actors Film Co. Ld.* v. *Glover*[2]; *Erskine Macdonald Ld.* v. *Eyles*[3]; *In re Jude's Musical Compositions*[4]; *Messager* v. *British Broadcasting Co.*[5]

DANCKWERTS J., having stated the facts: The question in this action is whether the publication by the defendants in their paper or periodical is publication of the work "in volume form." I agree with the contention of Mr. Scarman that this refers to the material form of the work, which is referred to in section 1 (2) of the Copyright Act, 1911—"any substantial part thereof in any "material form"—but I do not think that that carries the matter much further.

I have been referred to definitions in dictionaries. In the Shorter Oxford Dictionary, under the word "volume," the material part is: "A collection of written or printed sheets bound "together so as to form a book." Then I was referred to "book" in the same dictionary, and under the word "book" is: "A collection of sheets of paper or other substance, blank, "written or printed, fastened together so as to form a material "whole."

It seems to me that, whether or not those definitions are to be regarded as of the highest materiality, the defendants' publication meets both the definition which I have read of a volume and that of a book. It is a number of sheets which are fastened together so that they form one volume. The whole work, except for certain abridgments, was published by the defendants in this way; and it is immaterial that it is not published in the form of an object with thick cardboard sides and back and merely has a paper cover; and it has in fact a paper cover containing the title, a fancy picture on the outside on which is the name of the book or volume "A Mouse is Born," and a description "As a complete novel beginning overleaf." The whole work is there in substance.

I think that the real point of the agreement of April 16, 1951, is that the distinction is made between the publication of the work as a whole, that, in my view, is what is meant by the word "volume," and the publication of the work by instalments, which is publication in a serial form and is treated in a separate way in the agreement. On that point of construction, therefore, I feel no doubt whatever that the defendants' publication is a publication of Miss Anita Loos' work in the form of a volume. It is very difficult to differentiate the publication merely because it is in rather a flimsy material form and of a size inconvenient to put on a book shelf. It is, after all, common knowledge that on the Continent many works are published as books with paper covers, and I cannot see that there is any difference between

[2] [1918] 1 K.B. 299; 34 T.L.R. 162.

[3] [1921] 1 Ch. 631; 37 T.L.R. 187.

[4] [1907] 1 Ch. 651; *sub nom. Jude* v. *Reid Brothers Ld.*, 23 T.L.R. 461.

[5] [1929] A.C. 151; 45 T.L.R. 50.

those paper covered books and this paper publication, except that of size and shape. It is, therefore, within the rights which were given by the description " in volume form " in the agreement of April 16, 1951, and an infringement of the rights conferred on the plaintiff company.

The other point on which it is necessary for me to reach a conclusion is whether the rights given to the plaintiff company by this agreement amount to a partial assignment of the copyright or some other transfer of rights which enables the plaintiff company to sue alone without joining the author of the work. Several possibilities have been put forward, and this depends, in essence, on subsections (2) and (3) of section 5 of the Copyright Act, 1911. Subsection (2), which was a new provision of the Act altering the former copyright law, provides that the owner of the copyright in any work may assign his rights either wholly or partially, and, of course, subject to territorial limitations; but the subsection also introduces another conception which is apparently of a new kind; he may grant any interest in the right by licence. It is argued on behalf of the plaintiffs that if either of those two things are the result of the agreement to which I have referred, that is sufficient to enable the plaintiff company to bring an action in their own right against the defendant company. It is argued, on the other hand, on behalf of the defendant company that this agreement of April 16, 1951, does no more than create a licence, which may be a defence to an action for infringement but does not give any right to the owner of the licence or grantee of the licence to sue an infringer of the rights of copyright in the work on his own motion.

Again, I feel no real doubt as to the proper construction of the agreement the question is primarily a matter of construction of the words contained in the agreement between the author and the plaintiff company. I have been referred to certain authorities in which the matter is to some extent discussed, but I do not get much assistance in reaching the proper construction of this agreement from those authorities. Reading the agreement in its ordinary and natural way, it is quite plain that there is transferred and assigned to the plaintiff company by the words " the " exclusive right to print and publish an original work, or any " part or abridgment thereof, provisionally entitled ' A Mouse is " ' Born ' in volume form " a part of the copyright conferred upon the author by the Copyright Act, 1911; and the plaintiff company is therefore clearly entitled to bring this action.

It is unnecessary for me to consider the other point, whether the grant of any interest in the copyright by licence is sufficient to confer a right to sue, and I propose to leave it where it was left by Lush J. in *British Film Actors* v. *Glover*.[1] I conceive that somewhat difficult questions are raised by subsection (2) of section 5, and it is undesirable that I should make observations

[1] [1918] 1 K.B. 299, 309.

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which, in view of the conclusions which I have reached, would in this case be merely obiter dicta.

Accordingly, in my view, the plaintiffs' action succeeds.

Judgment for the plaintiffs.

Solicitors: *Rubinstein, Nash & Co.; Slaughter & May.*

I. G. R. M.

[QUEEN'S BENCH DIVISION.]

1954 *Oct.* 13.

Lord Goddard C.J., Lynskey and Parker JJ.

*REGINA *v.* NUNEATON JUSTICES, *Ex parte* PARKER.

Justices—Summons—Issue of—Decision as to appropriate charge—Whether matter for justices or prosecution—Police applying for summons for careless driving—Justices insisting on summons for dangerous driving—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *ss.* 11, 12.

Road Traffic—Careless driving—Summons, application for.

A police inspector applied to justices for the grant of a summons for driving without due care and attention contrary to section 12 of the Road Traffic Act, 1930, but the chairman of the justices refused to issue the summons stating that he was only prepared to grant a summons for dangerous driving under section 11 of the Act. On an application for an order of mandamus:—

Held, that it was for the prosecution, not for the justices, to decide what, on the evidence before them, the appropriate charge should be and, therefore, mandamus should go directing the justices to issue a summons for the lesser charge.

Dictum of Devlin J. in *In re Beresford* (1952) 36 Cr.App.R. 1, 3, explained.

APPLICATION for order of mandamus.

On April 26, 1954, Edward Parker, an inspector of police, applied to the Nuneaton justices for a summons against one Frank Bostock for driving a motor-car without due care and attention on April 2, 1954, contrary to section 12 of the Road Traffic Act, 1930. The chairman of the justices informed the inspector that he was prepared to grant a summons for dangerous driving under section 11 of the Act, but that he would not, without further explanation, grant one under section 12. The inspector informed the chairman that it appeared to him most unlikely that a conviction for dangerous driving would be obtained, but the chairman said that, as a matter of principle, no summonses for careless driving would be issued by him unless he was satisfied that there could not possibly be a conviction for an offence under section 11.

In an affidavit the chairman gave as his reasons, inter alia, for refusing to grant the summons, that on several occasions the justices had felt that proceedings which had been brought for

an offence under section 12 had merited a conviction under section 11; that his attention had been drawn to the remarks of Devlin J. in *In re Beresford* *; and that he felt that if there was any doubt whether an offence under section 11 or section 12 had been committed, an information should be laid under section 11.

Paul Wrightson for the prosecutor.

The justices did not appear and were not represented.

LORD GODDARD C.J. stated the facts, and continued: The chairman of the justices in an affidavit referred to certain remarks made by Devlin J. in *In re Beresford*.[1] Devlin J. was there concerned with the question whether it was desirable to charge a defendant with manslaughter where death had taken place. He said[2]: " . . . speaking generally, when dangerous driving results " in death, there is likely to be, at any rate, a prima facie case " of manslaughter. The degrees of negligence that are appro- " priate to the two crimes cannot be precisely defined and this " makes the question ordinarily one to be determined by a jury. " The police can never be criticised if the jury thinks it right to " reduce the charge, nor even if the judge thinks it proper to " withdraw it from the jury, but they can be criticised if they " usurp the functions of the proper tribunal by determining in " advance what ought to be a triable issue. Similar considerations " apply to the two charges of dangerous driving and careless " driving. There are, I believe, too many cases where the justices " are prevented from dealing with dangerous driving as such " because the police have preferred the lesser charge."

I desire to point out that in that passage the judge was not giving directions, but was making a recommendation to the police as to the charges the police should make. That is one thing, but it is a different thing for the justices to say: " We are not going " to issue a summons for the lesser offence; you must take out a " summons for the more serious offence." It must be for the Director of Public Prosecutions or the police to decide what charges should be preferred. If it was found that the police were being unduly lenient in not preferring a charge of dangerous driving in cases where the evidence showed that there was dangerous driving, the justices would be quite right to call the attention of the chief constable of the county to it and, if necessary, the Home Office, but I do not think that the justices can have a right to say when a prosecutor comes before them and asks for leave to prefer a charge: " You must prefer the more serious charge," because that is, to a certain extent, prejudging a case. For these reasons, I think that an order of mandamus must go and that the justices must issue the summons for which the police ask.

LYNSKEY J. I agree. Devlin J., when he made his remarks in the *Beresford* case,[2] was dealing with the particular case before

* (1952) 36 Cr.App.R. 1, 3.

[1] (1952) 36 Cr.App.R. 1.

[2] Ibid. 3.

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him, but my experience on circuit has been that those remarks have been to some degree misconstrued and misunderstood. I am sure that Devlin J. was not laying down, as I have found it was thought that he was laying down, that in every case where death occurs as the result of driving, there should be a charge of manslaughter; nor was he laying down that in every case where some driving takes place to which objection can be made that it must be dangerous driving.

The position, as I understand it, is this, that it must be left to the prosecution in the first instance to decide what, on the evidence before them, the charge amounts to. It would certainly, in my view, lead to a grave miscarriage of justice if one charged a man with an offence which the evidence before the police would not support. Take the cases of careless driving and dangerous driving; careless driving is one thing, generally dealt with by the justices, and very often, if it is ordinary careless driving, admitted by the defendant. If, on the same facts, he is charged with dangerous driving, one has the possibility and very often the probability of a trial by quarter sessions and a jury, with heavy expense, all on evidence which cannot be supported by the prosecution. It must not be thought that it is laid down that in every case where death occurs it should be manslaughter, or in every case where there is some defect it should be dangerous driving; it is a matter for the prosecution. On the other hand, the offence of dangerous driving or careless driving is a very serious one, and the police ought always, in my view, where the facts support it, to bring the more serious charge rather than the lighter charge; but they are not bound to bring the more serious charge where the evidence will not support that charge. I only add that, not by way of differing from Devlin J., but by way of attempting to explain what I think he meant by giving that decision.

PARKER J. I agree.

Order for mandamus.

Solicitors: *Sharpe, Pritchard & Co. for R. M. Willis, Warwick.*

J. D. P.

[QUEEN'S BENCH DIVISION.]

* MONSON v. BOUND.

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Oct. 7, 8, 11.

McNair J.

[1953 M. No. 2386.]

Agriculture—Agricultural holding—Definition—Shop—Demised land and premises used for horticulturist's business—Premises as a whole used as a retail shop for the sale of horticultural products—Horticultural processes carried on in substantially the whole of the premises ancillary to main use—Whether premises an "agricultural "holding"—Agricultural Holdings Act, 1948 (11 *&* 12 *Geo.* 6, *c.* 63), *ss.* 1, 3, 94.

Demised land and premises, in all about one-third of an acre, used by the tenant for the purposes of a horticulturist's business, consisted of a one-storey shop and glass conservatory where flowers and plants were displayed for sale with, behind, greenhouses and an area of cultivated stock garden used for raising plants, either grown on the premises or purchased elsewhere. Sixty-five per cent. of the turnover of the business came from the sale of cut flowers, pot plants, shrubs and wreaths, and one-sixth of that (equivalent to one-tenth of the total turnover) was in respect of plants and shrubs grown on the premises, the rest of the plants and shrubs being purchased elsewhere. The remainder of the turnover represented the purchase and sale of horticultural products such as seed potatoes, fertilizers and horticultural sundries. On the expiry of the lease the landlord claimed possession and the tenant contended that the premises were an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, and that, accordingly, he was entitled to the protection of section 3:—

Held (on a finding that although horticultural processes were carried on in substantially the whole of the premises, viewed as a matter of substance the premises as a whole were being used for the purpose of a retail shop for the sale of horticultural products, and that the raising, caring and culture of horticultural products on part of the land was merely ancillary to its main use) that in the case of a composite holding the test was not whether substantially all the land comprised in the tenancy was used in connexion with, though not mainly or primarily for, the purposes of those parts of the land which were purely agricultural, but that the Act applied only where the tenancy as a whole was in substance a tenancy of agricultural land, and that, therefore, since the demised land taken as a whole was in substance not land used for agriculture, it was not an agricultural holding within the Act.

Howkins v. *Jardine* [1951] 1 K.B. 614; [1951] 1 T.L.R. 135; [1951] 1 All E.R. 320 applied.

Dunn v. *Fidoe,* 66 T.L.R. (Pt. 2) 611; [1950] 2 All E.R. 685; [1950] W.N. 419 distinguished.

ACTION.

By a lease made on September 28, 1942, the plaintiffs' predecessors in title let to the defendant premises and land known as Nos. 112 and 114 Station Road, Redhill, Surrey, for a term of 10 years from June 24, 1942. The premises had for some time been used by the defendant for the purposes of a horticultural business, and by clause 11 of the lease the defendant covenanted

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not to use them for any purposes other than that of a horticulturist without the previous consent in writing of the lessors.

The defendant remained in possession of the premises after June 24, 1952, the date of the expiry of the term of years created by the lease, and the plaintiffs, alleging that the lease had expired by effluxion of time, brought proceedings claiming possession and mesne profits.

The defendant, relying upon the facts that by the terms of the lease the land and premises were let expressly for use for the purpose of a horticulturist, that he had throughout the term used and continued to use them for the business of horticulture, and that the land had upon it a substantial conservatory, planthouse and other horticultural buildings, claimed that the land and premises were an agricultural holding within the meaning of the Agricultural Holdings Act, 1948, and that, accordingly, upon the expiry of the lease on June 24, 1952, he became a tenant of the holding pursuant to section 3 [1] of the Agricultural Holdings Act, 1948, which tenancy had not been determined.

The following findings of facts as to the nature of the land and premises and their user are taken from the judgment of McNair J.: The demised land consisted of a rectangular plot of land with a frontage of 48 feet on to Station Road, Redhill, and with a depth of some 340 feet, comprising in all an area of about 16,500 square feet, or about one-third of an acre. Fronting on to Station Road, in the middle of a row of small retail shops, was a one-storey shop built on to the front of an old residence used as an office and for storage purposes and, in addition, a glass conservatory in which flowers and plants were displayed for sale. The shop and the conservatory presented an attractive shop front such as is commonly used by good class florists and seedsmen in the suburbs. Behind the conservatory was a wreath-making room and two heated greenhouses. Further back lay other store rooms, a garage and a stokehole, together with two more greenhouses, one derelict, a potting shed, and a number of cold frames and forcing sheds in a semi-derelict condition. Finally, at the rear of all the buildings, was an area of open ground described as a cultivated stock garden, which itself comprised about one-third in area of the whole of the demised land.

The defendant with his father before him had occupied the premises for many years for the purposes of his business, which,

[1] Agricultural Holdings Act, 1948, s. 1: "(1) In this Act the expression "'agricultural holding' means the "aggregate of the agricultural land "comprised in a contract of tenancy ". . . (2) . . . the expression "'agricultural land' means land "used for agriculture which is so "used for the purposes of a trade or "business . . ."

S. 3: "(1) A tenancy of an agricul- "tural holding for a term of two "years or upwards shall, instead of "terminating on the expiration of the "term for which it was granted, "continue . . . as a tenancy from "year to year . . ."

S. 94 (1): "In this Act . . . "'agriculture' includes horticulture, "fruit growing, seed growing . . . "market gardens and nursery grounds ". . . and 'agricultural' shall be "construed accordingly."

in May, 1949, was described as the business of florists, seedsmen, horticultural sundriesmen and nurserymen. At the material date the business consisted in substance of the retail sale of horticultural products and horticultural sundries. Sixty-five per cent. of the turnover came from the sale of cut flowers, pot plants, shrubs and wreaths.

Some of the plants and shrubs purchased outside were grown on in the premises, either because they did not meet a ready sale as purchased or because as a matter of policy it was desired to bring them on from an immature condition until fit for sale; but a fair figure for the value of the growth or raising on the premises was about one-sixth of that 65 per cent. of the total turnover, which was equivalent to about one-tenth of the total turnover. The remainder of the turnover represented the purchase and sale of other horticultural products such as seed potatoes, fertilizers and horticultural sundries, including seeds packaged on the premises in the defendant's own containers after some testing on the premises.

The stores were for the most part used for the storage of the seed potatoes, fertilizers and horticultural sundries, though part were used on occasion for the packaging of seeds. The greenhouses were used both for the holding and growing of all plants purchased from outside and for the raising of seedlings and cuttings raised on the premises and the growing from bulbs of cut flowers for sale. The open ground at the rear was used according to the season for bulbs, chrysanthemum, gladioli and geranium, and for raising some potting-out plants and vegetable plants and for raising flowering shrubs purchased elsewhere.

Of the staff of about six men and women employed, one man worked a little over half time in the nursery, with occasional help from an odd job man and from the girls in the wreath-making department.

Henry S. Ruttle for the plaintiffs.
L. A. Blundell for the defendant.

The following cases were referred to in argument: *Dunn* v. *Fidoe* [2]; *Thompson* v. *Milk Marketing Board* [3]; *Howkins* v. *Jardine* [4] and *Blackmore* v. *Butler*.[5]

Cur. adv. vult.

October 11, 1954. McNAIR J. This case raises some interesting and difficult questions under the Agricultural Holdings Act, 1948. [His Lordship stated the facts, and continued:] It is not contended by the plaintiffs that if, contrary to their contention, section 3 of the Act does apply, any step has been taken

[2] [1950] W.N. 419; 66 T.L.R. (Pt. 2) 611; [1950] 2 All E.R. 685.
[3] [1952] 2 K.B. 817; [1952] 2 T.L.R. 231; [1952] 2 All E.R. 344.
[4] [1951] 1 K.B. 614; [1951] 1 T.L.R. 135; [1951] 1 All E.R. 320.
[5] [1954] 3 W.L.R. 62; [1954] 2 All E.R. 403.

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to determine the statutory tenancy from year to year. The sole question, accordingly, which I have to determine is whether or not on June 24, 1952, the land and premises comprised in the lease were or were not an agricultural holding within the meaning of that Act, and it is agreed that the onus of proving the affirmative lies on the defendant. [His Lordship made the findings of fact set out above, and continued:]

Although undoubtedly horticultural processes were carried on in substantially the whole of the premises, if the preparation for sale of products grown in the premises is included in the term "horticultural process," my conclusion, viewing the matter broadly as a matter of substance, is that the premises as a whole were at the material time being used for the purpose of a retail shop for the sale of horticultural products and that the raising, caring and culture of horticultural products on part of the land was merely ancillary to its main use.

I next have to consider whether on the facts so found the demised premises are in law an agricultural holding. The relevant provisions of the Agricultural Holdings Act, 1948, omitting immaterial words, are as follows. [His Lordship read section 1 (1) and (2), section 94 (1), and continued:] Unfettered by authority I should be disposed to hold that the inclusion of the word "aggregate" in the definition of "agricultural holding," in section 1 (1), necessarily involved that in the case of a tenancy which comprises both land, whether in one or more parcels, used for agricultural purposes and land not so used, the aggregate of the land used for agricultural purposes constituted an "agricul- "tural holding" and the remainder of the land was excluded.

Admittedly, this construction involves very serious difficulties in its application to further sections of the Act, in particular to section 3. It is clear, however, from the decision of the Court of Appeal in *Howkins* v. *Jardine*,[1] that this construction is not open to me, and that the definition referred to does not in the case of a composite or mixed holding work a severance into agricultural land and non-agricultural land. I consider, too, that the reasoning underlying this decision also leads to the conclusion that the Act applies only if the tenancy as a whole is in substance a tenancy of agricultural land: see *per* Somervell L.J.[2] and Jenkins L.J.[3] If this is the correct reading of the effect of this authority, then on my findings the defendant must fail.

Mr. Blundell, however, contends that the principle stated in *Howkins* v. *Jardine*[4] applies only to take agricultural land out of the protection of the Act if there is comprised in the holding some part which is not used for any agricultural purposes at all and that if, on the facts of any particular case, it is found that substantially all parts of the land comprised in the tenancy are used in connexion with, though not mainly or primarily for, the

[1] [1951] 1 K.B. 614.
[2] Ibid. 619.
[3] Ibid. 628.
[4] Ibid. 614.

purposes of those parts of the land which are purely agricultural, then the case falls within the protection of the Act. For this principle Mr. Blundell cites the decision in *Dunn* v. *Fidoe*.[5]

In my judgment, this decision cannot be regarded as laying down any such general principle. Tucker L.J. having reached the conclusion that the findings of the county court judge clearly indicated that he regarded the premises in which the tenant lived as a necessary part of the agricultural land, was content to hold that on the facts as found the tenancy as a whole was an agricultural holding. With this view of the facts the remaining members of the court agreed and refrained from expressing any view of the law. I treat the decision in *Dunn's* case[5] as strictly a decision on the very peculiar facts of that case.

If, however, contrary to my view, any statement of principle is to be deduced from *Dunn's* case[5] which is contrary to the principle stated in *Howkins* v. *Jardine*,[6] the distinction between the two cases is, in my opinion, too fine for practical application, and I feel bound to follow the later and considered judgment of the Court of Appeal in *Howkins* v. *Jardine*.[6] I accordingly hold that the land demised here in question, taken as a whole, was in substance not land used for agriculture. The result is, that the plaintiffs are entitled to judgment for possession and mesne profits.

Judgment for the plaintiffs.

Solicitors: *Patersons, Snow & Co. for Mole, Rosling & Vernon, Reigate; Loxley & Preston for G. Lewis F. Greece, Redhill.*

J. F. L.

[5] [1950] W.N. 419; 66 T.L.R. (Pt. 2) 611; [1950] 2 All E.R. 685.

[6] [1951] 1 K.B. 614.

[QUEEN'S BENCH DIVISION.]

* REGINA *v.* CITY OF LONDON LICENSING JUSTICES. *Ex parte* STEWART AND ANOTHER.

1954
Oct. 15.

Lord Goddard C.J., Lynskey and Parker JJ.

Licensing — Justices — Jurisdiction — Planning removal of licence — Administrative County of London—Consent of sub-committee and licensing planning committee—Condition imposed by licensing planning committee — Validity of condition — Whether justices have power to grant planning removal of licence with invalid condition attached—Mandamus—Licensing Act, 1953 (1 *&* 2 *Eliz.* 2, *c.* 46), *s.* 58 (2).

The holders of a full licence for the sale of intoxicating liquor in respect of premises which had been closed since 1943 due to extensive

[Reported by G. D. BLACK, Esq., Barrister-at-Law.]

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damage by enemy action, wished to remove the licence to premises in another part of London. Consent was granted by the sub-committee of the City of London licensing planning committee and this was confirmed by the County of London licensing planning committee, subject to the condition that a written undertaking be given to the licensing justices that no intoxicating liquor would be sold for consumption off the premises and that only one bar would be provided during certain restricted hours for the general public. A written undertaking to this effect was lodged with the justices.

On application being made to the licensing justices in accordance with section 58 of the Licensing Act, 1953, the justices refused to grant a planning removal of the licence on the grounds that they had no jurisdiction to do so, since in their opinion the condition was one which the licensing planning committee could not impose on a full licence, and further that the undertaking, being of a permanent and continuous nature, was one which had not been, and could not be, complied with before application was made to the justices as required by section 58 (2) (*c*) of the Act. The applicants moved for an order of mandamus:—

Held, that in considering applications under section 58 of the Act the licensing justices cannot investigate the validity of conditions imposed by the Minister or the licensing planning committee, but only whether or not the conditions have been satisfied. As the applicants in giving a written undertaking had done all that was required of them the justices should have granted the removal, and accordingly an order of mandamus must go.

APPLICATION for order of mandamus.

The applicants were a director of a licensed catering company, Mecca Ld., and the general manager of one of their restaurants, the Dunster House Restaurant, Mark Lane, London, E.C.3. In January, 1943, other premises of the company, The Swan and Horseshoe, 32 Little Britain, London, E.C.1, for which the company held a full licence, were seriously damaged by enemy action and business there was discontinued. The licence was preserved by legislation passed during the war, and the company now wished to transfer the licence from the Swan and Horseshoe to Dunster House Restaurant.

On April 12, 1954, the applicants applied to the City of London licensing planning sub-committee who gave unconditional consent and submitted the proposal to the County of London licensing planning committee. On June 14, 1954, the licensing planning committee confirmed the proposal and gave its certificate of no objection, subject to the condition that the applicants should forthwith give an effective written undertaking to the licensing justices of the City of London (*a*) that they would not sell any intoxicating liquor under the licence for consumption off the premises, and (*b*) to provide only one public bar for use by the general public and to close the same during the evening permitted hours except during such times as the said restaurant was used for the purpose of organized functions to which admission would be by special arrangement. On July 6, 1954, the applicants lodged the required written undertaking at the offices of the clerk to the licensing justices and on July 14, 1954, applied to the

justices for the removal of the licence in accordance with section 58 (2) of the Act.[1]

At the hearing the justices indicated that they were of the opinion that they had no jurisdiction to grant the removal as the condition imposed by the licensing planning committee involved an undertaking of a permanent nature and was, therefore, such as could not be and had not been complied with before the application to the justices as required by section 58 (2) (*c*) of the Act. There was an adjournment until September 15, 1954, to enable the justices to consult the licensing planning committee. At the resumed hearing the justices said that although the licensing planning committee considered themselves entitled to impose the condition they (the justices) did not agree and accordingly refused the application. If they had jurisdiction under section 58 (2) (*c*) they would have been satisfied as to the conditions imposed by section 58 (2) (*a*) and (*b*).

The applicants moved for an order of mandamus on the grounds that the applicants had complied with the condition imposed by the licensing planning committee by giving the written undertaking; that the question of whether or not the undertaking was of a permanent nature was irrelevant when investigating whether or not the applicants had complied with the condition; that in the premises the justices not only had jurisdiction to grant the order, but were obliged to do so.

Viscount Hailsham Q.C. and *Sidney Lamb* for the applicants.
Christmas Humphreys for the justices.

LORD GODDARD C.J. In this case Lord Hailsham moves for an order of mandamus directed to the licensing justices of the City of London, "ordering them to hear and determine according "to law an application made by Hugh Duncan Stewart and "Herbert William Chapman for grant to them of a planning "removal pursuant to the provisions of section 58 of the Licen-"sing Act, 1953, of the justices' licence held by them in respect "of premises known as The Swan and Horseshoe situate at 32 "Little Britain in the City of London to other premises known "as Dunster House Restaurant situate at Mark Lane in the said

[1] Licensing Act, 1953, s. 58: "(2) Where proposals of a licen-"sing planning committee [in the "Administrative County of London "the sub-committee] that have been "confirmed by the Minister [in the "Administrative County of London "the licensing planning committee] "provide for a planning removal, "then, if the holder of the justices' "licence applies to the licensing "justices for the licensing district in "which the premises to which it is "intended to make the removal are "situated, the justices shall grant a "planning removal of the licence to "those premises if they are satisfied "that—(*a*) the premises are fit and "convenient for the purpose, (*b*) the "applicant is not disqualified by this "or any other Act for holding a "justices' licence and is in all other "respects a fit and proper person to "hold a justices' licence, and (*c*) any "conditions specified in the proposals "as confirmed have been complied "with."

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"City pursuant to the provisions of section 58 of the Licensing "Act, 1953."

The matter arises in this way: the Licensing Act, 1953, Part II, provides for various matters in what are called war-damaged areas. Under legislation passed in the war licences of premises which were destroyed by enemy action were kept alive and then legislation had to be enacted as to what was to happen to those licences when rebuilding took place or before rebuilding took place so as to enable licences to be removed. In London, the matter has to go before two bodies. First, before a sub-committee of the licensing planning committee, and, if they recommend that one of these old licences can be removed to other premises, the matter goes to the licensing planning committee for confirmation.

In the present case the applicants held a full on-licence at The Swan and Horseshoe. They also owned a large restaurant in Mark Lane which had not a licence, so it was very natural that they should apply first of all to the sub-committee and then to the full planning committee to be allowed to remove the licence from the demolished Swan and Horseshoe to the Dunster House Restaurant. The sub-committee recommended the full planning committee to grant the removal without any conditions, but the planning committee have power to modify the proposals of the sub-committee under a provision in section 65 (3), which re-writes another subsection which applies to London, and the licensing planning committee approved the removal, but required the applicants to give a written undertaking to the licensing justices, "(*a*) to sell no intoxicating liquor under the licence for consump-"tion off the premises and (*b*) to provide only one bar for use "by the general public and to close the same during the evening "permitted licensing hours except during such times as the said "restaurant is used for the purpose of organized functions to "which admission shall be by special arrangement." When they were about to make their application to the licensing justices, the applicants gave a written undertaking to the justices. The justices, however, thought and were advised that the licensing planning committee had no power to insert that condition and, accordingly, refused to proceed with the hearing of the application because in their opinion these undertakings which the applicants were required to give were ultra vires and they had no power to grant the licence subject to that undertaking as it was an old licence which was free of any conditions or undertakings in the past.

[His Lordship read section 58 (2) and continued:] It may be that the justices or their advisers have not perhaps distinguished between the condition which was imposed by the licensing committee, which was that they should give a written undertaking, and the undertakings themselves. The justices have thought there was a difficulty about the particular undertakings. If there is, that must be dealt with if the matter arises as to a breach of undertaking, but it seems to me that the applicants

have complied with the condition which was imposed, which was: "You, the applicants, shall give a written undertaking to the "justices that you will not do this, that or the other," and that they have done. Therefore, it seems to me with all respect to the justices, who obviously had a new point before them, and I dare say not an altogether easy one, that the applicants have complied with the condition imposed upon them and, therefore, by section 58 (2), the justices are bound to grant the licence. For these reasons I think the order must go.

LYNSKEY J. I agree. Under section 58 (2), which provides the powers of the licensing justices on an application for planning removal, the justices' jurisdiction is very limited. The effect of the subsection is to give them jurisdiction to inquire first, whether the premises are fit and convenient for the purposes of a licence; secondly, whether the applicant is a fit person and not disqualified, and thirdly, whether the conditions specified in the proposals have been complied with. It seems to me that all they have power to do is to look at the conditions imposed by either the Minister or the planning committee. If those conditions have in fact been complied with, the licensing justices have no power or discretion to refuse the grant of the planning removal and, in those circumstances, it seems to me that they are not entitled to investigate the question whether the conditions imposed by the planning committee are good or bad conditions. That will possibly be a matter for other persons at other times, but one would add that the powers given to the planning committee to make modifications and proposals are extremely wide and no limitation is applied to them. In those circumstances, it seems to me that the licensing justices had no option but to grant the planning removal, and they must now do so.

PARKER J. I agree with both the judgments which have just been delivered.

Order of mandamus.

Solicitors: *H. H. Wells & Sons; Comptroller and City Solicitor.*

[PROBATE, ETC., DIVISION.]

* SWYMER *v.* SWYMER (BY HIS GUARDIAN AD LITEM).

1954
May 31;
June 1;
July 30.

Mr. Commr.
Grazebrook
Q.C.

Husband and Wife—Divorce—Insanity—Care and treatment—Absence from mental hospital for cure of fractured leg—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*) (*d*).

A husband was admitted to a mental hospital pursuant to a reception order in 1925. In 1951 he was discharged "relieved" and

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immediately readmitted as a voluntary patient. As a result of a fractured leg it was necessary to send him from the mental to another hospital, where he stayed from January, 1953, to May, 1953, returning to the mental hospital when the leg was healed. The court was satisfied that he was incurably of unsound mind. On a petition for divorce:—

Held, that although the husband's name had remained on the books of the mental hospital, to which regular reports were made, the continuous care and treatment required by the statute had been broken while the fractured leg was being cured, and the petition must, accordingly, be dismissed.

PETITION by wife for divorce on the ground of insanity.

The parties were married in 1918 and there was one child born in 1924. On December 3, 1925, the husband was admitted to a mental hospital pursuant to a reception order dated November 28, 1925. He remainded under care and treatment until, in December, 1951, he was discharged "relieved" and readmitted as a voluntary patient on the same day. He remained at the hospital until he became an in-patient at the Southern Hospital, Dartford, on January 10, 1953, following a fracture of his leg. He returned to the mental hospital on May 11, 1953. Evidence was adduced that he went to the Southern Hospital with the approval of the medical superintendent for the purpose of attention to his leg, that arrangements were made for reports to the medical superintendent, that his name had been kept on the books of the mental hospital throughout, and that after his return to the mental hospital he had remainded there until his wife presented a petition for divorce on the ground that he was incurably of unsound mind.[1] The court was satisfied as to the insanity; but the question arose whether the husband could be said to have been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition in view of the period spent in the Southern Hospital.

[1] Matrimonial Causes Act, 1950, s. 1: "(1) Subject to the provisions "of the next following section, a "petition for divorce may be pre-"sented to the court either by the "husband or the wife on the ground "that the respondent . . . (*d*) is in-"curably of unsound mind and has "been continuously under care and "treatment for a period of at least "five years immediately preceding "the presentation of the petition; . . . "(2) For the purposes of this section "a person of unsound mind shall be "deemed to be under care and treat-"ment—(*a*) while he is detained in "pursuance of any order or inquisi-"tion under the Lunacy and Mental "Treatment Acts, 1890 to 1930, or of "any order or warrant under the "Army Act, the Air Force Act, the "Naval Discipline Act, the Naval "Enlistment Act, 1884, or the Yar-"mouth Naval Hospital Act, 1931, or "is being detained as a Broadmoor "patient or in pursuance of an order "made under the Criminal Lunatics "Act, 1884; . . . (*d*) while he is "receiving treatment as a voluntary "patient under the Mental Treatment "Act, 1930, or under any such law as "is mentioned in paragraph (*c*) of "this subsection, being treatment "which follows without any interval "a period during which he was "detained as mentioned in para-"graph (*a*), paragraph (*b*) or para-"graph (*c*) of this subsection; and "not otherwise."

Dimitry Tolstoy for the wife.

Stuart Horner for the Official Solicitor as guardian ad litem to the husband.

Cur. adv. vult.

July 30. MR. COMMISSIONER GRAZEBROOK Q.C. stated the facts, referred to the requirement of section 1 (1) (*d*) of the Matrimonial Causes Act, 1950, and continued: It is quite clear that there can be no detention in the case of a voluntary patient. This is apparent from section 1 (1) of the Mental Treatment Act, 1930, which refers to a person "voluntarily submitting himself to "treatment," from section 1 (5) of that Act, which provides for a patient leaving on giving 72 hours' notice of such intention, and by section 2 (3), which provides for the discharge of a voluntary patient on the expiration of 28 days after he became incapable of expressing himself as willing or unwilling to continue to receive treatment. The reference to the patient giving notice of his intention to leave the hospital is a reference to a final departure by the patient from the hospital or institution. There are no provisions in the Act of 1930 for absences on leave or trial, or escapes of voluntary patients.

The Southern Hospital, Dartford, where the patient was sent for treatment to his fractured leg, is not an institution as defined by section 21 (1) of the Mental Treatment Act, 1930, and it has not been approved by the Minister of Health as "a hospital, "nursing home or place" for the purposes of section 1 (1) of the Act. Various authorities were cited to me in the course of the argument but I think that it is unnecessary for me to refer to those authorities because they seem to give no assistance in the determination of the question which arises in this case. The husband was not in a prescribed institution and was not and cannot be said to have been receiving treatment for mental illness while he was at the Southern Hospital, Dartford. That seems quite clear on the facts of the case. In those circumstances, the husband cannot, in my view, be said to have been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. The petition, therefore, fails and must be dismissed.

Petition dismissed.

Solicitors: *L. H. Whitlamsmith, Law Society Divorce Department; Official Solicitor.*

J. B. G.

[PROBATE, ETC., DIVISION.]

1954
May 31;
July 30.

Mr. Commr. Grazebrook Q.C.

* CHAPMAN *v.* CHAPMAN (BY HER GUARDIAN AD LITEM).

Husband and Wife—Divorce—Insanity—Care and treatment—Admission under an "urgency order"—Regrading as voluntary patient—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 11 (1)—*Matrimonial Causes Act,* 1950 (14 *Geo.* 6, *c.* 25), *s.* 1 (1) (*d*), (2) (*a*), (*d*).

A wife was admitted to a mental hospital under an urgency order made in compliance with section 11 (1) of the Lunacy Act, 1890. Within seven days she was regraded as a voluntary patient; and after she had remained in hospital under treatment for a period exceeding five years the husband presented a petition for divorce. The court was satisfied that she was incurably of unsound mind:—

Held, (1) that admission under an "urgency order" is "detention" within the meaning of section 1 (2) (*a*) of the Matrimonial Causes Act, 1950;

(2) that as the treatment as a voluntary patient followed without any interval the previous detention, the necessary grounds for a decree of divorce under section 1 (1) (*d*) of that Act had been established.

PETITION by husband for divorce on ground of insanity.

The parties were married in 1922 and there were no children. In January, 1935, the husband went to California but the wife did not follow him as arranged, remaining in England. He returned to England in 1945 and on rejoining the wife he noticed a change in her mental condition. He was again in America between 1947 and April, 1951, and for two years of that period he was ill; on his return he learnt that the wife was in a mental hospital.

The wife had been admitted to a mental hospital on July 30, 1948. She was then suffering from arterio-sclerotic-dementia, and the court was satisfied that when the husband presented his petition for divorce in November, 1953, she was incurably of unsound mind.

The wife had been admitted on July 30, 1948, under an urgency order issued under section 11 of the Lunacy Act, 1890,[1] but on August 5, 1948, she was regraded as a voluntary patient under section 1 of the Mental Treatment Act, 1930. The court was satisfied that she had received treatment as a voluntary patient ever since. The question arose whether the reception and detention under section 11 of the Act of 1890

[1] Lunacy Act, 1890, s. 11 (1) [as amended by the Mental Treatment Act, 1930, ss. 17, 20, 22 (2) and Sched. IV]: "In cases of urgency "where it is expedient, either for the "welfare of a person alleged to be of "unsound mind, or for the public "safety, that the alleged person of "unsound mind should be forthwith "placed under care and treatment, he "may be received and detained in an "institution for persons of unsound "mind . . . upon an urgency order, "made (if possible) by the husband "or wife or by a relative of the "alleged person of unsound mind, "accompanied by one medical certi-"ficate."

amounted to "detention" within the meaning of section 1 (2) (*a*) of the Matrimonial Causes Act, 1950.[2]

Michael Talbot for the husband.

Stuart Horner for the Official Solicitor as guardian ad litem for the wife contended as alleged in the answer that the wife had never been "detained under any order or inquisition under the "Lunacy and Mental Treatment Acts, 1890–1930."

The cases cited are referred to in the judgment.

Cur. adv. vult.

MR. COMMISSIONER GRAZEBROOK Q.C. stated the facts, and continued: The matter which I have to determine is whether the detention under the urgency order dated July 30, 1948, is detention under an order within section 1 of the Matrimonial Causes Act, 1950. [The commissioner referred to section 11 (1) of the Lunacy Act, 1890, and said that by section 341 of the Lunacy Act, 1890, a reception order was stated to include an urgency order. The commissioner continued:] An urgency order is clearly a temporary order, and by section 11 (6) of the Act of 1890 it can only remain in force for seven days. In the present case the urgency order was discharged by operation of law when it was about to expire (the wife having expressed her willingness to sign the form necessary for her admission as a voluntary patient) and she was immediately readmitted as a voluntary patient on the discharge of the urgency order. She has remained in the hospital ever since.

There appears to be no authority directly in point on the question which I have to determine. Certain cases were cited to me in the course of the argument. In *Crutchfield* v. *Crutchfield*,[1] Jones J. considered section 20 of the Act of 1890. That section is parallel with section 11, the section applicable in the present case; and it concerns the reception and detention of a

[2] Matrimonial Causes Act, 1950, s. 1: "(1) Subject to the provisions "of the next following section, a "petition for divorce may be pre-"sented to the court either by the "husband or the wife on the ground "that the respondent . . . (*d*) is in-"curably of unsound mind and has "been continuously under care and "treatment for a period of at least "five years immediately preceding "the presentation of the petition; . . . "(2) For the purposes of this section "a person of unsound mind shall be "deemed to be under care and treat-"ment—(*a*) while he is detained in "pursuance of any order or inquisi-"tion under the Lunacy and Mental "Treatment Acts, 1890 to 1930, or of "any order or warrant under the "Army Act, the Air Force Act, the "Naval Discipline Act, the Naval "Enlistment Act, 1884, or the Yar-"mouth Naval Hospital Act, 1931, or "is being detained as a Broadmoor "patient or in pursuance of an order "made under the Criminal Lunatics "Act, 1884; , . . (*d*) while he is "receiving treatment as a voluntary "patient under the Mental Treatment "Act, 1930, or under any such law as "is mentioned in paragraph (*c*) of "this subsection, being treatment "which follows without any interval "a period during which he was "detained as mentioned in para-"graph (*a*), paragraph (*b*) or para-"graph (*c*) of this subsection; and "not otherwise."

[1] 62 T.L.R. 661; [1946] 2 All E.R. 730n.

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pauper alleged to be of unsound mind. Jones J. held that the respondent had not been detained in a mental hospital or institution pursuant to an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930.

I was also referred to *Whitley* v. *Whitley*.[2] That case also concerned section 20 of the Act of 1890, and Barnard J. held that the respondent had not been detained pursuant to an order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930. In the course of his judgment he did refer [3] to an urgency order as being an order under those Acts, but that reference was not necessary for the purposes of his decision and it is not binding on me in this case. *Whitley* v. *Whitley* [4] was taken to the Court of Appeal; but although the appeal was dismissed it was dismissed on the fact (as it turned out on further investigation at the instance of the Court of Appeal) that there had been no compliance with certain requisite provisions, and the ground upon which Barnard J. decided the case was not considered by the Court of Appeal.

I was also referred to *Benson* v. *Benson*.[5] That was a case under section 5 of the Mental Treatment Act, 1930, concerning temporary treatment of certain persons for a period not exceeding six months. Lord Merriman P. held that an order made by the Board of Control under section 5 (13) of the Mental Treatment Act, 1930, extending the period of six months, was an order under section 3 (*a*) of the Matrimonial Causes Act, 1937, which at that time was the section equivalent to section 1 of the Matrimonial Causes Act, 1950.

Although *Crutchfield* v. *Crutchfield* [6] and *Whitley* v. *Whitley* [7] related to detention of a temporary nature or of short duration, the decisions were based on the fact that there was no detention under an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. Section 1 (2) (*a*) of the Matrimonial Causes Act, 1950, refers to "any order . . . under the Lunacy and Mental "Treatment Acts, 1890 to 1930"; and although, quite clearly, an urgency order is of a temporary nature and is of very short duration, it is, in fact, an order under the Lunacy and Mental Treatment Acts, 1890 to 1930. In those circumstances I am satisfied that the wife was detained under an order, and that the husband has proved his case in accordance with section 1 (*d*) of the Matrimonial Causes Act, 1950.

Decree nisi.

Solicitors: *Peacock & Goddard for Arthur F. Clark & Son, Reading; The Official Solicitor.*

J. B. G.

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[2] [1946] 2 All E.R. 726.

[3] Ibid. 728.

[4] [1947] W.N. 132; 63 T.L.R. 289; [1947] 1 All E.R. 667.

[5] [1941] P. 90; [1941] 2 All E.R. 735.

[6] 62 T.L.R. 661.

[7] 63 T.L.R. 289 (C.A.); [1946] 2 All E.R. 726.

[QUEEN'S BENCH DIVISION.]

* SURTEES v. BENEWITH.

1954
Oct. 11.

Lord Goddard C.J., Lynskey and Parker JJ.

Road Traffic — Disqualification — Conditional discharge — Third party insurance—User of uninsured vehicle—No special reasons for not disqualifying—Conditional discharge inappropriate—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35—*Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *ss.* 7 (1), 12 (2).

Justices who convicted a driver of using an uninsured motor-vehicle on a road contrary to section 35 of the Road Traffic Act, 1930, did not find that "special reasons" existed why they should not disqualify him from holding a licence, but they granted him a conditional discharge:—

Held, that the justices could not avoid the necessity of disqualifying by giving a conditional discharge unless there were "special "reasons" which justified them in so doing; and that, as no such special reasons existed, they were bound to order disqualification.

Dennis v. *Tame,* post, 1338, applied.

CASE STATED by Surrey justices sitting at Wallington.

An information was preferred under section 35 [1] of the Road Traffic Act, 1930, against the defendant, Robert Benewith, alleging that on January 25, 1954, he used a motor-vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance or such a security in respect of third party risks as complied with the requirements of the Act.

The following facts were proved or admitted before the justices: At 11.25 a.m. on January 25, 1954, the defendant arrived at Wallington station driving a passenger in the car in question which was being used for private hire. At the request of the prosecutor, a police sergeant, the defendant was unable to produce a certificate of insurance covering the use of the car; moreover, at his home, a search only revealed a certificate relating to another car which he had previously sold and which, in any case, did not cover private hire work. Later the same day the defendant produced a cover note issued at 5 p.m. on that day which covered the car for private hire.

The defendant had been a cab driver and had recently decided to change over to private hire. He sold his previous car on January 14, 1954, and took over the car in question on Friday, January 15, 1954. He started working the car on Monday,

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

[1] Road Traffic Act, 1930, s. 35: "(1) Subject to the provisions of this "Part of this Act, it shall not be "lawful for any person to use . . . "a motor vehicle on a road unless "there is in force in relation to the "user of the vehicle by that person ". . . such a policy of insurance . . . "as complies with the requirements "of this Part of this Act."

"(2) . . . a person convicted of an "offence under this section shall "(unless the court for special reasons "thinks fit to order otherwise . . .) "be disqualified for holding or "obtaining a licence under Part I of "this Act for a period of twelve "months from the date of the "conviction."

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January 18. He discovered that his own insurance company did not insure for private hire, and he approached a colleague, who gave him the name of the agent of another office. The defendant attempted but failed to contact the agent on the telephone before he (the defendant) started work on January 18, and similar attempts failed on January 19 and 20, but he left messages with the agent's wife. On January 22, the defendant approached his colleague who then attempted to find the agent both on January 22 and on the morning of January 25. Finally, the agent was found on the afternoon of that day. In the meantime the agent had tried to contact the defendant on January 22 and 23, but failed to do so. When he issued the cover note on the afternoon of January 25, the agent was unaware that the defendant had been stopped by the police earlier on that day.

The defendant submitted special reasons why he should not be disqualified from holding or obtaining a licence for 12 months pursuant to section 35 (2) of the Act. Alternatively, he asked that the justices should order an absolute or conditional discharge under section 7 (1) of the Criminal Justice Act, 1948.[2] The defendant gave evidence and called witnesses in support of his submission which was not challenged by the prosecutor.

The justices were not satisfied that the defendant had established special reasons why he should not be disqualified from holding or obtaining a licence pursuant to section 35 (2) of the Act of 1930, since the reasons shown by him were not special to his offence as laid down in *Whittal* v. *Kirby*[3] and other cases. They nevertheless took into account: (1) that the defendant (being confronted with the fact that his previous insurance company did not cover private hire risk) had made several attempts to get in touch with the insurance agent of a new company; (2) that men of the defendant's class were not very conversant with insurance practice and were used to doing their insurance business with local agents; and (3) that there was no question raised against the character of the defendant. Furthermore, they were satisfied both by the defendant's demeanour in the witness box and by the whole of the evidence that he did not deliberately or intentionally attempt to evade the law. They were consequently of the opinion that it was inexpedient to inflict any punishment and they accordingly discharged him conditionally for 12 months pursuant to section 7 (1) of the Criminal Justice Act, 1948.

The prosecutor appealed.

Paul Wrightson for the prosecutor.

The defendant did not appear and was not represented.

[2] Criminal Justice Act, 1948, s. 12: "(2) . . . the conviction of an "offender who is placed on probation "or discharged absolutely or conditionally as aforesaid shall in any "event be disregarded for the purposes of any enactment which "imposes any disqualification or disability upon convicted persons, or "authorises or requires the imposition of any such disqualification or "disability."

[3] [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552.

The following cases, not referred to in the judgment, were cited in argument: *Quelch* v. *Collett*[4]; *Gardner* v. *James*.[5]

LORD GODDARD C.J. This is a case stated by justices for the county of Surrey before whom the defendant was charged with using an uninsured vehicle on the road; the justices convicted him but gave a conditional discharge. The effect of their decision was that by virtue of the provisions of the Criminal Justice Act, 1948, no disqualification could follow. But, although the reasons given by the justices for their decision show that they applied their minds very carefully to the point at issue, the facts as found by them show that this was a bad case.

The defendant started working his private car hire business on January 18, 1954. He discovered that his own insurance company would not insure for private hire, and approached a colleague who told him the name of an agent of another office. He did not contact that agent until January 25, which was the day on which he was stopped by the police. Meanwhile, he had been driving the car uninsured for almost a week. That seems to the court a serious matter. If during that time he, while using the car, had met with an accident, there would have been no insurance company who would have been on risk.

Mr. Wrightson has called our attention to a case decided as recently as May, 1954, *Dennis* v. *Tame*,[1] in which this court held, after considering *Taylor* v. *Saycell*,[2] that justices can only use the machinery of conditional discharge to avoid a disqualification if there are circumstances in the case which would amount to special circumstances. If there are circumstances in the case which would amount to special circumstances, the court can use conditional discharge, which avoids the necessity of imposing any penalty and the requirement that the licence be endorsed. Conditional discharge concerns a matter of punishment and, therefore it is quite open to the court in a particular case to deem it inexpedient to give any punishment; and if there are special circumstances they need not give any punishment; they can give a conditional discharge, but they cannot avoid the necessity of disqualifying by giving a conditional discharge unless there are special circumstances which justify them in so doing. In this case there were no special circumstances found by the justices and the case must go back to them; but I do call attention to the fact that owing to what I think is an unfortunate oversight in the Road Traffic Act, 1930, the disqualification will have to date back to the conviction, and as the conviction was on March 10, 1954, more than six months have elapsed since then and, consequently, the defendant may apply for the disqualification to be removed.

[4] [1948] 1 K.B. 478; 64 T.L.R. 108; [1948] 1 All E.R. 252.

[5] [1948] W.N. 502; 65 T.L.R. 36; [1948] 2 All E.R. 1069.

[1] Post, 1338.

[2] [1950] W.N. 479; 66 T.L.R. (Pt. 2) 842; [1950] 2 All E.R. 887.

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Therefore, whether the justices impose it and remove it at the same time is a matter for them; we can only say that this case must go back to them with a direction that they must disqualify.

LYNSKEY J. I agree.

PARKER J. I agree.

Appeal allowed.

Solicitor: *Solicitor for the Metropolitan Police.*

NOTE.

[QUEEN'S BENCH DIVISION.]

* DENNIS *v.* TAME.

1954
May 4.

Lord Goddard C.J., Hilbery and Donovan JJ.

Road Traffic — Disqualification — Conditional discharge — Third party insurance—User of uninsured vehicle—No special reasons for not disqualifying—Conditional discharge inappropriate—Road Traffic Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35—*Criminal Justice Act,* 1948 (11 *&* 12 *Geo.* 6, *c.* 58), *s.* 12 (2).

CASE STATED by Bedfordshire justices.

Niall MacDermot for the prosecutor.
Paul Curtis-Bennett for the defendant.

LORD GODDARD C.J. This is a case stated by justices for the county of Bedford, before whom the defendant pleaded Guilty to unlawfully using an uninsured motor-car on a road. He is a leading aircraftsman in the Royal Air Force, and he drove out from the main gate of the Royal Air Force Station at Cardington onto the main road, when he was stopped by a policeman who asked him to show his insurance certificate, to which the defendant replied that he had not got one. He said that he was driving to a neighbouring town to see if he could get the car insured.

The justices, having been informed by an officer that the defendant had been dealt with by his commanding officer for a breach of discipline in driving an uninsured car on the road and given seven days' confinement to camp, thought fit to give him a conditional discharge. I can understand the view of the justices. They felt that they did not want to punish a man twice for the same offence. But the effect of giving a conditional discharge was that by reason of the provisions of section 12 (2) of the Criminal Justice Act, 1948, they could not disqualify. [His Lordship read the subsection and continued:] It is not for us to consider whether or not Parliament had in mind in passing that section disqualifications imposed by the Road Traffic Act; it is enough to say that the words are wide enough to cover it. But this court has laid down on more than one occasion that the provisions with regard to conditional discharge must not be used to avoid disqualifying in cases

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

where the Road Traffic Act, 1930, requires disqualification unless such special circumstances exist as would, apart from conditional discharge, justify the justices on conviction from refraining from disqualification. If there are special circumstances, and the justices for certain reasons think fit not to impose a penalty, they can grant a conditional discharge; but where there is no evidence of any special reasons which would justify them in refraining from imposing disqualification, they must disqualify because that is what the Road Traffic Act requires; and it is wrong to use the machinery of conditional discharge to avoid imposing that disqualification. The section regarding conditional discharge states that the court can grant a conditional discharge where, in their opinion, having regard to the circumstances, including the nature of the offence and the character of the offender, it is inexpedient to inflict punishment.

In the present case no doubt the justices considered that it was not one in which they should punish in the sense of imposing a penalty, because the man has been dealt with by his commanding officer. That would be a reason for imposing only a nominal penalty. But they must disqualify because Parliament has said that there is to be disqualification unless there are special reasons. There are no special reasons here. What the defendant did he did deliberately, and with knowledge that he was not insured, and the fact that he had been punished by his commanding officer was a matter which related to the offender and certainly did not relate to the offence. It was nothing to do with the offence at all. In the leading case of *Whittall* v. *Kirby* [1] it is laid down that the reasons must be special to the offence and not the offender, and if there is any doubt as to how far *Taylor* v. *Saycell* [2] goes, I should desire to make it perfectly clear that this is what the court understands: Neither the provisions relating to absolute nor conditional discharge are to be used to avoid disqualification unless the justices can see that there are circumstances which would amount to special reasons. If they amount to special reasons, and the justices for other reasons think that no penalty need be inflicted, conditional discharge is quite proper. Conditional discharge is not to be used in these motor-car cases unless there are special reasons which would justify the justices in refraining from disqualifying.

The case must, therefore, go back to the justices with directions that they must impose a penalty, which can be of nominal amount, and they must impose disqualification because no special reasons exist. But they may, if they see fit, and I hope they will, impose disqualification only from driving the particular class of motor-car to which this case relates, that is to say, a private motor-car; and that will leave the respondent free to drive service vehicles.

HILBERY J. I agree.

DONOVAN J. I agree.

Solicitors: *Gibson & Weldon; Theodore Goddard & Co.*

[1] [1947] K.B. 194; 62 T.L.R. 696; [1946] 2 All E.R. 552.

[2] [1950] W.N. 479; 66 T.L.R. (Pt. 2) 842; [1950] 2 All E.R. 887.

[COURT OF APPEAL.]

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1954
Oct. 15, 18.

Evershed M.R., Hodson and Romer L.JJ.

* STEVENS *v.* BRITTEN.

[Plaint No. KO. 665.]

Partnership—Dissolution—Deed—Indemnity clause—Construction—"All debts and liabilities of the partnership"—Whether income tax on partnership trading profits included—Assessment on firm—Joint liability of partners—Income Tax Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 10), *ss.* 144, 223.
Revenue—Income tax.

By a deed of dissolution of a partnership the continuing partner covenanted with the retiring partner that he would "pay and "satisfy all debts and liabilities of the . . . partnership and . . . "at all times hereafter keep the retiring partner indemnified "against the said debts and liabilities." The trading profits of the partnership were assessed to income tax for the year during which the dissolution took effect and the retiring partner paid half the assessed tax. He then claimed that he was entitled to be indemnified by the continuing partner the amount which he had paid:—

Held, that the partners were jointly liable for the whole of the tax due (after deducting any reliefs to which they might individually be entitled) and, therefore, the liability was a partnership debt within the scope of the indemnity contained in the deed of dissolution.

City of London Income Tax Commissioners v. *Gibbs* [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221 applied.

APPEAL from Judge Gordon Clark sitting at Guildford County Court.

On February 26, 1951, Sidney Albert Stevens and John Britten, who were partners, made a deed dissolving the partnership on the terms there set out. The defendant Britten took over the whole of the partnership business with its goodwill from the plaintiff Stevens in consideration of a cash payment. By clause 4 of the deed Britten covenanted with Stevens to "pay "and satisfy all debts and liabilities of the said partnership and ". . . at all times hereafter keep the retiring partner indemnified "against the said debts and liabilities." The dissolution was expressed by the deed to have taken effect on December 10, 1950, and an assessment to income tax on the trading profits of the company was made in the partnership name in respect of the year ending April 4, 1951. The plaintiff paid half of the assessed amount (a sum of £37 9s. 6d.). He then claimed that by virtue of clause 4 of the deed of dissolution he was entitled to be indemnified by the defendant, but the defendant denied liability. The plaintiff brought proceedings, but the county court judge found that the demand by the collector of taxes for payment by the plaintiff of the assessed tax was not a liability or

debt of the partnership firm and, accordingly, he found for the defendant. The plaintiff appealed.

L. B. Schapiro for the plaintiff.
Gershon Ellenbogen for the defendant.

In addition to the case referred to in the judgment the following was cited in argument: *Conway* v. *Wingate*.[1]

EVERSHED M.R. referred to the facts set out above, and continued: In respect of the year which ended on April 4, 1951, it appears that an assessment was made upon the firm for income tax. I say "it appears" because there was produced a receipt from the collector of taxes which shows on the face of it that the name of the person assessed was Stevens & Britten, which was the firm name under which these parties had carried on their partnership business. The receipt was for the sum of £37 9s. 6d., which was the share of the total assessment which the plaintiff appears to have paid and, I understand, that was in fact one half of the tax. Under the last heading on the receipt "Paid by cash" the collector wrote somewhat inappropriately, that the sum paid was "on account." The plaintiff, having paid that sum of tax, claimed that, by virtue of clause 4 of the deed of dissolution, he was entitled to be indemnified by the continuing partner, the defendant. The defendant denied liability under the covenant and this action was brought.

I have stated already that the assessment was in respect of the year 1950/1951. I observe (and this is not said with the intention of being critical of anybody) that the payment was made in fact in March, 1954. We have been referred to sections of the Income Tax Act, 1952. Whether the provisions of that Act would be applicable in strictness to all the various problems which might arise when the tax was assessed and eventually paid does not matter, because it appears from what we have been told that section 144 of the Act of 1952 is a re-enactment of what previously was rule 10 of the rules applicable to Cases I and II of Schedule D to the Act of 1918, so that, if the case is not strictly within section 144 of the Act of 1952 it would fall within rule 10 of that schedule to the earlier Act. It seems plain from section 144 that where persons are carrying on business in partnership, it is an obligation of "the precedent acting partner" to make a return of the income tax for which the firm is chargeable in respect of the firm's profits: "Where a trade or profession is carried on by "two or more persons jointly, the tax in respect thereof shall be "computed and stated jointly and in one sum, and shall be "separate and distinct from any other tax chargeable on those "persons or any of them, and a joint assessment shall be made "in the partnership name." From that it seems to follow

[1] [1952] W.N. 171; [1952] 1 All E.R. 782; [1952] T.R. 145.

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as the night the day that when the precedent partner has fulfilled his obligation of making his return an assessment is made in the name of the partnership firm, which is a joint assessment for the tax chargeable in respect of the trading profits. By what is now section 223 of the Act of 1952, the partners in a firm may, if they so desire, for the purpose of their partnership assessment, claim any reliefs to which they are entitled under any other parts of the income tax legislation in so far as those reliefs have not been already allowed to them under what I will call their private or individual assessments; and if that be done the result is to reduce by the amount for which the partnership is chargeable the total of the reliefs of all the partners. I have used the word "partnership" because that is the word which is to be found in section 144, but it is axiomatic that, generally speaking, a partnership in English law is merely a compendious description of the individual persons who compose the firm.

In *City of London Income Tax Commissioners* v. *Gibbs*[1] the significance of the use of the word "partnership" in the then Income Tax Act was discussed. As Lord Macmillan observed[2]: "Justification is thus not wanting for the view" which Romer L.J. had expressed in an earlier case, "that for taxing purposes "'a partnership firm is treated as an entity distinct from the "'persons who constitute the firm.'" But when it comes to liability, in the sense of liability at law for payment of the tax and for the penalties in the case of non-payment, it seems clear that the individuals are themselves liable for the "partnership" tax. It seems equally clear that their liability is joint, though not, be it observed, joint and several.

I think the legal position which I have tried to state by reference to the sections of the Act of 1952 is correctly set out in Simon's Income Tax, 2nd ed., vol. I, at p. 337: "The tax "assessed in the firm name is a partnership debt for which all "who were partners at the time when the debt was incurred, or "who have held themselves out to the Revenue to be such, are "jointly liable. This means that any or all of those persons may "be sued for the whole of the tax due (when the assessment "becomes final) without reference to their respective shares under "the partnership agreement." At p. 338 the effect of section 223 in regard to reliefs is stated, and that statement is in accord with what I have already said upon that section.

It appears that the collector of taxes, as I dare say had been the practice, looked to each partner for half of the sum comprised in the partnership assessment, and the receipt indicates that the plaintiff paid one half of the assessed amount, and I assume the defendant paid the other half. But in law both partners were jointly liable for the whole sum, and if the plaintiff had failed to

[1] [1942] A.C. 402; [1942] 1 All E.R. 415; 24 T.C. 221.

[2] [1942] A.C. 402, 419.

pay this sum of £37 9s. 6d. the collector of taxes could have demanded and recovered from the defendant, or if the case had been the other way round and the defendant had failed to pay his share, the plaintiff could have been made to pay. In those circumstances, the question is whether this sum which the plaintiff paid was within the ambit of clause 4 of the deed. I find it impossible to come to any other conclusion than that it was, for the amount due to the Crown for income tax was, as I have already stated, a liability of the two partners jointly, and as such it was a partnership debt in the ordinary usage of words. It seems to me, therefore, to follow that the phrase "all debts "and liabilities of the said partnership" must comprehend a debt of this kind for which both partners were liable and which, let it be added, was a debt which owed its existence wholly and exclusively to the trading operations of the two partners without regard to what their private resources might have been.

The county court judge took another view. In the brief note of the judgment he said that in his view the argument that this was a partnership debt was not sustainable. He said: "I do "not think it is a partnership debt in that sense of the word," referring to the passage in Simon on Income Tax which I have already read. He then referred to a passage in *Gibbs'* case [3] and continued: "Lord Simon went on: 'by rule 10, when a trade is "'carried on by two or more persons jointly . . . a joint assess-"'ment shall be made in the partnership name' . . . I agree "with Mr. Dunlop that this is a matter of machinery, for the "purposes of assessment only." With all respect to the judge, I am unable to agree with that conclusion. In a sense, I suppose, it may be said to be a matter of machinery, but when considering the impost of taxes the distinction between machinery and liability is not always substantial. The question is, who was liable for this tax? And the tax being a tax due in respect of trading profits and nothing else, it seems to me, not only as a matter of machinery but as a matter of substance, that this was a partnership liability.

I, therefore, have come to the conclusion that this appeal ought to be allowed. Whether the effect will be to reopen the accounts between the retiring and continuing partner I do not know. I can understand the point of view of the respondent who on this view is paying the whole tax, though it may be the profits have been shared on a different assumption. Whether, therefore, he can recover anything back I need not say, but I should observe that clause 2 [4] may be a difficulty in his way. I am, however,

[3] [1942] A.C. 402.

[4] Clause 2: "The retiring part-"ner hereby releases the continuing "partner and the continuing partner "hereby releases the retiring partner "from all actions claims and demands "in relation to the said partnership "and from all the covenants clauses "and agreements matters and things "in the said partnership deed con-"tained."

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satisfied that it is impossible, whatever may have been in the mind of the defendant, to read clause 4 so as not to include an indemnity for this sum. I think it could be only done by reading into the clause the words "other than income tax," and it need not be said that, according to ordinary principles of construction, only the most cogent and powerful reasons to be derived from an examination of other parts of the deed and the surrounding circumstances could possibly justify such an insertion into the written terms of the document. I think there is no basis which would justify such a reading in to the plain language. For these reasons I have come to the conclusion that the judgment below was wrong and that the plaintiff should have obtained judgment for £37 9s. 6d.

HODSON L.J., after stating the facts. The only question for consideration was whether the words "debts and liabilities" include this sum of income tax payable by the partnership. I think that sum was clearly a debt due to the Crown, and was none the less a debt because the actual amount of tax for which the partners might personally be liable varies with the circumstances of each partner. To my mind, it seems that there is no escape from that position and, accordingly, the plaintiff ought to have judgment for the sum claimed.

ROMER L.J. I agree. It seems to me that as a general proposition it is impossible to deny that a sum due for tax, pursuant to an assessment made on a partnership under what is now section 144 (1) of the Act of 1952, constitutes a debt or liability of the partnership in whose name the assessment is made; because each partner is liable to pay the whole just as much as each partner is liable to pay the whole of any sum due for rates or any other debt which has been incurred in carrying on the business of the partnership. Indeed, Mr. Ellenbogen himself was somewhat impressed, as the discussion proceeded, with that view, and attempted to take the point that as a matter of construction of the dissolution agreement one could read the phrase "all debts "and liabilities of the partnership" as being confined to ordinary trading debts and liabilities, or, at all events, such debts and liabilities as do not depend in any way in their ultimate evaluation on any personal characteristic or qualification of an individual partner. But that is taking liberties with the terms of the document which no canon of construction that I have heard of can justify. Where one finds language which is plain and unequivocal, as in my opinion clause 4 is plain and unequivocal, in relation to the debts and liabilities of the partnership, no court has any right to inject into the language used something which is not there merely because one of the partners against whom the clause according to its ordinary language

operates thinks it operates harshly and unfairly. Whether it does so operate I express no opinion because I do not know what the facts were as between the parties themselves. I, accordingly, agree with my brethren that this appeal must be allowed.

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Appeal allowed.

Solicitors: *Gregory, Rowcliffe & Co. for Gilbert H. White & Co., Guildford; Gibson & Weldon for Macpherson & Lawson, Hindhead.*

E. D.

[COURT OF APPEAL.]

* UNITED DOMINIONS TRUST LD. *v.* BYCROFT.

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Oct. 11, 12.
Evershed M.R., Hodson L.J. and Upjohn J.

[Plaint No. 2242.]

Court of Appeal—County court—Appeal from—New point—Action to enforce promissory note — Plantiffs' claim in county court based on allegation that they were holders in due course — Action dismissed—Basis of plaintiffs' claim on appeal changed—New point of law not open to plaintiffs—Legal aid.

Hire-Purchase—Void provision—Agreement incorporating promissory note—Validity of promissory note—Hire-Purchase Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 53), *ss.* 4, 5 (*c*).

By a hire-purchase agreement dated July 18, 1952, the defendant agreed to purchase an ice cream conservator for £87. The agreement provided, in pursuance of section 4 of the Hire-Purchase Act, 1938, that the hirer might put an end to the agreement subject, in effect, to payment of half the instalments, and, further, that the hirer should give to the owner a promissory note as collateral security for due payment of the instalments. The promissory note, which was executed by the defendant, was at the foot of the agreement and was separated from it by perforations. The plaintiffs, a company whose business included that of financing hire-purchase contracts, having paid the purchase price to the owners had acquired from the owners the benefit of the hire-purchase agreement. The defendant failed to pay the last four instalments under the hire-purchase agreement and the plaintiffs sued on the promissory note, claiming as holders in due course.

The defendant in his defence claimed that the promissory note was rendered void by section 5 (*c*) of the Hire-Purchase Act, 1938. At the hearing before the county court judge the plaintiffs' claim was argued on the footing that they were holders in due course of the promissory note and, therefore, entitled to sue upon it whatever its earlier history, and that it was a wholly separate instrument from the hire-purchase agreement and unaffected by any invalidity which might attach to any provisions of that agreement. The defence was that the promissory note and the agreement were one single agreement and its effect was to enable the note to be sued on even though the defendant had terminated the hiring. The county court judge dismissed the action.

On the appeal the plaintiffs did not claim to be holders in due course or that the promissory note was an instrument distinct from

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the hire-purchase agreement, but contended that a written agreement which modified the liability of the maker of a promissory note was good as between the original parties, and the plaintiffs could sue upon it, their right being limited by the conditions in the agreement. The defendants objected that this was a new point and not available to the plaintiffs:—

Held, that what amounted to a new point of law was a matter of common sense to be considered in the light of all the circumstances of a particular case. In the present case, although the general issue of the validity of the hire-purchase agreement and whether any invalidity affected the right of the holder of the promissory note to sue upon it had been raised by the pleadings, the new way of putting the plaintiffs' case was entirely at variance with the earlier submission that it was quite separate from the agreement, and amounted to a new point of law. An appellant from a county court could not be allowed, unless the other party consented, to raise a new point of law not raised below. The plaintiffs could not rely on the new contention which they had raised and the appeal must be dismissed. That the defendant was legally aided on appeal was entirely irrelevant.

Smith v. *Baker & Sons* [1891] A.C. 325; 7 T.L.R. 679 applied.

APPEAL from a decision of Judge Block sitting in the Mayor's and City of London Court.

The plaintiffs, United Dominion Trust Ld., appealed from a decision of Judge Block dismissing their claim to recover the sum of £12 17s. 4d. upon a promissory note dated July 18, 1952, made by the defendant Marcel Bycroft and indorsed to the plaintiffs for value.

The facts are stated in the judgment of Evershed M.R.

Maurice Lyell Q.C. and *John Rankin* for the plaintiffs.

Christopher Shawcross Q.C. and *Maurice Share* for the defendant.

Reference was made in argument to Byles on Bills, 20th ed., pp. 106, 107; *Bowerbank* v. *Monteiro* [1]; *Modern Light Cars Ld.* v. *Seals* [2]; *Maillard* v. *Page* [3]; *McManus* v. *Bark.* [4]

EVERSHED M.R. This was an action on a promissory note to recover the sum of £12 17s. 4d. The plaintiffs are a long established company whose business includes that of financing hire-purchase contracts; that is to say, in a case in which, like the present, a hirer contracts with an owner to pay the hire-purchase price by a series of instalments, the plaintiff company pays the full hire-purchase price to the owner, subject to an appropriate discount, and then acquires from the owner the benefit of the obligations of the hirer under the hire-purchase contract. The owner in the present case is a firm known as Munday (Walthamstow) Ld., and the article which was the

[1] (1813) 4 Taunt. 844.
[2] [1934] 1 K.B. 32; 49 T.L.R. 503.
[3] (1870) L.R. 5 Exch. 312.
[4] Ibid. 65.

subject of the hire-purchase contract was known as an Elwood ice cream conservator, a title which perhaps sufficiently describes its nature. The hire-purchase price was £87. The story of the defendant's entry into this transaction is, from his point of view, a somewhat melancholy one.

The defendant paid all but four of the instalments, £12 17s. 4d. representing the last four instalments together with a sum of 4s. for interest. Having paid 14 instalments, it appears that the ice cream conservator, which was in the physical possession of one Stebbings, had disappeared. The suggestion is that it had been irregularly parted with or stolen. The defendant not unnaturally thereupon refrained from making any further payments under the hire-purchase contract, and the result was that the present action was brought against him.

The hire-purchase agreement was dated July 18, 1952, and was made between Munday (Walthamstow) Ld. and the defendant. In pursuance, or purported pursuance, of the terms of the Hire-Purchase Act, 1938, the agreement contains the following further provisions. Under the heading "Notice" there is a provision that the hirer "may put an end to this agreement by "giving notice of termination in writing . . . He must then pay "any instalments which are in arrear at the time when he gives "notice. If when he has paid those instalments the total amount "which he has paid under the agreement is less than £43 10s."—viz., half the total of the purchase price—"he must also pay "enough to make up that sum." Then on the back of the document is a number of conditions of which the first is significant: "1. The hiring shall be deemed to commence on "the date of this agreement and unless determined by the hirer "or the owner as herein provided shall continue for the period "of hire set out in the schedule. The hirer shall, upon the "making of this agreement, pay the initial instalment and shall "punctually pay the several instalments of the balance of hire "as set out in the schedule. The hirer shall pay interest at the "rate of 6 per cent. per annum on all overdue instalments until "payment thereof. The hirer shall simultaneously with the "making of this agreement make and give to the owner a "promissory note as collateral security only for the due payment "of such instalments (other than the initial instalment) and not "as payment thereof." The promissory note referred to appears at the foot of the agreement and is separated from the body of the agreement by a perforation. It is plain that it was intended to be detached and was in fact detached. The terms of the promissory note are: "For value received I promise to pay to "the order of"—then the owner's name is set out—"the sum "of"—and then the figure is the hire-purchase price less the first instalment—"payable in 18 consecutive monthly instalments"—the dates of which are given. "Payable at the office of" the plaintiffs; and it is signed by the hirer. The promissory note

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bears a serial number which corresponds to the serial number on the hire-purchase agreement.

Section 4 of the Hire-Purchase Act, 1938, gives to the hirer the right at any time before the final payment to determine the agreement by notice, when his liability is limited to what has accrued due before the termination or to one half the purchase price, less anything paid, whichever is the greater. That provision is reflected in the terms of the agreement. Section 5 provides: "Any provision in any agreement—. . . (*c*) whereby a "hirer, after the determination of the hire-purchase agreement ". . . in any manner whatsoever, is subject to any liability which "exceeds the liability to which he would have been subject if "the agreement had been determined" in accordance with the provisions of section 4 "shall be void."

The plaintiffs sued upon the promissory note, which had been detached and which had come into their possession in the way that was obviously contemplated. Their claim, when they issued their writ, was as holders in due course of the promissory note. To that claim the defendant had first put in a defence in a somewhat general and untechnical form and, when the case first came before the judge, on May 11, 1954, counsel for the defendant indicated in plain terms that one of the main points for which he was going to contend was that this promissory note was affected to the detriment of the plaintiffs by the invalidity of the agreement or a provision of it by reference to section 5 (*c*). That point had not been really raised in the informal defence. Therefore, the case was adjourned to permit an amendment of the pleadings.

The defendant thereupon put in a formal and elaborate defence. It contained, among other provisions, the following: "The plaintiffs at the time of the negotiation of the said promis-"sory note, if any, which is denied, had notice of a defect in the "title of the person who negotiated the said promissory note "in that the said promissory note was drawn pursuant to "condition 1 of a hire-purchase agreement to which it was "attached. The said hire-purchase agreement was within the "protection of the Hire-Purchase Act, 1938 . . . The issue "and/or subsequent negotiation on the said promissory note was "affected by illegality, the said condition 1 being illegal and "void by reason of the section 5 (*c*) of the Hire-Purchase Act, "1938, and/or the plaintiffs were at all material times aware of "the existence of the said condition and that the said promissory "note was drawn pursuant thereto." Later, the defence states: "In the further alternative the said promissory note is an agree-"ment which is rendered void by section 5 (*c*) of the Hire-"Purchase Act, 1938." I take that merely to be an allegation that the promissory note is void, as a separate agreement, whereas the earlier paragraph merely stated that condition 1 was void. To that defence a formal traverse by way of reply was put in.

In such condition the case came on for trial a fortnight after the first hearing. The course that the trial took emerges plainly enough from the full and careful judgment of the judge. I think it manifest that at the trial the plaintiffs founded themselves from first to last on the propositions either that they were holders in due course of this promissory note and, therefore, entitled to sue upon it, whatever had been its earlier history; or that, at least, it was a wholly separate instrument from the hire-purchase agreement itself and was, in any event, therefore, unaffected by any invalidity which might attach to any provision of that agreement.

On the other hand, Mr. Share, for the defendant, insisted that the agreement and the promissory note were one single agreement, and he founded his argument for invalidity upon the proposition that the effect of condition 1 was to enable the promissory note, which was but part of the agreement, to get into the hands of somebody who could sue for it even though the defendant had terminated the hiring.

That view of the course of the trial is made plain by these passages in the judgment. The judge said: "In the event, can "it be said that in this complete document any provision which "makes the hirer liable to pay more than he would otherwise "have had to pay under the Act make it void? In my view it "can, because it is not disputed that, in the hands of an "unscrupulous finance company, Bycroft could, after the pay-"ment of, shall we say, one instalment, have returned the "machine and, under the Act, would then become liable to pay "half of the purchase price, which would be £43 10s. If an "unscrupulous finance company, being holders in due course, "could enforce the payment of the full amount under the pro-"missory note, that clearly in my view would make the agreement "void." The judge then referred to the wording of the Act and said that, in his view, the hirer became, as a result of the condition, liable to pay more than he otherwise would have to pay, and accordingly that the provision in the agreement was void.

Before that passage in the judgment the judge had read the pleadings. He had read without any comment the two passages to which I have referred in the defence, and he had then said: "It was argued by Mr. Share that this agreement should be "regarded as one agreement, that is to say, the document headed "'Hire-Purchase Agreement' and the detachable promissory "note at the bottom referred to in condition 1 of the hire-"purchase agreement; and, in my view, that submission is "correct." Later the judge said: "If I am wrong in regarding "the document as a whole as an agreement, and Mr. Rankin "[counsel for the plaintiffs] is right that the promissory note "should be treated as a separate agreement, then, in my view, "the wording of section 5 is wide enough to include this promis-"sory note as a separate agreement." I am not quite sure, with

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all respect to the judge, that I entirely follow his argument, but thus, brevi manu, he disposed of Mr. Rankin's submission, having already held that the premise upon which it was founded was incorrect.

In this court Mr. Lyell, in opening the appeal, put his case quite plainly in an entirely different way. He no longer claimed that his clients were holders in due course; nor did he claim that the promissory note was an instrument wholly distinct from the hire-purchase agreement and unaffected by any disabilities which might attach to the hire-purchase agreement. Indeed, he accepted in limine the proposition that in the hands at any rate of the plaintiffs, who had negotiated it from the owners, the promissory note was necessarily affected by any disqualification which might affect the right of the owner to sue upon the hire-purchase agreement itself. Mr. Lyell quoted from Byles on Bills, 20th ed., pp. 106, 107: "A written agreement on a distinct "paper, to renew, or in other respects to qualify, the liability "of the maker or acceptor, is good as between the original "parties." In support of that general principle Mr. Lyell referred us to *Bowerbank* v. *Monteiro*,[1] and to certain other cases designed to show that the right of the plaintiffs, as holders of the promissory note, to sue upon it, was limited by the conditions in the agreement to which the promissory note had originally been attached, the two being to that extent dependent one upon the other.

That submission is completely at variance with Mr. Rankin's earlier submission that the promissory note was quite separate from and unaffected by the agreement itself, and also it involved a negation of that which, according to the judge, had been conceded, namely, that in the hands of an unscrupulous finance company the defendant could have been sued after termination of the agreement; for, however unscrupulous the finance company (I am not suggesting that the plaintiffs are unscrupulous), their unscrupulousness would have availed them nothing, according to the present argument, since they would, in the supposed circumstances, have been necessarily disabled by the fact that the owners under the hire-purchase agreement could not themselves sue.

When that point had been put and argued with skill and persuasiveness by Mr. Lyell, Mr. Shawcross for the defendant replied that this was, to use his own language, a turning of the plaintiffs' case inside out. He raised the question that this was really a new point which, not having been taken in the court below, according to well-known principles, must be treated as not available to an appellant from a county court judgment in this court.

I agree, of course, that the general issue of the validity of the agreement and whether any invalidity affected the right of the

[1] (1813) 4 Taunt. 844.

holder of the promissory note to sue upon it has been raised by the amended pleading, but I have myself come to the conclusion that, although within the scope of the general issue, this was such a new way of putting the plaintiffs' case as to amount to a new point within the meaning of that formula, as it has been used and applied in these courts ever since *Smith* v. *Baker & Sons*,[2] in 1891. I make no attempt to define "a new point" for this purpose or to declare what are its characteristics. I think it is perhaps a matter in the end of common sense in the light of all the circumstances of a particular case, but in the present case I am satisfied that this way of putting the case is a new point of law. I rest my conclusion perhaps most strongly upon this consideration, that the judgment, extracts from which I have read, seems to me to be in no way whatever related to it; indeed, it seems to me to have proceeded upon a basis which was absolutely inconsistent with the way in which Mr. Lyell now puts his case.

As a matter of principle, the Court of Appeal has always been strict in applying the rule that an appellant from a county court, unless the other party consents, cannot be allowed in this court to raise a new point of law not raised below. After all, the county court is intended to serve litigants of relatively small means, and it is not in accordance with the public interest that a party, who has fought a case in a county court and been defeated, should then come to this court and raise in this court a new point, and put his case in an entirely different way as a matter of law and so make the other party, hitherto successful, litigate the matter again at the risk of having to pay the costs not only below but in this court.

I am aware that the defendant is legally aided, but that I hold to be an entirely irrelevant consideration. The scheme of the Legal Aid Act is to put the litigant, who is not affluent, in the same position as that of what is sometimes known as a Dives litigant; nor does it affect the case, as I think, that the issue now raised is one of importance to the plaintiffs. The Legal Aid Act was devised to assist those whom it finances in the course of litigation and not indirectly to assist other parties, or even the general public, in determining points of interest. I therefore do not further develop this matter except to say, if analogy is of any use, that one can well conceive that where, on a given set of facts, the question is whether a person is liable to account to another as a trustee and that is the general issue, within the scope of that general issue, the case might be put in many ways, and it would not be difficult to imagine the putting of a case in an appellate court in so different a way as to amount quite plainly to a new point of law.

I add one further point. As Mr. Shawcross observed by reference to *Smith* v. *Baker & Sons*,[2] one consideration which

[2] [1891] A.C. 325; 7 T.L.R. 679.

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has moved the courts in applying this rule is that if the point taken in the appellate court had been earlier taken, evidence might have been obtained to meet it. Stebbings, from whose possession the conservator has apparently disappeared, has become insolvent and such also has been the fate of Munday (Walthamstow) Ld.; but, had the present point been clearly put on the face of the pleading below as it was argued here, it might well have been the duty of those advising the defendant to see if they could not establish some relationship between Stebbings and Munday (Walthamstow) Ld., which would have disabled the latter from suing and which on this argument would also have disqualified the plaintiffs.

Having stated my conclusion on that matter, it is unnecessary to consider the other points raised in this case and, indeed, it would not be right for me to go into them, since all that I said would in the circumstances be obiter. I have made clear, in fairness to the judge, that the language of the judgment which I have read was directed to the plaintiffs' case as it was then put, and does not bear at all upon the case as it was put here. It cannot, in my judgment, be fairly treated as expressing an opinion upon the matter as it has been argued before us. Indeed, I doubt whether, if the case has been put as Mr. Lyell has put it, the judge would have decided the case in the way he did, or at least would have used the language which I have quoted.

There may be other grounds available under the Act for successfully impeaching the validity of the condition and thereby disqualifying the plaintiffs. On that I express no view. I observe that Mr. Shawcross did intimate that there was a point about interest and also other points; but, as this matter was debated, it may be perhaps convenient if I say that I do not, as at present advised, accept the argument of Mr. Shawcross that, if as a result of something done, not as the agreement contemplated and in pursuance of its terms but in complete disregard of its terms and in breach of them, in effect, in fraud of the hirer, with the result that the promissory note should get, if it could get, into the hands of an innocent third party to whose suit the hirer would have no answer, there is infringement of section 5 (*c*). It would not appear to me, on those facts alone, that an infringement of the terms of section 5 (*c*) is shown, for such a result would involve reading the words in the paragraph "is subject to" as "may become subject to." I refer again to the language; it is "any provision in any agreement whereby a hirer after "determination of the agreement in any manner whatosever is "subject to a liability exceeding the liability he would have been "subject to on" determination in accordance with section 4. On the facts that I have supposed, the dealings would have been in complete disregard of the condition, which in terms states that the promissory note is to be collateral only to the main obligation; and if, therefore, in breach of that condition transactions took place as a result of which a party appeared who could say that

he was the holder in due course without any notice of the hire-purchase agreement, then the liability, which might impose itself upon that hirer, would not be a liability under the agreement or one to which he had been made subject or was subject by virtue of any provision of the agreement.

In the view I take, applying what I believe to be the proper and salutary rule in these courts, I think it is too late now for the plaintiffs to put their case upon a basis quite inconsistent with that upon which hitherto they had fought it. I think, therefore, that the appeal ought to be dismissed.

HODSON L.J. I agree and have nothing to add.

UPJOHN J. I agree.

Appeal dismissed.

Solicitors: *H. H. Harper; Leader, Henderson & Leader.*

B. A. B.

[CHANCERY DIVISION.]

* *In re* CROSSLEY, A DEBTOR.

1954
Oct. 18.
Upjohn J.

Bankruptcy—County court—Transfer of proceedings to High Court—Application of petitioning creditor for transfer—Object of application to secure benefit of legal aid—Effect of legal aid certificate in favour of person not entitled to sue—Discretion of court—Bankruptcy Rules, 1952, *r.* 21.
Legal Aid.

In bankruptcy proceedings in a county court the petitioning creditor desired the trustee to take proceedings against the debtor and another person to set aside certain transfers made by the debtor. The trustee was unwilling to do so unless he received a proper indemnity against the costs which he would incur and, if unsuccessful, have to pay.

The petitioning creditor who was unable to give such an indemnity and wished to have the proceedings transferred to the High Court so that she could have the benefit of legal aid, obtained a certificate entitling her to legal aid "to take proceedings in the "High Court of Justice, Bankruptcy Court, for (*a*) application to "the court for leave to bring proceedings in the name of the trustee "in bankruptcy to avoid settlements made by the bankrupt, and "(*b*) to take such proceedings against the bankrupt, and to enforce "any order for costs."

On an application for the proceedings to be transferred to the High Court:—

Held, (1) that as those responsible for the operation of the Legal Aid and Advice Act, 1949, had not yet thought fit to bring it into operation in relation to county court proceedings, it would not be a proper exercise of judicial discretion to make an order of transfer solely on the ground sought; (2) that as the only person entitled in law to take the proposed proceedings, the trustee, could not take

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the benefit of the legal aid certificate as granted, it would not be right to make an order solely for the purpose of affording legal aid to a person who had no title to sue.

APPLICATION.

An application was made to the High Court by a petitioning creditor in bankruptcy proceedings, that those proceedings, which were in the Wandsworth County Court, might be transferred to the High Court. The reason for the application was stated in an affidavit of the petitioning creditor, which was to the following effect:

On November 6, 1952, a receiving order was made in the Wandsworth County Court against the debtor on a petition presented in respect of a final judgment obtained by the petitioning creditor for £268 17s. On January 28, 1953, the official receiver was appointed trustee of the property of the debtor. As a result of the investigations made by the trustee in bankruptcy certain transactions came to light with regard to the debtor's affairs. The trustee in bankruptcy declined to institute proceedings to avoid certain conveyances with which those transactions were concerned, without being furnished by the petitioning creditor with a complete indemnity in respect of his costs in those proceedings and also in respect of the possibly adverse costs, if the proceedings were taken in his name.

The petitioning creditor further stated in her affidavit that she had not the means to provide the indemnity and she applied for and was granted, on May 10, 1954, a legal aid certificate to take proceedings in the High Court of Justice in Bankruptcy for (a) an application for leave to bring proceedings in the name of the trustee in bankruptcy of the debtor to avoid settlements made by the debtor, and (b) to take such proceedings against the debtor and to enforce any order for costs.

By reason of those matters the petitioning creditor submitted that this was a case where the proceedings should be transferred from the county court to the High Court of Justice in Bankruptcy under rule 21 of the Bankruptcy Rules, 1952.[1]

Bernard Lewis for the applicant.
Muir Hunter for the debtor.

Case referred to in argument: *Reg.* v. *Manchester Legal Aid Committee.*[2]

UPJOHN J. This is an application by the petitioning creditor for the transfer of bankruptcy proceedings now in the Wandsworth County Court to this court. The relevant facts are these: that on

[1] Bankruptcy Rules, 1952, r. 21: "The judge of the High Court may "order the proceedings in any matter "under the Act to be transferred from "a county court to the High Court, "or from the High Court to a county "court."

[2] [1952] 2 Q.B. 413; [1952] 1 T.L.R. 476; [1952] 1 All E.R. 480.

the petition of the petitioning creditor a receiving order was made against the debtor, who was the husband of the petitioning creditor, the amount of the petitioning creditor's judgment debt being some £268, and the only other debt being a sum of £147 due to some other person. The debtor was duly adjudicated bankrupt, and the official receiver was appointed and remains the trustee of the property of the bankrupt.

In due course investigations of the bankrupt's affairs were made, and, putting it very shortly (for it is undesirable at this stage that I should say more than is absolutely necessary), it is considered that there is a reasonable prospect of setting aside certain conveyances and transfers made by the debtor to a third party under section 172 of the Law of Property Act, 1925. As the official receiver has insufficient funds in hand, he is not willing to bring those proceedings unless he has a proper indemnity against the costs which he will incur and against the costs which he will be ordered to pay if the application is unsuccessful.

The petitioning creditor states in her affidavit that she has insufficient means to provide the required indemnity. She may be able to provide a sufficient indemnity against costs which the official receiver may be ordered to pay, but she cannot at the same time provide an indemnity against the official receiver's own costs. She has therefore made this application for transfer to this court in order that she may receive the benefit of the Legal Aid and Advice Act, 1949, and she has already obtained a certificate, to which I shall refer in detail later, enabling her, so she says, to bring proceedings here under the Legal Aid and Advice Act, 1949, in the name of the official receiver against the bankrupt and the transferee of the various properties. Therefore, the whole basis of this application to transfer is to enable her to receive the benefit of that statute, which, of course, is not yet available to her in proceedings in the county court.

The relevant rule in relation to transfers is rule 21, and it confers a complete discretion on the court in the matter of ordering a transfer, but, of course, that discretion must be exercised judicially. The usual ground, of course, is for some geographical reason—the assets or the trustee or the main body of creditors or the bankrupt may be situate in a particular area to which it would be convenient to move the proceedings—but transfers may of course be made for other reasons; such, for instance, as the magnitude of the application proposed. No such grounds are suggested in this case. It depends solely on the question which I have already stated, that the petitioning creditor desires to have the benefit of legal aid.

The Legal Aid and Advice Act, 1949, provides that legal aid may be made available in the county court as well as in the High Court, but those responsible for the operation of the Act have not yet thought fit to bring it into operation in relation to proceedings in the county court; and, in my judgment, it would not be proper for a court to make an order of transfer solely on the ground

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sought. It seems to me a matter entirely for those responsible for the operation of the Act to consider whether it is desirable that legal aid should be available in the county court, and, if it is not so, it would not, in my judgment, be a proper judicial exercise of the discretion conferred by rule 21 to order a transfer, so that legal aid may be available in proceedings where, in the natural and proper forum, it has not yet been thought right to make it available.

I have not overlooked the fact that these are bankruptcy proceedings, nor the fact that, had the debtor, instead of being resident immediately to the south of the Thames in Wandsworth, been resident just to the north, the whole of the bankruptcy proceedings would have taken place in this court, and that, subject to the point on the certificate, to which I shall turn in a moment, legal aid would have been available. Although the circumstances under which the county court is exercising bankruptcy jurisdiction are quite different from the ordinary county court proceedings, nevertheless, it does seem to me wrong to order a transfer of the proceedings solely to obtain the benefit of the Act. It is a matter for others to consider whether that Act should be made available in the county court or not. It is not a matter on which I express any opinion.

The other point depends on the form of the legal aid certificate. It is, so far as is relevant, in this form: It is a certificate that the petitioning creditor "is entitled, in accordance with the Legal Aid "and Advice Act, and the regulations and schemes made there-"under, to legal aid as applicant in connection with the following "proceedings: (1) To take proceedings in the High Court of "Justice, Bankruptcy Court, for (*a*) application to the court for "leave to bring proceedings in the name of the trustee in bank-"ruptcy of [the bankrupt] to avoid settlements made by the "bankrupt and (*b*) to take such proceedings against the "bankrupt, and to enforce any order for costs."

Supposing that the proceedings are transferred, it is clear that in this court any application to set aside these conveyances and transfers must be made in the name of the official receiver, the trustee of the property of the bankrupt. Therefore, the court would have before it, as applicant, the trustee, and, as respondent, the transferee of these various properties, but one would not have in name before the court the petitioning creditor. In that state of affairs, when the court comes to consider the question of taxation of costs, it is quite clear that, if the official receiver loses, there will be an unconditional order against him to pay the respondent's costs. Against that liability, it may be that the petitioning creditor can give satisfactory security, but when the official receiver asks for his costs to be taxed under the Legal Aid and Advice Act, 1949, it will at once become apparent that the certificate is not for the benefit of the official receiver but for the petitioning creditor, who is not a party to the application, and on that form of certificate it seems to me that it would be quite

impossible to order any taxation for the purposes of the Act of the official receiver's costs.

As was pointed out in *Reg.* v. *Manchester Legal Aid Committee* [1]: "The truth of the matter is that at the moment there "are no specific provisions dealing with the position of a trustee "in bankruptcy in relation to the income test," and it seems to me clear that the only provision of legal aid that would be of assistance to the official receiver and to the petitioning creditor in this case would be a certificate in the name of the official receiver, which has not been obtained.

It was suggested that that difficulty could be overcome by joining the petitioning creditor as applicant in these proposed proceedings so that her costs could be taxed for the purposes of the Legal Aid and Advice Act, 1949, thereby covering those of the trustee in bankruptcy. I cannot think that that could possibly be right. She has no title to sue in her own name. It is perfectly true, as Mr. Lewis has pointed out, that she would be in substance the applicant and the principal person to benefit if successful, but in law she would not. The applicant would be the trustee; and I do not feel disposed to order a transfer solely for the purpose of facilitating proceedings for which the State may become bound to pay although the assisted person has herself no title to sue. On that ground, therefore, also, in my judgment, this application fails.

The real truth of the whole matter may be summed up in one sentence, that the petitioning creditor, quite reasonably from her point of view, is trying to get round the fact that legal aid is not available in the forum where these matters ought to be litigated, and I do not think that it is the duty of this court to assist her to obtain legal aid by transfer to this court. Accordingly, the application fails.

Application dismissed.

Solicitors: *Raymond S. Hill; Savory, Pryor & Blagden.*

J. L. D.

[1] [1952] 2 Q.B. 413, 423.

[QUEEN'S BENCH DIVISION.]

*KEATS *v.* LONDON COUNTY COUNCIL.
SAME *v.* SAME.
SAME *v.* SAME.

1954
Oct. 14.

Lord Goddard C.J., Lynskey and Parker JJ.

Town and Country Planning—Enforcement notice—Form—Compliance with statutory requirements—Validity of notice—Magistrate's jurisdiction—Town and Country Planning Act, 1947 (10 & 11 *Geo.* 6, *c.* 51), *s.* 23.

In October, 1949, premises, which had previously been used for residential purposes, were occupied by a firm of builders who used

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them for about five weeks for light industrial purposes within the meaning of the Town and Country Planning (Use Classes) Orders, 1948 and 1950. The premises were then unoccupied until February 15, 1950, when they were let to optical manufacturers who also used them for light industrial purposes. On November 11, 1953, the county council served an enforcement notice on the owner which alleged that there had been a development without permission and stated: "Beginning the use of the land described . . . for the "purpose for which the same is now used namely as an industrial "building within the meanings of the Town and Country Planning "(Use Classes) Order, 1948, and the Town and Country Planning "(Use Classes) Order, 1950"; and the notice required the owner to determine such use. The owner appealed to the magistrate under section 23 of the Town and Country Planning Act, 1947, alleging, first, that the notice was too vague and secondly, that as the development by the builders had taken place more than four years before the date of the notice, the notice could not in law relate to that development. The magistrate dismissed the appeal. On appeal:—

Held, first, that the notice was not too vague since it stated clearly that the complaint was made with regard to the current user at the date when the notice was served.

Held, secondly, in the circumstances, that the magistrate had no power under section 23 to inquire whether the development had taken place prior to the user by the optical manufacturers; he had to assume that the notice was regular and his sole jurisdiction under the section was to ascertain whether permission had been granted or was not required.

Lincolnshire (Parts of Lindsey) County Council v. *Wallace Holiday Camp Ld.* [1953] 2 Q.B. 178; [1953] 2 W.L.R. 1088; [1953] 1 All E.R. 1143 distinguished.

CASES STATED.

The appellant, Gerald Keats, preferred complaints before the magistrate at Old Street Magistrates' Court that he was a person aggrieved by three enforcement notices dated November 11, 1953, relating to the ground, first and second floors of 127 Southgate Road, Islington, served on the appellant by the London County Council under section 23 [1] of the Town and Country Planning Act, 1947, and that he desired to appeal against those notices by virtue of the provisions of that section.

[1] Town and Country Planning Act, 1947, s. 23: "(1) If it appears "to the local planning authority that "any development of land has been "carried out after the appointed day "without the grant of permission ". . . the local planning authority "may within four years of such "development being carried out, if "they consider it expedient so to do "having regard to the provisions of "the development plan and to any "other material considerations, serve "on the owner and occupier of the "land a notice under this section. "(2) Any notice served under this "section (hereinafter called an 'en-"'forcement notice') shall specify "the development which is alleged to "have been carried out without the "grant of such permission . . . may ". . . require . . . the discontinuance "of any use of land . . . (4) If "any person on whom an enforce-"ment notice is served under this "section is aggrieved by the notice, "he may, at any time within the "period mentioned in the last fore-"going subsection, appeal against "the notice to a court of summary "jurisdiction for the petty sessional "division or place within which the "land to which the notice relates is "situated; and on any such appeal "the court—(*a*) if satisfied that per-"mission was granted under this "Part of this Act for the develop-"ment to which the notice relates,

With regard to the ground floor, the magistrate found the following facts: On July 1, 1948 (the appointed day under the Act of 1947), the use of the premises was residential. In October, 1949 (namely, more than four years before the service of the enforcement notice), a firm of builders went into occupation and used the premises for making window-frames, sashes, doors and other woodwork and continued to do so for about five weeks. (It was agreed that such user, if proved, would be user of the premises as a light industrial building within the meaning of the Town and Country Planning (Use Classes) Order, 1950.) Thereafter the premises remained empty until about February 15, 1950 (namely, less than four years before the service of the enforcement notice), when they were let to and used by a firm of optical manufacturers for light industrial purposes within the meaning of the Order of 1950, and thereafter continued to be let and used for such purposes by various persons up to the date of the hearing. About March, 1951, the premises were sold to the present owner, the appellant. On November 11, 1953, the London County Council served an enforcement notice on the owner.

The notice alleged that certain development had been carried out after July 1, 1948, without the grant of permission by the county council. The alleged development specified by the notice was in the following terms:—"Beginning the use of the land "described in the Second Schedule hereto for the purpose for "which the same is now used namely as an industrial building "within the meanings of the Town and Country Planning (Use "Classes) Order, 1948, and the Town and Country Planning "(Use Classes) Order, 1950."

The owner contended that the notice was too vague in that it did not specify the development sufficiently clearly, and that it was out of time, as the development had been carried out more than four years before the date of the notice.

The county council contended that the notice specified the development sufficiently clearly, that the notice was in time since the use of the premises as an industrial building should be held to have begun on or about February 15, 1950, and that in any event the court had no jurisdiction to quash the notice even if it accepted the owner's contentions.

The magistrate, rejecting the owner's contentions, was of the opinion that on the facts he was required by section 23 (4) to dismiss the appeal unless no permission was required for the development to which the enforcement notice related; that the use by the optical manufacturers constituted a "beginning the "use" as an industrial building—a development to which the enforcement notice related and for which permission was required;

"or that no such permission was "required in respect thereof, or, as "the case may be, that the condi-"tions subject to which such permis-"sion was granted have been com-"plied with, shall quash the notice "to which the appeal relates; . . . "(c) in any other case shall dismiss "the appeal."

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and that his jurisdiction to quash an enforcement notice was strictly confined to the matters set out in section 23 (4) (*a*).

In the case of the enforcement notice relating to the first floor the facts, contentions, and opinion did not differ materially from those set out above. On the enforcement notice in respect of the second floor, which was in the same terms as the notice relating to the ground floor, the owner's only contention, which was rejected by the magistrate, was that the notice was too vague.

A. P. Marshall Q.C. and *F. R. McQuown* for the owner.
J. S. Daniel for the London County Council.

The following cases were referred to in argument: *Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ld.*[2]; *Perrins* v. *Perrins*[3]; *Mead* v. *Chelmsford Rural District Council.*[4]

PARKER J. stated the facts, and continued:

The magistrate took the view that his jurisdiction was strictly limited by the Act; and it is necessary to look at section 23 to see how the matter came before him. Section 23 provides: "(1) If it appears to the local planning authority that any "development of land has been carried out"—and by section 12 (1) of the Act "development" includes the making of any material change in the use of any buildings or land—"after the "appointed day without the grant of permission . . . the local "planning authority may within four years of such development "being carried out, if they consider it expedient so to do having "regard to the provisions of the development plan and to any "other material considerations, serve on the owner and occupier "of the land a notice under this section." By subsection (2) that enforcement notice shall specify the development which is alleged to have been carried out and may require the discontinuance of any use of land. By subsection (4) it is provided: "If any person on whom an enforcement notice is served under "this section is aggrieved by the notice, he may, at any time "within the period mentioned in the last foregoing subsection, "appeal against the notice to a court of summary jurisdiction "for the petty sessional division or place within which the land "to which the notice relates is situated; and on any such appeal "the court—(*a*) if satisfied that permission was granted under "this Part of this Act for the development to which the notice "relates, or that no such permission was required in respect "thereof, or, as the case may be, that the conditions subject to "which such permission was granted have been complied with,

[2] [1953] 2 Q.B. 178; [1953] 2 W.L.R. 1088; [1953] 1 All E.R. 1143.

[3] [1951] 2 K.B. 414; [1951] 1 T.L.R. 945; [1951] 1 All E.R. 1075.

[4] [1953] 1 Q.B. 32; *sub nom. Mead* v. *Plumtree* [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

"shall quash the notice to which the appeal relates; . . . (c) in "any other case shall dismiss the appeal."

It is to be observed from those words that the magistrate's jurisdiction is strictly limited—and this court has so held—to the question whether permission was granted for the development to which the notice relates or that no such permission was required. By section 24 it is provided that in any subsequent proceedings to enforce the notice, the owner or occupier shall not be entitled to dispute the validity of the action taken by the local planning authority on any ground which could have been raised by such appeal.

Two points were raised before the magistrate and before us. The first is that in all these notices the description of the development is too vague. Mr. Marshall has contended that it should at least state the time of the development, the nature of the development, and the class into which the development falls. He points out that the class is of some importance, because there is no change of use within the meaning of the Act if premises are used for a different purpose, provided it is within the same class. On that point, if the wording had been merely "the use of the "land as an industrial building" there might well be complaint that it was not specific enough; but this notice says: "for the "purpose for which the same is now used." It thus becomes perfectly clear that the complaint is made with regard to the current use at the time—which, in this case, was the use by the firm of optical manufacturers.

The other point taken arises on the particular facts of this case. It is said that this notice complains of a beginning of the use of the land described for that purpose. In so far as it was a user on which the enforcement notice could, as it were, bite, it must be a user by these optical manufacturers; but, it is said, the development under this Act had already taken place when the firm of builders first used the premises at the end of October, 1949. Accordingly, as the user by the optical manufacturers and by the builders falls within the same class, no further permission was required for the use of the premises by the optical manufacturers.

It seems to me that the answer to Mr. Marshall's argument must be that that was not a matter for the magistrate. The magistrate has to approach the matter under section 23 (4) on the basis that the local authority are satisfied that the development referred to in the notice has taken place. He must assume that the notice is regular and his sole jurisdiction is to ascertain whether permission was granted or was not required. That has already been decided by this court in *Mead* v. *Chelmsford Rural District Council*,[1] where the enforcement notice served was irregular on its face because the necessary date on which it was to take effect did not appear. There was in that case no appeal

[1] [1953] 1 Q.B. 32; *sub nom. Mead* v. *Plumtree* [1952] 2 T.L.R. 700; [1952] 2 All E.R. 723.

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Parker J.

to the magistrates, but when it was sought to enforce the notice and the prosecution took place, the point that the notice was irregular was then taken, and this court held that that was a point which could then be taken. Lord Goddard C.J. said [2]: "The "recipient can say: 'This notice never ought to have been served "'on me because I had received, or did not require, permission,' "or: 'I have carried out the conditions subject to which per-"'mission was granted', or: 'This notice exceeds what is "'reasonable for me to be called on to do.'" That is what he can contend before the magistrates. The Lord Chief Justice went on [2]: "The sub-section does not provide for an appeal "against the notice on the ground that it is a bad notice because "that involves, not an appeal against the notice, but a conten-"tion that the recipient never had a notice served on him at all, "which is what the appellant contends in this case."

Mr. Marshall relied strongly on a more recent decision of this court in *Lincolnshire (Parts of Lindsey) County Council* v. *Wallace Holiday Camp Ld.*,[3] where it was held that an enforcement notice was a bad notice, but that nevertheless the justices were entitled to quash it; and Mr. Marshall says that that supports his contention here. When one looks at the case more closely, however, it will be seen that the development complained of there was a development which took place before the appointed day, development which, it was said, contravened previous planning control; but the enforcement notice and the appeal to the magistrates was on the basis that section 23 applied; and this court said in effect that the magistrates in the special circumstances of that case were entitled to quash the notice because in fact no permission was required, since the development took place before the appointed day.

I am quite satisfied that the magistrate here had no jurisdiction to embark on the inquiry on which he was invited to embark, and that his decision when he refused to quash the notice should be upheld. What I have said with regard to the complaint that the development is alleged too vaguely applies to all three cases. The second point taken only arises in regard to the ground floor and the frrst floor; there is no distinction between the two. Accordingly the magistrate was right in all three cases and the appeal should be dismissed.

LORD GODDARD C.J. I agree.

LYNSKEY J. I agree.

Appeals dismissed.

Solicitors: *J. C. Fox, Gamble & Son; J. G. Barr, The Solicitor, London County Council.*

C. J. E.

[2] [1952] 2 All E.R. 723, 725.

[3] [1953] 2 Q.B. 178; [1953] 1 All E.R. 1143.

[CHANCERY DIVISION.]

*MORLEY AND ANOTHER v. WOOLFSON AND ANOTHER.

1954
Oct. 22.

Harman J.

PRACTICE NOTE.

Practice and Procedure—Trial—Witness list—Chancery Division—Interlocutory applications after case has appeared in list.

An action, having been set down for trial on July 2, 1954, appeared in the list on July 26 and was fixed for hearing on October 28. On October 20 a summons by one of the defendants asking for particulars of the statement of claim came before the master and was dismissed on the grounds (*a*) that paragraph 6 of the Practice Direction (Witness List) dated April 2, 1954 [1954] 1 W.L.R. 693, which states that "all applications with "regard to cases appearing in the Witness List are to be made "to . . . the judge in charge of the list" deprived the master of jurisdiction to hear the application, and (*b*) that all necessary parties had not been made respondents to the application.

The second defendant now applied for postponement of the trial of the action to enable the application for particulars to be dealt with.

J. G. Strangman Q.C. and *G. B. H. Dillon* for the plaintiffs.
Raymond Walton for the first defendant.
G. H. Crispin for the second defendant.

HARMAN J. said that the intention of paragraph 6 of the Practice Direction of April 2 was that applications as to the hearing of cases appearing in the witness list were to be made to an indicated judge; it did not affect the ordinary practice with regard to interlocutory applications which should, as hitherto, normally be made by summons returnable before a master. In the case before him, his Lordship refused to postpone the hearing of the action and directed that the application for particulars should be adjourned into court to come on with the trial of the action. If the judge then thought that further particulars should be given, he would so order.

Solicitors: *Zeffertt, Heard & Morley Lawson; Miller, Clayton & Co.; Saunders, Sobell, Greenbury & Leigh.*

K. R. A. H.

[QUEEN'S BENCH DIVISION.]

1954
Oct. 21.

Lord Goddard C.J., Lynskey and Ormerod JJ.

*DAVIES, TURNER & CO. LD. *v.* BRODIE.

Criminal Law—Aiding and abetting—Mens rea—Carriage of goods for hire—Failure to obtain necessary permit—Bona fide assurance by driver that permit granted—Contractor's duty to make inquiries—Road and Rail Traffic Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 51), *s.* 9 (1) *—Transport Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 52.
Law Reports—Reporting of decisions—No principle of law.
*Road Traffic—Licence—"A" carriers licence—*25*-mile radius.*

The appellants were charged with aiding, abetting, counselling and procuring H. in the commission of the offence of using a goods vehicle with an "A" licence for the carriage of goods without the necessary permit. H.'s driver had approached the appellants' manager for an order for the carriage of goods on a return journey. The manager asked the driver if he had a permit to carry the goods and on the driver saying "Yes," but failing to produce the permit, the manager required him to sign an assurance that his employers held the necessary documents and if required would produce them. In fact there was no permit for such carriage. In giving the assurance the driver misinformed the appellants' manager, but acted in ignorance in so doing. The justices, being of the opinion that the appellants gave the order for the carriage of the goods without requiring the production of the permit or authorisation and without making sufficient inquiry as to the necessity for or existence of such permit or authorisation, found the appellants guilty. On appeal:—

Held, that the appellants' manager, having been assured by H.'s driver that a permit existed and having received an undertaking in writing from him that his employers would produce the permit if required, had taken reasonable precautions to prevent the commission of an offence and therefore could not be said to be aiding and abetting the commission of the offence.

Carter v. *Mace* [1949] 2 All E.R. 714 distinguished.

CASE STATED by Newport justices.

The appellants, Davies, Turner & Co. Ld., were charged on an information preferred by James Arthur Brodie, on behalf of the licensing authority for goods vehicles (South Wales Traffic Area) with aiding, abetting, counselling and procuring Arthur Vincent Hill, a partner in the firm of Hills Transport, in the commission of an offence in that on October 29, 1953, between Newport and Newark, he used a goods vehicle authorised in a public "A" carriers licence granted under Part I of the Road and Rail Traffic Act, 1933, on a road for the carriage of steel for hire or reward outside the permitted radius of 25 miles from its operating centre other than under the authority of a permit granted in accordance with the provisions of section 52 of the Transport Act, 1947, contrary to section 9 (1) of the Act of 1933, and contrary to section 35 of the Magistrates' Courts Act, 1952.

The justices found the following facts. On October 29, 1953, the goods vehicle in question owned by Hills Transport and driven

by their employee, Durrance, was being used on a return journey from Newport to Newark for the carriage of steel, which carriage required a permit, but none had been granted. For some months prior to and until a day or two before October 29, Durrance had been driving one of the three vehicles owned by Hills Transport which did not require permits for the carriage of goods. Durrance had previously obtained orders from the appellants for the carriage of goods on return journeys. Durrance was unaware that he required a permit for the carriage of steel on October 29 and as far as he personally was aware there was no difference between the carriage of goods on that day and carriage on previous occasions. On October 29, Durrance applied to and obtained from the appellants, who were forwarding agents, an order for the carriage of steel. Prior to giving the order the appellants' manager, Evans, asked Durrance if he had a permit to carry the load and on Durrance answering in the affirmative, but failing to produce any permit, Evans required him to sign an assurance on behalf of his employers in the following terms: "Goods are "handed to you on your express assurance that you hold the "necessary documents and will produce them if required to and "on the express condition that you are legally able to collect and "effect delivery to the destination." Durrance did not know much about permits and Evans was aware of that. Evans realized that it was his duty to see that vehicles engaged by him could legally carry the loads for which he engaged them. He also knew that a driver was required to carry any necessary permit with him. In giving the assurance, Durrance misinformed Evans, but acted in ignorance in so doing. Evans, in accepting the assurance, also acted in ignorance of the fact that no permit or authority covering the carriage had been granted. Evans acted in accordance with the appellants' usual practice.

It was contended on behalf of the appellants that for them to be found guilty it was necessary to prove, either that they knew that the vehicle was being used without a permit when a permit was required or that they suspected that it was being so used and connived at the offence.

It was contended on behalf of the respondent that the appellants were under a duty to see that a permit had actually been granted, that that duty was not and could not be discharged merely by obtaining a written assurance from the driver and that by failing to make further inquiries after the driver had failed to produce his permit the appellants closed their eyes to a contravention of the Act, and the respondent relied on *Carter* v. *Mace*.[1]

The justices were of the opinion that the appellants were guilty of the offence alleged because they gave the order for the carriage of the goods without requiring the production to them of the permit or authorisation for such carriage and without making

[1] [1949] 2 All E.R. 714.

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proper or sufficient inquiry as to the necessity for or existence of such permit or authorisation.

The questions for the opinion of the court were whether in law the appellants were under a duty to require production of the permit itself and whether there was any evidence on which the justices could find the appellants guilty of the alleged offence.

Gilbert Dare for the appellants.
J. P. Ashworth for the respondent.

The following cases were cited in argument: *Johnson* v. *Youden* *; *Carter* v. *Mace* †; and *Churchill* v. *Norris*.‡

ORMEROD J., delivering the first judgment, stated the facts and continued: It appears to be clear, from the opinion expressed by the justices and from the questions on which they ask the opinion of this court, that in coming to their conclusion, that the appellants' manager, Evans, had not made sufficient or proper inquiry as to either the necessity or the existence of a permit in this particular case, they were dominated by the view that not only was it the duty of the driver to carry this permit, but it was also the duty of Evans to demand production of it; and if he had demanded production of it and it had not been forthcoming, presumably the situation might have been different.

It is contended for the appellants that there is no evidence here of aiding and abetting on the part of the appellants because, before they allowed this load to be put onto this motor-lorry, they did in fact obtain from the driver Durrance an assurance that the licence was in order and would be produced at any time if necessary. That appears, on the face of it, to be a contention to which there is no answer. Mr. Ashworth, however, on behalf of the respondent, referred the court to *Carter* v. *Mace*.[1] That was a case in which the appellant carried on a business which appears to be very much on the same lines as the business carried on by the appellants in the present case, the business of a transport clearing house, and he appears to have hired a lorry for the transport of copper cathodes, a lorry which could not carry that particular load. The evidence in that case was that the appellant made no inquiry of any kind whether the owner of the lorry was licensed or permitted to carry this particular load, and in that case Lord Goddard C.J., in his judgment, used these words [2]: "The appellant carries on a business which is described "as a clearing house for transport. That means that he executes "orders from people who want goods transported. He does not "transport the goods himself, but he gets other people to do so. "He engages the lorry owners to do the work and pays them "rather less than he receives. If the appellant undertakes this

* [1950] 1 K.B. 544; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.
† [1949] 2 All E.R. 714.
‡ (1938) 158 L.T. 255.
[1] [1949] 2 All E.R. 714.
[2] [1949] 2 All E.R. 714, 715.

"class of business, he must see that contracts are carried out in "a legal manner, and that the people whom he employs can "lawfully carry out the contracts which he has made." Then a few lines further on he says: "In these circumstances, it "seems to me perfectly clear that the appellant was aiding and "abetting the commission of the offence by Alderson."

On the strength of that judgment Mr. Ashworth argued that it was the duty of Evans to make inquiries, and that the inquiries which were made by Evans were not sufficient, as the justices have found, and that as that is a question of fact, quite clearly the justices were entitled to convict. I think that is the way Mr. Ashworth put his case, relying entirely on *Carter* v. *Mace*.[3] I think it is proper to say that *Carter* v. *Mace*[3] was one of those cases which was decided on its particular facts, the case of a man engaged in this sort of business who made no inquiries as to the existence or otherwise of licences, and not a case such as the one under consideration, an entirely different matter, where inquiry was made and an assurance given by the driver that there was a licence in existence and the additional precaution taken by the manager of the appellants' firm of an undertaking in writing that the permit was in existence and would be produced if required at any future time. In those circumstances, it seems impossible to say that these appellants, having taken this precaution—it may have been they could have done other things—which was a perfectly reasonable precaution, and inquired about the existence of a permit and received an assurance both orally and in writing, were aiding and abetting this offence. In those circumstances, this appeal must be allowed.

LORD GODDARD C.J. I agree. I only repeat what I said, with the assent of the other members of the court, in *Johnson* v. *Youden*[4]: "Before a person can be convicted of aiding and "abetting the commission of an offence he must at least know "the essential matters which constitute that offence." If a person shuts his eyes to the obvious or refrains from making any inquiry where a reasonably sensible man would make inquiry, I think the court can find that he was aiding and abetting, certainly if he shuts his eyes to the obvious.

The case on which so much reliance has been placed, *Carter* v. *Mace*,[5] which has got into some of the reports, was in fact a case which laid down no principle of law. It was decided entirely on its own particular facts. They were very striking. The man made no inquiry, but was taking any lorry that came along and using it, and the court said that he could not be heard to say that he was not aiding and abetting. In this case, I do not say that the people took every precaution or made every inquiry, and

[3] [1949] 2 All E.R. 714.

[4] [1950] 1 K.B. 544, 546; 66 T.L.R. (Pt. 1) 395; [1950] 1 All E.R. 300.

[5] [1949] 2 All E.R. 714.

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I do not think that is necessary, but once it is shown that they were acting in good faith—and in this case the justices found that they were—and got this assurance which they took in good faith, and incidentally was given in good faith, I do not see how it can be said that they aided and abetted an offence when they had no reason to suppose that the facts were present which would constitute an offence; that is the point: you must know the essential matters which constitute the offence. For these reasons, I think that the appeal should be allowed.

LYNSKEY J. I agree with my brothers and with their reasoning.

Appeal allowed.

Solicitors: *Coward, Chance & Co.; The Treasury Solicitor.*

C. J. E.

[CHANCERY DIVISION.]

1954 *Oct.* 20, 21.

Upjohn J.

* HEELEX INVESTMENTS LD. *v.* INLAND REVENUE COMMISSIONERS.

Revenue—Profits tax—Company—Principal and subsidiary companies—Notice given by principal requiring profits of subsidiary to be treated as its own profits—Subsequent exemption of principal from profits tax—Principal not thereafter liable to profits tax in respect of subsidiary's profits—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 22 (1) (2)—*Finance Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 35), s. 31 (2).

The appellant company, H., was a subsidiary company of S. On September 28, 1948, S. gave a notice, which was accepted, to the Inland Revenue Commissioners under section 22 [1] of the Finance Act, 1937, requiring that the profits of H. should be treated as the profits of S., the principal company, for the purposes of profits tax.

By a notice given in September, 1952, the commissioners directed that the income of S. should be deemed to be the income of the

[1] Finance Act, 1937, s. 22: "(1) Where a body corporate resident in the United Kingdom is a subsidiary of another body corporate so resident (hereafter in this section referred to as 'the principal company') the principal company may, by notice in writing given to the Commissioners of Inland Revenue before the expiration of any chargeable accounting period of the subsidiary or within two months thereafter, require that the provisions of subsection (2) of this section shall apply to the subsidiary as respects that period and all subsequent chargeable accounting periods throughout which it continues to be a subsidiary of the principal company. . . . (2) Where such a notice is given, the profits or losses arising in any chargeable accounting period to which the notice relates from the trade or business carried on by the subsidiary shall be treated, for the purpose of the provisions of this Act relating to [profits tax] . . . as if they were profits or losses arising in the corresponding chargeable accounting period from the trade or business carried on by the principal company."

members and apportioned accordingly, pursuant to section 21 of the Finance Act, 1922. In consequence, by virtue of section 31 (2) of the Finance Act, 1947,[2] the income of S. became exempt from liability for profits tax.

Subsequently assessments, which were disputed, were made on H. for profits tax in relation to the profits for the chargeable accounting periods ending in 1948 and 1949. It was contended for the taxpayers that the effect of the notices given by S. to the commissioners in 1948 and by the commissioners to S. in 1952 was, that (a) the liability of H. to profits tax was transferred to S.; (b) S. had ceased to be liable to profits tax, so that (c) H. was not liable for the tax. The Crown contended that there was an inherent assumption underlying section 22 of the Act of 1937 that S., the principal company, must be liable for profits tax, and that if S. was not so liable, the section was inoperative. The special commissioners affirmed the assessments. On appeal:—

Held, that there was nothing in the language of section 22 to justify the assumption contended for by the Crown, or to restrict the meaning of "principal company" to a company which was itself liable to profits tax; so that the assessments must be discharged.

Dicta in *Inland Revenue Commissioners* v. *Birmingham District Power and Traction Co. Ld.* (1928) 141 L.T. 1 considered.

APPEAL from the Commissioners for the Special Purposes of the Income Tax Acts.

The relevant facts are stated in the judgment.

L. C. Graham-Dixon Q.C. and *John Creese* for the appellant.
Geoffrey Cross Q.C. and *Sir Reginald Hills* for the Crown.

The case cited in argument is referred to in the judgment.

UPJOHN J. This appeal relates to profits tax, and the case depends on a short point of construction of section 22 of the Finance Act, 1937, section 19 of which introduced the tax for the first time under its former name of National Defence Contribution. [His Lordship read or summarized sections 19, 20, 21 and 22 and continued:] It is admitted that the appellant, Heelex Investments Ld., is and at all material times was a subsidiary of a company known as Sidcup Investments Ld.

On September 28, 1948, Sidcup Investments Ld., to which I will refer as Sidcup, gave a notice, under section 22 (1), requiring that the provisions of subsection (2) of that section should apply to the appellant company for the relevant years. The notice was out of time, but no question arises on that. The

[2] Finance Act, 1947, s. 31 (2): "The said section 19 [the principal charging section of the Act of 1937] shall not apply to any trade or business carried on by a body corporate during any chargeable accounting period if, for a year or period which includes, or for years or periods which together include, the whole of the chargeable accounting period, the actual income of the body corporate from all sources is apportioned under or for the purposes of section 21 of the Finance Act, 1922, and all the persons to whom it is apportioned are individuals."

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notice given was treated, and has always been treated, as a valid notice for the purposes of section 22.

The result of giving such a notice is that it applies not only to the relevant period for which it is given but to all subsequent chargeable accounting periods, and comes to an end only when the appellant ceases to be a subsidiary of Sidcup.

As a result of giving the notice, assessments to profits tax for the years 1947, 1948 and 1949, which I will call the relevant years, were made on Sidcup in respect of the profits of both companies. There was no appeal, and tax was paid on those assessments.

In 1947, the scope of the profits tax was to some extent enlarged, in that different rates of tax were prescribed according to whether the profits were retained by a company or were distributed by it. In another way the scope of the tax was somewhat reduced, because, whereas under the original Act individuals carrying on business, not being exempt as engaged in professional occupations, were equally liable, although at a different rate, with corporations carrying on business, by section 31 (1) of the Finance Act, 1947, individuals and partnerships were exempted from profits tax. Down to that date a company might have been subject both to profits tax and to a direction under section 21 of the Finance Act, 1922, directing that, in certain cases, its profits, putting it shortly, should be subjected to surtax as though it was an individual. But, when individuals ceased to be subject to profits tax, it appeared to the legislature that it would be right, if any direction was given under the Finance Act, 1922, to treat the profits of the company as though they were that of an individual, that, in those circumstances, the company should be exempt from profits tax. That was brought into effect by section 31 (2), which reads: "The said section 19"—that is, the principal charging section under the Finance Act, 1937—"shall "not apply to any trade or business carried on by a body cor- "porate during any chargeable accounting period if, for a year "or period which includes, or for years or periods which together "include, the whole of the chargeable accounting period, the "actual income of the body corporate from all sources is appor- "tioned under or for the purposes of section 21 of the Finance "Act, 1922, and all the persons to whom it is apportioned are "individuals."

Pursuant to section 21 of the Finance Act, 1922, on September 29, 1952, the special commissioners by notice to Sidcup directed that its income from all sources for the relevant years should be deemed to be the income of its members and the amount thereof should be apportioned among the members. It is common ground that, at that time, all the members of Sidcup were individuals. Accordingly, assuming that direction to become final and binding for the relevant years, Sidcup will be exempt from profits tax under and by virtue of section 31 (2) of the Act of 1947.

Mr. Graham-Dixon, for the appellant, took a subsidiary point that the direction under the Finance Act, 1922, was still under appeal and had not become final and binding, and, therefore, that the assessments which I must mention in a moment were premature. However, I indicated that, if that point were pressed, I would decide it, but I should be disinclined to decide the main point if I decided the subsidiary point in Mr. Graham-Dixon's favour, for that would mean there would be a judgment on an important point which would be entirely obiter. Faced with that, Mr. Graham-Dixon preferred to abandon his subsidiary point, and this appeal has been argued on the footing that the direction under the Finance Act, 1922, has become final and binding.

In respect of the relevant years, on the footing that Sidcup was exempt from the payment of profits tax, the Commissioners of Inland Revenue have repaid to Sidcup the profits tax already paid by them. Mr. Cross, for the Crown, concedes that, technically, the commissioners might not have been compellable so to repay the tax; but at all events they have done so. However, in respect of the profits tax in those years, they have raised separate assessments on the appellant for two of the relevant years. This appeal raises the question of the validity of those assessments.

The Crown claims to make those assessments to profits tax on the appellant on the ground that, where the principal company, Sidcup, is itself not liable to profits tax, then section 22 (2) of the Finance Act, 1937, can during that period have no operation. Therefore, the profits of the appellant cannot be treated as profits of the principal company, but remain its own profits on which it is assessable to profits tax. That is the short point which I have to determine.

Mr. Cross concedes that a notice may be given under section 22 (1), although the principal company may be exempt. It may be exempt because it is a statutory undertaking; it may be exempt for the reason, as in this case, that a direction has been made on it under the Act of 1922. But, although the notice applies during the period for which it is given, and during all subsequent chargeable accounting periods, Mr. Cross submits that, in fact, it can have no operation during the period for which the company is exempt for whatever reason that may be. He submits that the words in section 22 (2) of the Act of 1937, "the profits or lossses "arising in any chargeable accounting period . . . shall be treated, "for the purpose of the provisions of this Act relating to the "national defence contribution," mean in effect for the purpose of charging those profits to profits tax; and that it is inherent in that section, or there is an assumption underlying that section, that the principal company is itself to be liable in respect of the relevant period to profits tax for the section to operate. In other words, this is really a collection section, which assumes that the principal company is liable, and, if the principal company is not so liable, it can have no operation. That is the whole point.

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Upjohn J.

The argument is supported by an authority, to which I must refer, *Inland Revenue Commissioners* v. *Birmingham District Power and Traction Co. Ld.*,[1] a decision of the House of Lords. The case there arose on a somewhat similar provision in the Finance Act, 1920, which created something called then the corporation profits tax. There was a provision, verbally different, but in substance very much the same as the provisions of section 22, whereby a parent company could give a notice requiring the profits of a subsidiary company or companies to be assessed with those of the parent company for the purposes of that tax. In that case the Birmingham District Power and Traction Co. was an exempt company for the period from January 1, 1920, to December 31, 1922. That appears from section 52 (2) of the Finance Act, 1920. Therefore, it was exempt for the relevant period. But it had three subsidiary companies which were not exempt. The principal company gave a notice which was accepted by the Inland Revenue. In that case an attempt was made by assessment on the principal company to obtain tax upon the profits of the subsidiary companies. Those assessments were upheld by the commissioners, and by Rowlatt J.; but were discharged by the Court of Appeal and the House of Lords on the perfectly simple ground that the company was exempt.

In the course of the speeches in the House of Lords the question was canvassed, although it was completely obiter, as to whether the notice given by the principal company was a valid notice having regard to the fact that the principal company was itself exempt. Lord Buckmaster said this[2]: "The judgment of "the Court of Appeal means that the profits which can properly "be charged with tax in the hands of the company by whom "those profits are earned are exempted from taxation by reason "of the special character of the company which holds its ordinary "shares. This position is of course due to the application of the "respondents made under section 53 (3) having been as I think "erroneously granted by the commissioners." That is not quite verbally accurate. What the learned Lord obviously meant is the notice having been accepted as valid by the commissioners. "It must be remembered that the respondent company had been "expressly exempted from January 1, 1920, to December 31, "1922, but subsection (3) assumes that the company entitled to "make the application is the company whose profits are subject "to the provisions of the statute, for the profits of the subsidiary "company are to be treated for the purposes of the Act as the "profits of the principal company. The purposes of the Act do "not in this case apply to the profits of the principal company "at all, and although there is underlying the subsection the "assumption that assessment is possible upon the company that "makes the application this is impossible if the company satisfies

[1] (1928) 141 L.T. 1. [2] Ibid. 3.

"the conditions mentioned in section 52 (2) (*b*) (i). Further, "the provisions at the end of subsection (3), providing that the "subsidiary companies shall not be separately assessed, to my "mind suggest that there is to be an assessment on the "company that makes the application, while the concluding words "of the subsection, which relate to the amount of tax that is to "be payable by the principal company, assume that the result "of the application is that some tax at least must be levied from "them. The application, however, having been made and granted "and the assessments on the subsidiary companies discharged on "that basis, it is necessary to consider what is the right con-"clusion upon the hypothesis that the application was rightly "made." There is in that passage very strong support for the view submitted by Mr. Cross. Lord Sumner delivered a speech of two words, and Lord Carson of three words agreeing with Lord Buckmaster, but we do not know whether they also agreed with Lord Buckmaster's obiter dicta which I have just read.

Lord Wrenbury plainly did not accept Lord Buckmaster's view. He said this [3]: "In my opinion the appellants fail. The "Finance Act, 1920, s. 52 (2) (*b*) (3), defines a company by "words which include the Birmingham District Power Co. The "company is therefore within the Act. The proviso contained "in section 52 (2) (*b*) (i) enacts that 'this part of this Act shall "'not' during a relevant time apply to the profits of a com-"pany which carries on certain defined undertakings of which the "undertaking of the Birmingham company is one. It results "that the company is within the Act, but its profits are not. "Being within the Act the company could and did make an "application under section 53 (3), the result of which was that "the profits of the three subsidiary companies are to be treated "'for the purposes of this part of this Act as being the profits' "of the Birmingham company as if the subsidiary companies "were branches of the Birmingham company. The profits of the "Birmingham company are not assessable under the Act. It "follows that the profits of the subsidiary companies which are "to be 'treated for the purposes of this part of this Act as being "'the profits of the principal company' are not assessable." It is quite plain from that that Lord Wrenbury was giving a much more literal construction to the Act, and refused to import any underlying assumption such as the one Lord Buckmaster was prepared to introduce.

Lord Warrington was of the same opinion as Lord Wrenbury although he put the matter in rather a different way. He said this [4]: "The only remaining point to consider is whether a "company, the profits of which are exempt from taxation, is "capable of making an application under the section in question. "There is no exception in terms of such a company from the "generality of the expression 'a company,' and I cannot infer

[3] Ibid. 4.

[4] Ibid. 6.

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HEELEX INVESTMENTS LD. v. INLAND REVENUE COMMISSIONERS.

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"such an exception from the fact that its absence produces a "result which may not have been foreseen."

There is one cardinal distinction between that case and this case, apart from the fact that all the expressions of opinion I have read were obiter, and it is this. In that case, at the time the notice was given, everyone knew that the principal company was an exempt company. In the present case, at the time the notice was given and acted upon, everyone was bound to assume that Sidcup was not an exempt company. Whether Lord Buckmaster would have expressed the views that he did express in a case such as this I do not know.

With all respect to the arguments addressed to me, and with all respect to the observations of Lord Buckmaster, it seems wrong in a taxing statute to introduce any underlying assumption, or any inherent idea, unless the words of the statute compel one to do so. It seems to me that the words here are quite plain. A notice can be given and will continue to operate for the stated period. Where the notice is given, then, for the purposes of the Act—not merely for those of section 19—the profits of the subsidiary company must be treated as the profits of the principal company. If one introduces any underlying assumption, one is really placing a restriction on the meaning of the words "principal company"; because the essential part of the argument is that it is only where the principal company is itself liable that this section operates. I see nothing whatever in the section which justifies that construction. It seems to me that any company, provided that it is resident in the United Kingdom, may give a notice. There is no other restriction contained in section 22 (1). Then, when the notice is given, it automatically follows that the profits of the subsidiary companies of that principal company must for the purposes of the Act be treated as the profits of the principal. If it is found, for some reason or another, for example, that the principal is a statutory undertaker, or that it is subject to some direction under the Finance Act, 1922, the principal itself is not to be taxed because it is exempt. That is the position.

In my judgment, the commissioners came to a wrong conclusion on the matter, and these assessments were not properly made. Accordingly, the appeal will be allowed; the assessments to profits tax must be discharged, and the Crown must pay the costs of the appeal.

Appeal allowed.

Solicitors: *Titmuss, Sainer & Webb; Solicitor of Inland Revenue.*

F. R. D.

[CHANCERY DIVISION.]

* *In re* CAMERON, DECD. CURRIE *v.* MILLIGAN.

1954
Oct. 21.

Roxburgh J.

[1954 C. 2271.]

Will—Construction—Annuity—One third of income of residuary trust fund payable to widow for life—If insufficient to provide £6,500 *in any year "free of English income and super-tax" trustees to pay balance "out of the income of the trust fund"—Whether annuity a continuing charge on income.*

A testator, who died in 1929, by clause 12 of his will directed his trustees to pay to his widow one third of the income of his residuary trust fund and "if one third of the income of the trust "fund shall in any year during the life of my said wife amount "to less than £6,500 per annum free of English income and super-"tax my trustees shall in respect of that year pay or cause to be "paid to my said wife out of the income of the trust fund in "addition to one third of the income thereof such further sum as "will give to her a net income for that year of £6,500 free of "English income and super-tax." By clause 13 the testator directed that "subject to the interest of my said wife in part of the income "of the trust fund under the last preceding clause hereof" his trustees should hold the income of the trust fund on certain trusts.

Although the estate was of considerable value, difficulties arose in the administration of the trust fund, as a result of subsequent legislation increasing the rates of income tax and surtax. Owing to the insufficiency of the income since the year 1938 to produce the net sum required, the executor took out a summons for the direction of the court as to the manner in which the terms of the will in relation to the annuity should be carried out.

Held, that, from the context, and under the terms of clause 12, a limitation of the income to the income of a particular year must be implied; and that the phrase "subject to the interest of my "said wife in part of the income of the trust fund under the last "preceding clause hereof," at the beginning of clause 13 was inconsistent with the conception that income was only to be dealt with subject to a continuing charge by the annuitant on each and every part thereof; so that the widow had no power to resort to accumulations of income or to the income of the accumulations in right of her annuity.

In re Coller's Deed Trusts [1939] Ch. 277; 53 T.L.R. 859; [1937] 3 All E.R. 292 considered.

ORIGINATING SUMMONS.

By his will dated June 2, 1927, the testator Alastair Cameron (who died on February 23, 1929), after giving certain specific and pecuniary bequests and directing his trustees to sell and convert into money his real and personal estate, and directing the payment of debts, funeral and testamentary expenses and legacies, directed by clause 12: "My trustees shall pay or cause to be paid one-"third of the income of the residue of the said moneys (which "moneys and the property for the time being representing the "same are hereinafter called 'the trust fund') to my said wife

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"for her life and so that during coverture the same shall be "without power of anticipation I declare that if I shall have in "my lifetime not made any settlement in favour of my said "wife and if one-third of the income of the trust fund shall in "any year during the life of my said wife amount to less than "£6,500 per annum free of English income and super-tax my "trustees shall in respect of that year pay or cause to be paid "to my said wife out of the income of the trust fund in addition "to one-third of the income thereof such further sum as will give "to her a net income for that year of £6,500 free of English "income and super-tax."

Clause 13 (1): "Subject to the interest of my said wife in "part of the income of the trust fund under the last preceding "clause thereof my trustees shall upon my [son] attaining the "age of 25 years hold the income of the trust fund upon . . . "protective trusts for my said son during the remainder of his "life."

Clauses 14 to 18 of the will, which are sufficiently set out in the judgment, contained directions to the trustees with regard to the application of income towards the maintenance of the testator's son until he attained 25 years and to accumulate the residue of such income and hold such accumulations and the resulting income for the person or persons who should eventually become entitled to the principal sum from which the same should have proceeded, and in the event of the failure of these trusts the trust fund was to be held in trust for certain specified persons.

The testator had only one son. He was born on October 5, 1916, and died on August 19, 1940, so that he attained 21 but did not attain 25.

A summons was taken out by the executor of the will to determine (inter alia): (3) whether on the true construction of the will and in the events which had happened, and having regard to the insufficiency since the year 1938 of the income of the trust fund to provide the testator's widow with such a further sum as would give her a net income of £6,500 (as reduced in amount by the joint effect of section 25 of the Finance Act, 1941, and section 20 of the Finance (No. 2) Act, 1945), free of income tax and surtax (*a*) accumulations of surplus income made pursuant to clause 16 of the said will during the lifetime of [the son] and [subject to any answer which might be given to question 4]; (*b*) the income arising from accumulations so made were or was applicable for the purpose of providing the testator's widow with the said net income of £6,500 (so reduced as aforesaid); (4) whether there was an intestacy as to the income arising from the said accumulations subsequently to the expiration on February 23, 1950, of the period of 21 years from the testator's death and, if so, whether such income ought to be applied in the first place in or towards discharge after statutory charge for

£1,000 and interest to which the widow of the testator would be entitled under such partial intestacy.

H. A. Rose for the plaintiff.
W. T. Elverston for certain beneficiaries.
W. A. Bagnall for infant beneficiaries.
Owen Swingland for the testator's widow.

Cases referred to in argument: *In re Coller's Deed Trusts* *; *In re Platt.*†

ROXBURGH J. This is not an easy case, and I am surprised to find that there is not in the reports any case bearing any resemblance to it; because, though it is a type of case which would have been unlikely to occur before the war, there must be many settlements in existence under which it must be occurring nowadays.

The short point is this: The testator, who was a man of great wealth, provided that his widow should receive a specified portion of income, with a proviso that if it fell short of a certain sum free of income tax and surtax, it (that is to say, the aliquot portion of income of residue) should be made up to a specified sum. Of course, the whole approach to the problem must necessarily be artificial, because if there is one thing that can be predicated with certainty it is that this testator, who died in the year 1929, never considered the possibility that, owing to the lamentable events since that date, the income of his estate in any particular year might fall short of the amount required to provide the full sum which he intended his widow to have. I stress that, because much has been said about giving priority to an intention to benefit his widow. It is obvious, from the large sum which he has given her, that he intended her to be amply, or perhaps more than amply, provided for; but the question which I have to determine is one which I am sure he could not, as a reasonable man, have contemplated. Therefore, I resile altogether from the suggestion that it is possible to interpret this will in any other manner than by looking strictly and particularly at the words which he has used. Again I resile from the suggestion that there is some kind of presumption of law which should actuate me in my approach.

There is, of course, the well-known case of *In re Coller's Deed Trusts* [1] (none the less difficult because well known). The difficulty, as Mr. Bagnall in his short but extremely able argument pointed out, is the reconciliation of the absolute principle laid down by Romer L.J.[2] with the approbation of the decision in *In re Platt.*[3] A reconciliation there may well be, and I think

* [1939] Ch. 277; 53 T.L.R. 859; [1937] 3 All E.R. 292.
† [1916] 2 Ch. 563.

[1] [1939] Ch. 277.
[2] Ibid. 281.
[3] [1916] 2 Ch. 563.

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it is perhaps material for me to say this much for the purposes of the present case: if there is a continuing charge on income, then, as the annuitant has a charge on each and every part of income, nobody, strictly speaking, during the life of the annuitant can have anything without the consent of the annuitant; but, of course, as everybody knows, though there may be a charge on each and every part of a fund, that does not in the least mean that each and every part of the fund will be required to meet the charge. That doctrine, if given unfettered play, would produce such ridiculous results that it becomes necessary to invoke the idea that if the trustees pay over some part of the income to some other beneficiary without the consent of the annuitant, technically they have committed a breach of trust, but it is a breach of trust which is justified. If that is the reconciliation, it does not make a great appeal to me, but I do not know of any other. At any rate, Romer L.J. did say one thing with absolute certainty, and it is on this that I think this case will largely turn, namely [4]: "But what is to happen to the surplus remaining in any year "after the annuity and all arrears up to that time have been "satisfied? I cannot think that the answer to this question "admits of any doubt. Where any property is charged with or "is subject to a trust for payment of an annuity the annuitant "is entitled to demand and can, by taking the appropriate steps, "ensure that every part of that property is made available for "payment of the annuity, and the right of the annuitant must "prevail whatever may be the nature of the property that is "charged or is the subject-matter of the trust. Where, there-"fore, the property in question is the income of a fund, the "annuitant is in strictness"—and I would emphasize those two words "in strictness"—"entitled to require that the surplus "income in any year, after keeping down the current instalments "of the annuity and any existing arrears, shall, within the limits "permissible by law, be accumulated for the purpose of meeting "subsequent instalments. If this be the right, as I think it is, "of an annuitant whose annuity is a continuing charge upon "the income of a fund until paid in full, any directions in the "instrument creating the annuity that are inconsistent with that "right indicate that the annuity is not meant to be so charged."

Having regard to the extraordinary incidence of a continuing charge, if strictly applied—and I must confess I do not know if I am right in thinking that the words "in strictness" mean "according to the principles of equity," but I think that they must—one would be slow, I should have thought, to find a continuing charge except in a very clear case. I do not altogether relish a situation in which the law says that a man has an equitable right but that he would be so unreasonable in enforcing it that the court would never assist him. That appears to be the position with regard to these continuing charges in certain cases.

[4] [1939] Ch. 277, 281.

One thing that is clear is that this question is a question of construction in the first instance. The words of the gift are quite unusual in their form, though not unusual in substance, and are as follows: "My trustees shall pay or cause to be paid one-third "of the income of the residue of the said moneys," which are defined as "the trust fund," "to my wife for her life." So far, that is simple, and then this is the additional clause which creates what I think is undoubtedly an annuity in law: "and if one-third "of the income of the trust fund shall in any year during the "life of my said wife amount to less than £6,500 per annum free "of English income and super-tax"—the word "English" is there because this testator had many interests abroad—"my "trustees shall in respect of that year pay or cause to be paid to "my said wife out of the income of the trust fund in addition to "one-third of the income thereof such further sum as will give "to her a net income for that year of £6,500 free of English "income and super-tax." As everybody knows, a fantastic gross income is now required to produce that net sum. I have lost the faculty of calculating anything so vast; and, of course, the gross income of this estate, great though it is, is quite insufficient to provide that sum, even though it is reduced by the operation of section 25 of the Finance Act, 1941. The will goes on: "Subject to the interest of my said wife in part of the income of "the trust fund under the last preceding clause hereof my "trustees shall upon my [son] attaining the age of 25 years hold "the income of the trust fund upon (subject as hereinafter men-"tioned) protective trusts for my said son during the remainder "of his life."

The testator had only one son. He was born on October 5, 1916. He died on August 19, 1940; so that he attained 21, but he did not attain 25. He was married, but there is no provision under this will for any wife of his. He was quite a small boy when the testator died, and he had no issue.

Clause 14 directs: "After the death of my said son my "trustees shall (subject to the interest aforesaid of my said wife "in part of the income of the trust fund during her life) stand "possessed of the capital and future income of the trust fund in "trust for the issue of my said son in such shares and in such "manner" as his son should appoint. As he had no issue, he could not exercise the power of appointment, and the trusts in favour of issue in default of appointment also failed.

Clause 15 directs: "If at my death my said son shall be "under the age of 25 years my trustees may until he attains the "age of 25 years apply or cause to be applied the whole or such "part as they in their discretion shall think fit of the income "which my said son would if he had attained the age of 25 years "be entitled to receive under the trusts hereinbefore contained "for or towards his maintenance education or benefit and may "either themselves so apply the same or may pay the same to

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"the guardians or guardian of my said son for the purpose "aforesaid without seeing to the application thereof and shall "accumulate the residue of such income and hold such accumu-"lations and the resulting income thereof for the person or "persons who shall eventually become entitled to the principal "fund from which the same shall have proceeded with power at "their discretion to apply the said accumulations or any part "thereof during the infancy of my said son as if the same were "income arising in the then current year"; and clause 16 provides: "Upon my said son attaining the age of 21 years and "until he shall attain the age of 25 years"—and, of course, he did attain 21, though he never attained 25; so this clause came into operation—"my trustees shall pay to him out of the income "referred to in the last preceding clause hereof such sums as "with any income provided for him by any settlement will make "up his income to the sum of £1,000 per annum at least and "shall accumulate the remainder (if any) of such income and "hold such accumulations and the resulting income thereof in "the same manner and for the same purposes as if they were "made in pursuance of the last preceding clause hereof." That clause also raises great difficulties, to which I will revert presently.

By clause 18: "If the trusts hereinbefore declared shall fail "or determine then subject to the trusts powers and provisions "hereinbefore declared and contained and to the powers by law "vested in my trustees and to every or any exercise of such "powers my trustees shall hold the trust fund and the income "thereof in trust for such of my said sisters," and he mentions the persons specifically, "as shall be living at the failure or "determination of the prior trusts hereinbefore contained," with a clause of substitution. I have already held that the failure or determination of the prior trusts will not happen until the death of the testator's widow. She is still alive.

I must confess that if clause 12 (which, of course, is the primary clause) stood alone, I should, on the whole, be inclined to say that there was not a continuing charge on income. That depends on how I construe the words "shall in respect of that "year pay or cause to be paid to my said wife out of the income "of the trust fund in addition to one-third of the income thereof "such further sum as will give to her a net income for that year "of" so much. Mr. Swingland, in a very able argument, said: the testator does not say "out of the income of the trust fund "in that year," and therefore presumably he meant "out of the "income of the trust fund generally"; but, on the whole, though it is a matter of first impression, it seems to me that, from the context in this clause which I have already read, must be implied the limitation of the income to the income of the particular year. That seems to me to be exactly what the testator meant: that and nothing else.

However, I should be very slow to decide the case on that ground if I could find no other, because that, after all, is a question of first impression and I can well believe that it might strike other people differently. Some people may not be so impressed as I am by the extreme improbability that anybody in a will of this sort would want to create a continuing charge on income when it has the vast consequences indicated by the judgment of Romer L.J. in *In re Coller's Deed Trusts.*[5]

I think that the matter is really concluded by clause 13, because it begins: "Subject to the interest of my said wife in "part of the income of the trust fund." There are two things to notice about that. It may be of some significance that he uses the word "interest" and not the word "charge" or simply the words "subject to." He says "Subject to the interest," an unusual phrase which, so far as I am concerned, seems to me to point away from rather than in the direction of a charge. But that is a small point compared with the next point which Mr. Bagnall urged, which is that, if there is a continuing charge, its very nature involves a charge on each and every part of the income, as Romer L.J. said quite specifically. Therefore, it seems to me that by saying that it is an interest in a part of the income of the trust fund—and he said it more than once, but it gains no additional strength by repetition—he has in effect said that it is not a continuing charge. That seems to me to be a devastating point. The fact that not all the income would ever be expected to be required in the days when the will was made is, to my mind, beside the point. If there is a continuing charge, it is because the will is construed as saying that income is only to be dealt with subject to a continuing charge by the annuitant on each and every part thereof; and this phrase, in my opinion, is quite inconsistent with that conception.

I think that there are other indications which point in the same direction, but I must confess that I regard that one as almost conclusive.

There is one different line of argument which I must now consider. Clause 15 gives an express power to resort to accumulations. If there is one thing that is clear about that power, it is that it was not inserted for the benefit of the widow in respect of her annuity, and I do not think that by accident it was limited to infancy. It was so said in terms, and I do not think that it was an accident. I have been asked to strike out the words "during the infancy," so as to construe it as giving a power to resort to accumulations in aid of the widow's annuity. I can see no ground at all for striking out those words. It seems to me that they were intended to be there. So far as clause 16 is concerned, I think that something has gone wrong, because I do not think that was intended to be confined to

[5] Ibid.

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infancy, and I think that it would be difficult to construe it otherwise. However, I need not pursue that point, because if I were disposed to do violence to clause 16, which I am not, I should merely extend the power to resort to accumulations during the period between the date when the infant attained 21 years and the date when he would have attained 25 years if he had lived, and accordingly I would not, even if I did anything to it, extend it in such a way as to enable resort to be had to it now after his death.

That being so, I have come to the conclusion that there is no continuing charge on income. It has not been contended that there is a charge on capital. The result is that the widow has no power to resort to the accumulations or to the income of the accumulations in right of her annuity. I say that because she may be entitled under a different title.

I now must mention that the period allowed by law for accumulation ended on February 23, 1950; so, of course, there can be no lawful accumulation after that date, and I think that it is agreed that as from that date the widow is entitled to the income from the accumulations in right of intestacy. It has not been contended that the widow is not entitled to the income of the accumulations since that date. I suppose that she receives the surplus income, if any, but there will not be any; so it does not matter.

Declarations accordingly.

Solicitors: *Johnson, Jecks & Landons; Elvy Robb & Co.; Lee, Bolton & Lee.*

J. L. D.

[COURT OF APPEAL.]

C. A.

1954
Oct. 22, 25.

Denning, Birkett and Morris L.JJ.

* RAZZEL *v.* SNOWBALL.

Limitation of Action—Public authority—Hospital—Duty of Minister to provide "services of specialists"—Specialist performing services as agent of Minister protected by statutory limitation period—Limitation Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 21), *s.* 21 (1).

National Health Service—Hospital—Specialist—Duty of Minister to provide "services of specialists"—Extension of duty to treatment carried out by specialists—Specialist acting as agent of Minister —National Health Service Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 81), *s.* 3 (1) (*c*).

The duty "to provide . . . the services of specialists" placed on the Minister of Health by section 3 (1) (*c*) of the National Health Service Act, 1946, is not limited to the provision of specialists but extends to the provision of treatment by those specialists. Accordingly a specialist appointed under the section, when performing an operation on the plaintiff, was acting as the agent of the Minister in execution of an Act of Parliament or a public duty, and was entitled to rely on the protection of section 21 (1) of the Limitation

Act, 1939, so as to bar the plaintiff's right of action in a claim for alleged negligence brought by her against the specialist more than one year from the date of the operation.

Decision of Lord Goddard C.J. affirmed.

APPEAL from Lord Goddard C.J.

The defendant, Laurence Alfred Howard Snowball, was a part-time surgeon engaged as a specialist under the National Health Service. The terms of his engagement were contained in a letter of January 5, 1950, written to him by the Secretary of the South-East Metropolitan Regional Hospital Board, as follows: "I am instructed by the South-East "Metropolitan Regional Hospital Board to offer you a part-"time appointment as general and orthopaedic surgeon with "effect from January 1, 1950, to the staff of the hospitals "maintained by the following hospital management com-"mittee(s) Eastbourne (general surgery—two notional half-"days); (orthopaedic surgery—two notional half-days)." The letter stated further that the duties attached to the appointment were "the provision of hospital and specialist services under "section 3 of the National Health Service Act, 1946,[1] within "your appointment," and continued: "The average number of "hours per week for which, it is estimated, these duties and the "travelling time necessary for the performance of these duties will "require your attendance is fourteen and this number of hours "represents four notional half-days." His salary, £795 9s. 1d., for the part-time work he was to do was then stated. The appointment incorporated the terms and conditions of service issued in a pamphlet by the National Health Service. On January 11, 1950, Mr. Snowball accepted the terms of the appointment.

On November 23, 1950, Mr. Snowball performed an operation on the plaintiff, Gloria Maria Razzel, at the St. Mary's Hospital, Eastbourne. Two years later, on November 28, 1952, the plaintiff brought an action against Mr. Snowball alleging negligence in his conduct as a surgeon. On a preliminary point, the defendant claimed that the proceedings were out of time, since he had performed the operation in the course of his duty, and that he was protected by the one-year limitation provided by section 21 (1) of the Limitation Act, 1939 (repealed by the Law Reform (Limitation of Actions) Act, 1954) in that he was "acting in execution or purported execution of a public duty or

[1] National Health Service Act, 1946, s. 3: "(1) As from the "appointed day, it shall be the duty "of the Minister to provide through-"out England and Wales, to such "extent as he considers necessary to "meet all reasonable requirements, "accommodation and services of the "following descriptions, that is to "say:—(a) hospital accommodation; "(b) medical, nursing and other ser-"vices required at or for the purposes "of hospitals; (c) the services of "specialists, whether at a hospital, a "health centre provided under Part "III of this Act or a clinic or, if "necessary on medical grounds, at "the home of the patient; and any "accommodation and services pro-"vided under this section are in this "Act referred to as 'hospital and "'specialist services.'"

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"authority and/or pursuant to the provisions of the National "Health Service Act, 1946."

Lord Goddard C.J., on May 20, 1954, gave judgment for the defendant, holding on the preliminary point that he was entitled to the protection afforded by section 21 (1) of the Limitation Act, 1939.[2]

S. N. Bernstein for the plaintiff.
J. R Cumming-Bruce for the defendant.

The following cases were cited in the argument: *Gold* v. *Essex County Council*[3]; *Nelson* v. *Cookson*[4]; *Higgins* v. *North West Metropolitan Hospital Board and Bach*[5]; *Cassidy* v. *Minister of Health*[6]; *Collins* v. *Hertfordshire County Council*[7]; *Roe* v. *Minister of Health*[8]; *Griffiths* v. *Smith*[9]; *Drake* v. *Bedfordshire County Council.*[10]

DENNING L.J. delivered a judgment which he later revised to read as follows. He stated the facts, and continued:—I am glad to say that since the Law Reform (Limitation of Actions) Act, 1954, the problems arising from the Public Authorities Protection Acts will no longer trouble the courts. Since June, 1954, the period of limitation is the same for everybody whether they are public authorities or not, namely, three years. But this case is not affected by that Act. The question here is whether the surgeon is within the protection of the Limitation Act, 1939. Section 21 protects the surgeon if the act was done "in pursuance, or "execution, or intended execution of any Act of Parliament, or "of any public duty or authority." The surgeon says that he comes within that section because it was the duty of the Minister of Health under the National Health Service Act, 1946, to provide treatment by means of specialists; that, when he was operating on the plaintiff, he was only an agent of the Minister carrying out the Minister's duty; and that he is therefore protected by the Act; whereas the plaintiff says that the Minister was under no such duty. The Minister's duty, she says, was only to provide the specialists and not the treatment; and that when the surgeon performed the operation he was not carrying

[2] Limitation Act, 1939, s. 21: "(1) No action shall be brought "against any person for any act done "in pursuance, or execution, or "intended execution of any Act of "Parliament, or of any public duty "or authority, or in respect of any "neglect or default in the execution "of any such Act, duty or authority, "unless it is commenced before the "expiration of one year from the date "on which the cause of action "accrued: . . ."

[3] [1942] 2 K.B. 293; 58 T.L.R. 357; [1942] 2 All E.R. 237.

[4] [1940] 1 K.B. 100; 56 T.L.R. 2; [1939] 4 All E.R. 30.

[5] [1954] 1 W.L.R. 411; [1954] 1 All E.R. 414.

[6] [1951] 2 K.B. 343; [1951] 1 T.L.R. 539; [1951] 1 All E.R. 574.

[7] [1947] K.B. 598; 63 T.L.R. 317; [1947] 1 All E.R. 633.

[8] [1954] 2 Q.B. 66; [1954] 2 W.L.R. 915; [1954] 2 All E.R. 131.

[9] [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 56.

[10] [1944] 1 K.B. 620; 60 T.L.R. 304; [1944] 1 All E.R. 633.

out the Minister's duty but only the surgeon's private duty. The question therefore is, what is the Minister's duty under the Act? Is it to provide treatment or merely to provide specialists? This depends, of course, on the true interpretation of the Act.

By section 1 it is the duty of the Minister to "promote the "establishment in England and Wales of a comprehensive "health service . . . and for that purpose to provide or secure "the effective provision of services in accordance with the "following provisions of this Act." One of the services which he has to provide is "hospital and specialist services," and in regard to them section 3 (1) of the Act says that "it shall be "the duty of the Minister to provide throughout England and "Wales, to such extent as he considers necessary to meet all "reasonable requirements, accommodation and services of the "following descriptions, that is to say:—(*a*) hospital accommo-"dation; (*b*) medical, nursing and other services required at or "for the purposes of hospitals; (*c*) the services of specialists, "whether at a hospital, a health centre provided under Part III "of this Act or a clinic or, if necessary on medical grounds, at "the home of the patient." As I read that section in the light of the other sections of the Act and of the regulations, it is the duty of the Minister to provide all necessary services at the hospitals. He is to do it by means of doctors and nurses under paragraph (*b*) and by means of specialists under paragraph (*c*). He does not discharge his duty merely by appointing competent doctors and nurses and competent specialists. He has not merely to provide the staff. He has to provide their services; and, inasmuch as their services consist of treating the sick, it is his duty to treat the sick by means of their services.

An attempt was made to distinguish between doctors and nurses under paragraph (*b*) and specialists under paragraph (*c*). It was conceded that doctors and nurses were carrying out the duty of the Minister but it was said that specialists were not. I cannot see any justification for this distinction. All of them, doctors, nurses and specialists, are carrying out the Minister's duty to treat the sick.

Turning back now to the contract by which Mr. Snowball was engaged, there can be no doubt that the regional board appointed Mr. Snowball as a specialist to perform the duty which the Act laid on the Minister, namely, to treat the sick by means of specialist services: and that being so, Mr. Snowball was simply carrying out the Minister's duty and is protected by the Limitation Act.

In support of this interpretation of the Act I would refer to the observations which Lord Greene M.R. and Goddard L.J. made in *Gold* v. *Essex County Council*.[1] The terms of the Act then in question were those of the Public Health Act, 1936. They were not nearly so strong as the terms of the National

[1] [1942] 2 K.B. 293, 303, 309; 58 T.L.R. 357; [1942] 2 All E.R. 237.

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Health Act, 1946, but nevertheless both Lord Greene M.R. and Goddard L.J. were clearly of opinion that the effect was to impose a duty on the hospital authority not merely to provide staff but also to provide treatment—in short to treat the sick.

It is no new thing to find the doctors and surgeons of public hospitals protected by the Limitation Act. In *Nelson* v. *Cookson*,[2] Atkinson J. held that medical officers of the West Middlesex County Hospital were entitled to the protection of the Public Authorities Protection Act. In *Higgins* v. *North West Metropolitan Hospital Board and Bach*,[3] Pilcher J. held that a part-time specialist who was performing duties in the hospital was protected under section 21 of the Limitation Act.

In the present case Lord Goddard C.J. followed those cases. He stated the true position when he said: "I think that the "surgeon is an agent, both of the Minister and of the hospital "board, because the Minister and the hospital boards have "specific duties to carry out; that is to say, to offer medical "and surgical treatment." As an agent of a public authority, he is entitled to the protection of the Limitation Act just as the public authority itself.

Mr. Bernstein pressed us with some observations in the cases about consultants. He said the defendant was a part-time consultant, and that a consultant was in a different position from the staff of the hospital. I think Mr. Cumming-Bruce gave the correct answer when he said that, whatever may have been the position of a consultant in former times, nowadays, since the National Health Service Act, 1946, the term "consultant" does not denote a particular relationship between a doctor and a hospital. It is simply a title denoting his place in the hierarchy of the hospital staff. He is a senior member of the staff but nevertheless just as much a member of the staff as the house surgeon. Whether he is called specialist or consultant makes no difference. He, like all the others, is just carrying out the duties of the Minister and is entitled to the protection of section 21 of the Limitation Act. For these reasons, I am of opinion that the appeal should be dismissed.

BIRKETT L.J. By section 1 of the National Health Service Act of 1946, it was the design of Parliament that there should be instituted a comprehensive free health service, which the Minister of Health was enjoined and empowered to set up; and it was that health service to which Mrs. Razzel appealed when she went for the operation to her toes. By section 3, the Minister is empowered to provide that health service. It is quite true that the section is split up by saying: "to provide through-"out England and Wales, to such extent as he considers "necessary to meet all reasonable requirements, accommodation "and services of the following descriptions, that is to say:—

[2] [1940] 1 K.B. 100; 56 T.L.R. 2; [1939] 4 All E.R. 30.

[3] [1954] 1 W.L.R. 411; [1954] 1 All E.R. 414.

" (*a*) hospital accommodation " with which we are not concerned and " (*b*) medical, nursing and other services required at or for " the purposes of hospitals " with which we are concerned. Mr. Bernstein says that if in (*b*) there had been put in brackets " including specialists' services " he would have nothing more to say; but because in the Act of Parliament specialists' services were put under (*c*) by themselves—" the services of specialists, " whether at a hospital, a health centre provided under Part III " of this Act or a clinic or, if necessary on medical grounds, at " the home of the patient "—he says that the protection of section 21 cannot apply; that the draftsman had in mind that all that the Minister was empowered to do was to provide the man, namely, the specialist, and that this elaborate machinery of the regional board and so on was designed with that end in view. My mind is coloured a great deal by this fact, that after (*a*), (*b*) and (*c*) have been set out in section 3, it concludes: " and any accommodation and services provided under this " section are in this Act referred to as ' hospital and specialist " ' services ' "—linking them all together. It would be simple to go through this Act of Parliament and see how in section after section that same phraseology is employed. The two are linked together; in section 11, for example, regional hospital boards, management committees, boards of governors, and so on, are to be constituted by the Minister " for such areas as he may " by order determine, for the purpose of exercising functions " with respect to the administration of hospital and specialist " services in those areas." In sections 12, 13, 14 and so on, one finds that, although the draftsman has certainly separated (*a*), (*b*) and (*c*), they are all linked together in " hospital services." It seems quite impossible to contend that what the Act was aiming at and saying was: " Your duty, Mr. Minister, is to find " the men." It must mean that what the Minister is to be empowered and enjoined to do is not merely to select the men but the specialists to perform the services which alone make the health service of any value whatsoever. It is not merely providing the men but also the service. It is quite plain that when Mrs. Razzel went under the service for her treatment it was under the National Health Service Act. She was treated by the orthopaedic surgeon who had been appointed by the regional board as one of the specialists for that area on the terms set out. I see that in the regulations in one of the schedules there is this heading: " Category I: Work which is within the scope of the " hospital and specialist services provided under section 3 of the " Act," and there follows a long list of things which can be done and a long list of what cannot be done, hospital and specialist services being inextricably linked together. It seems plain that what Mr. Snowball was doing was that which the Minister through the board had appointed him to do. The act that he did, therefore, was done as an agent of the regional board, or the agent of the Minister, and in so doing he brought himself

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entirely within the words of section 21 (1) of the Limitation Act. He was doing it in execution of the Act of Parliament, that is, the Act of 1946, which itself created the health service; and it was a public duty which had been imposed by Parliament on the Minister who was acting through his agent. I agree that this appeal ought to be dismissed.

MORRIS L.J. It was the duty of the Minister to promote a comprehensive health service. In the course of performing that duty it was his function to provide hospital and specialist services as well as hospital accommodation. It was, therefore, his duty to provide the services of medical men in the hospital, the services of nurses, the services of the hospital staff and also the services of specialists. It is clear that the position in this case cannot be affected by the circumstance that Mr. Snowball was engaged only as to part of his time; nor can it in any way affect the position that he was exercising his skill in a manner for which he was specially qualified, so that it would be inappropriate for anyone to interfere while he was in the actual course of doing what he thought best in a particular case. He was engaged by the Minister to give certain services which were a part of the hospital and specialist services which it was the duty of the Minister to provide. It would follow that Mr. Snowball was performing a public duty and that what he did and the services that he rendered were acts done in the execution or intended execution of an Act of Parliament.

We were referred by Mr. Cumming-Bruce to a passage in the speech of Lord Maugham in *Griffiths* v. *Smith*,[4] who said[5]: "It is sufficient to establish that the act was in substance done "in the course of exercising for the benefit of the public an "authority or a power conferred on the public authority not "being a mere incidental power, such as a power to carry on "a trade." In *Nelson* v. *Cookson*,[6] Atkinson J. expressed himself as follows: "The council could not exercise that authority "by their own hands, but must act through other people, and "on the relevant occasion their authority was being exercised by "these two medical men. It seems to me idle to say that they "were not acting in pursuance of a public duty and authority "conferred on the Middlesex County Council. They were per-"forming this public duty or authority, whichever you may like "to call it, as agents or delegates for and on behalf of the "council, and they are entitled to the benefit of the Act of "1893." Similarly in this case it can be said that Mr. Snowball was doing what he did as the agent or delegate for or on behalf of the Minister, and that he is entitled to the protection of section 21 of the Limitation Act. It follows from that that it is not necessary here to consider any application of the doctrine of respondeat superior to the work done by Mr. Snowball.

[4] [1941] A.C. 170; 57 T.L.R. 185; [1941] 1 All E.R. 56.

[5] [1941] A.C. 170, 185.

[6] [1940] 1 K.B. 100, 105.

Similarly it is not necessary to express any opinion as to the position of a medical practitioner to whom section 33 of the Act applies; nor to express any opinion on any special case such as one which might arise under section 29 of the Act. Mr. Cumming-Bruce has pointed out that there are certain differences in language in other sections which may have to be considered if and when the occasion arises. I am satisfied that the provisions of section 21 were available for Mr. Snowball, and I am in agreement with the judgment of Lord Goddard C.J.

Appeal dismissed.

Solicitors: *Walter O. Stein; Hempsons.*

M. M. H.

[CHANCERY DIVISION.]

* PRACTICE DIRECTIONS (APPLICATIONS : AFFIDAVITS : MORTGAGES).

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PRACTICE DIRECTIONS.

Practice and Procedure—Chancery Division—Applications, ex parte—Affidavits—Office copies—Mortgage—Redemption and foreclosure—Notice—Place of redemption.

With a view to carrying out certain recommendations of the Committee on Supreme Court Practice and Procedure, the judges of the Chancery Division have directed as follows:—

1. EX PARTE APPLICATIONS.

Where, by any rule or practice, orders or directions may be sought in chambers ex parte supported by affidavit, it shall not be necessary to issue a summons for such purpose unless required by the rule under which the application is made or the judge shall otherwise direct.

Examples.

(1) Garnishee order nisi.
(2) Change of parties upon devolution of interest.
(3) Appointment of next friend or guardian-ad-litem of an infant or person under disability in the stead of such a person who has died.
(4) Substituted service of writ and other process.

2. OFFICE COPIES OF AFFIDAVITS.

Unless the court or a judge in any particular instance shall otherwise direct, it shall not be necessary to bespeak for the use of the court or judge office copies of affidavits intended to be filed in connexion with interlocutory or procedural matters as distinct from affidavits forming part of the evidence in a suit or dealing

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with the merits of the case; as to which latter the existing practice shall continue.

Examples where office copies will not usually be required:—

(1) Of fitness to act as receiver, manager, next friend or guardian-ad-litem or guardian of an infant.

(2) Verifying the security of a surety or a receiver's, manager's or guardian's account.

(3) Proving service of process (including notices to prove a claim or the allowance thereof).

(4) In support of applications under R.S.C., Ords. 7, r. 4; 14, 18, r. 2; 31, r. 19A (3); and 57, etc.

Note.—A more extensive list can be inspected in the Masters' Summons Rooms.

3. REDEMPTION AND FORECLOSURE OF MORTGAGED PROPERTY.

(1) All orders nisi for redemption or foreclosure of mortgaged property shall provide that unless the mortgagor or other the person who is required to pay the redemption money shall, at least seven days prior to the date fixed for redemption by the order or the master's certificate pursuant thereto, give to the mortgagee's solicitor a written notice of his intention to redeem at the appointed time and place, attendance made for the purpose of redemption at the appointed time and place shall be treated as a notice of intention to attend at the same place and time on the corresponding day of the week then following and the period allowed for redemption shall be treated as enlarged accordingly.

(2) The master's certificate pursuant to an order nisi (or the order itself if thereby a certificate is avoided) shall nominate as the place of redemption the office of the mortgagee's solicitors if it be within five miles of the Royal Courts of Justice, Strand, or such other place as may be agreed between the parties and recorded in the order or certificate. In all other cases the place for redemption shall be recorded as Room 138 of the Royal Courts of Justice, Strand, W.C.2.

M. G. WILLMOTT,
Chief Master.

November 3, 1954.

[COURT OF APPEAL.]

C. A.

1954
Oct. 29;
Nov. 1.

Lord Goddard C.J., Hodson and Romer L.JJ.

* WELLS *v.* WELLS.

Husband and Wife—Divorce—Condonation—Confession of adultery by wife with X—Act of intercourse following confession—Effect of condonation not destroyed by husband later learning extent of adulterous association with X. Restitution of conjugal rights—Desertion—Bona fide offer by deserted but guilty wife to resume cohabitation—Husband paying maintenance—Decree for restitution of conjugal rights—Mutual affection not necessary. Desertion.

A husband had intercourse with his wife immediately after she had confessed to him that she had committed adultery with and was pregnant by another man. Later he learned that she had committed adultery with the same man on a number of occasions. He thereupon left the matrimonial home, and refused to return, although his wife begged him to do so; but he continued to support her and the child of their marriage. Later the wife filed a petition for restitution of conjugal rights, and by his answer the husband alleged just cause for leaving her, namely, the adultery and other complaints not amounting to matrimonial offences. Having seen the answer, the wife wrote him a letter accusing him in turn of many unkind acts during their married life. The husband thereupon amended his answer to allege that she had not a sincere desire to resume cohabitation with him:—

Held (1) that an act of intercourse with knowledge of adultery with a man was condonation in law, the effect of which was not destroyed by later more specific knowledge of the extent of the adultery with him.

Henderson v. *Henderson* [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44 followed.

(2) That where the wife showed a genuine desire for the matrimonial home to be re-established, the court was bound to grant a decree for restitution of conjugal rights, irrespective of whether the parties had any affection for each other; a fortiori, in the present case where the wife's motive was not solely to obtain maintenance. Her letter was in the nature of a tu quoque.

Price v. *Price* [1951] P. 413; [1951] 2 All E.R. 580n. considered.

Decision of Mr. Commissioner Grazebrook Q.C. reversed on both points.

APPEAL from Mr. Commissioner Grazebrook Q.C.

The parties were married in 1941, and there was one child of the marriage. In May, 1951, the wife confessed to her husband that she had committed adultery with another man and was pregnant by him. On the same day, having heard his wife's confession and believing that she had committed adultery more than once, the husband had intercourse with her; but he had no further sexual relations with her after that day. He continued to live in the matrimonial home until, in November, 1951, he found a letter in her handbag which she had written to the other man, giving details which showed that she had committed adultery with him on at least eight occasions. The husband did not discuss the letter with his wife, but told her that in future he would look after himself; and in December he found other accommodation, left the matrimonial home, and did not return. She wrote to him many times, begging him to return, but he refused to do so, though he continued to maintain her and the child of the marriage, sending her £4 a week. Shortly after, she gave birth to the child of the other man, and registered it as the child of her husband.

In December, 1952, the wife filed a petition for restitution of conjugal rights. By his answer the husband admitted that he had refused to live with her since December, 1951, but that he had just cause for not doing so; and he set out various complaints

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of matters during the married life, and in particular the complaint that his wife had committed adultery.

After his wife had seen that answer, she wrote a letter to him, in which she accused him of many forms of unkind conduct during their married life. The husband thereupon amended his answer, alleging, in reliance on that letter, that his wife had not a sincere desire to resume cohabitation with him.

The commissioner, on June 18, 1954, distinguishing *Henderson* v. *Henderson* [1] on the facts, held that the occasion on which the husband had had intercourse with his wife after the confession of adultery did not amount to condonation in law, because at the time he had not been in possession of all the material facts. He held, further, that the wife was not sincere in her desire to have her husband return to her as she had not satisfied the court that she wanted him back with all that his return entailed, namely, the rendering to him of marital rights; and he refused to grant the decree prayed for.

The wife appealed.

D. R. Stuckey for the wife.
Victor Russell for the husband.

The following cases were cited in the argument: *Williams* v. *Williams* [2]; *Palmer* v. *Palmer* [3]; *Harnett* v. *Harnett* [4]; *Price* v. *Price* [5]; *Timmins* v. *Timmins* [6]; *Russell* v. *Russell* [7]; *Greene* v. *Greene*.[8]

LORD GODDARD C.J. Although I feel bound to say that I think the decision of the commissioner, refusing the wife an order for restitution of conjugal rights, must be reversed, I have very considerable sympathy for the view which he took, because the law seems to be in a somewhat curious position in regard to this matter. We have had a number of cases cited to us, and it is not easy to reconcile them all.

[His Lordship stated the facts, and continued:] We feel that we cannot say that there was no condonation here without knowledge of the facts. It was always the same man. It was not as if the wife had committed adultery on eight occasions with eight different men. She had told her husband that she had been unfaithful to him, and committed adultery with the father of the expected child, and the husband admitted that he did not suppose it was one solitary act. It is impossible for this court now to say that where a man has intercourse with his wife with knowledge that she has committed adultery, she does not wipe out that adultery entirely, and that

[1] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44.
[2] [1921] P. 131; 37 T.L.R. 131.
[3] [1923] P. 180; 39 T.L.R. 609.
[4] [1924] P. 126; 40 T.L.R. 269.
[5] [1951] P. 413; [1951] 2 All E.R. 580n.
[6] [1953] 1 W.L.R. 757; [1953] 2 All E.R. 187.
[7] [1895] P. 315; 11 T.L.R. 579; H.L. [1897] A.C. 395; 13 T.L.R. 516.
[8] [1916] P. 188; 32 T.L.R. 520.

the act of intercourse that takes place with knowledge of his wife's unfaithfulness is not a complete condonation. Indeed, Lord Simon L.C., delivering the opinion of the House in *Henderson* v. *Henderson*,[1] made it quite clear that where intercourse takes place with knowledge of adultery, it is a complete and absolute condonation.

I cannot see that it matters in the least whether the husband has admitted that at the time he had this act of intercourse with his wife he suspected that she had been guilty of more than one act of adultery. In fact, she never said on that occasion that she had been guilty of only one act of adultery. She told him she had committed adultery. She told him that she was "in "the family way" by this man. Whether she had committed adultery once, twice, or eight times has no bearing on the subject at all. The husband had intercourse with his wife, and thereby condoned the adultery.

After he had left her she wrote many letters to him, begging him to come back. The husband admitted that he thought she did want him back. It is only fair to the husband to say that he has been supporting his wife and, at any rate, the one child of their marriage, by sending her £4 a week.

She then filed a petition for restitution of conjugal rights, and the husband put in an answer in which he accused her of various matters of conduct to show that she was not a good wife to him, although not alleging any matrimonial offence, other than this particular act of adultery which the court has said is condoned. After he put in that answer, she wrote him a very angry letter, in which she said: "You have committed adultery. You know "quite well you have committed adultery"; and she catalogued various other causes of complaint, which she had against him; but I am bound to say that, taking as dispassionate a view of this case as I can, it is very much in the nature of what a schoolboy would call a tu quoque. As he had in his answer set out various complaints against her, she said: "How about you! "Think of all the complaints I have against you."

The commissioner held that he was not satisfied that she had a sincere desire to return to her husband. It seems to me that he has, perhaps, misunderstood or not given due consideration to the expression "lack of sincerity" as used in the cases. I need not refer to all the cases cited because *Price* v. *Price*[2] is, at any rate, one which impresses me very much. The wife there admitted that she hated her husband; she said she hated her husband; nevertheless, this court held that, as she obviously desired that the home should be re-established, she was entitled to a decree.

On the question of sincerity, or the question whether there is a sincere wish for the husband to return and live with the

[1] [1944] A.C. 49; 60 T.L.R. 113; [1944] 1 All E.R. 44.

[2] [1951] P. 413; [1951] 2 All E.R. 580n.

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wife, although there were various expressions used about living together as man and wife in a true and happy way, the court cannot go into what Hodson L.J. described as the emotional reasons. The fact that the spouse commits a matrimonial offence does not mean that she does not genuinely desire the return of the husband, and if she does, the court awards a decree.

In the present case, the wife is being supported by the husband. She does not contend that she is not receiving support. That fact alone seems to show that she really does want him to return to her. He need not return to her if the decree is made. The court does not force him to go back, but it does give her the right to obtain a sum of money. She is already obtaining a sum of money. Whether she wants any more, or is likely to get any more, I do not know. It is also possible that if he did go back, he would go away very quickly. However that may be, the cases show that if she does obviously want her husband to go back to her—and I think the facts show that—although she may have no affection for him and he none for her, the court is bound to grant a decree. Therefore, the appeal must be allowed, although I decide so with some regret.

HODSON L.J. I agree.

ROMER L.J. I also agree.

Appeal allowed.
Decree of restitution of conjugal rights granted.

Solicitors: *Paul Simes, Law Society; Arthur Benjamin & Cohen.*

M. M. H.

[COURT OF APPEAL.]

C. A.
1954
Oct. 26, 27.
Denning, Birkett and Morris L.JJ.

* SINASON-TEICHER INTER-AMERICAN GRAIN CORPORATION *v.* OILCAKES AND OILSEEDS TRADING CO. LD.

Sale of Goods—C.I.F.—Bank guarantee—Provision for bank guarantee by buyers to sellers on first presentation of documents—Repudiation by sellers before receipt of guarantee — Event guaranteed — Time when guarantee to be provided.

A contract made on August 11, 1952, for the sale of Canadian barley c.i.f. Antwerp-Hamburg range provided for shipment during October/November, 1952, payment to be net cash in London upon first presentation of documents, the buyers to give the sellers through their London bank a guarantee that the documents would be taken up on first presentation. No time was stipulated in the contract

as to the date of the guarantee. On September 10 the sellers purported to cancel the contract alleging that they were entitled so to do as the guarantee had not been received. On September 10 also the buyers' London bank informed the sellers that an irrevocable letter of credit had been opened by the buyers in favour of the sellers, but the sellers maintained their refusal to carry out their obligations under the contract and on September 16 the buyers referred the matter to arbitration.

An appeal committee found or held that the buyers' obligation was to provide the guarantee within a reasonable time before the first shipment date, namely, October 1, 1952; that such reasonable time had not arrived by September 10; that the sellers had wrongfully repudiated the contract; and that the buyers accepted that repudiation on September 16 and were entitled to damages accordingly.

By special case the following question was submitted for determination by the court: "Whether on the true construction of the "documents and the facts as found the sellers were entitled to "treat the contract as determined":—

Held, affirming the award, that the committee had not erred in law in favour of the buyers.

Pavia & Co. S.P.A. v. *Thurmann-Nielsen* [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492 applied.

Decision of Devlin J. [1954] 1 W.L.R. 935; [1954] 2 All E.R. 497 affirmed.

APPEAL from Devlin J.[1]

On August 8, 1952, an English company, Oilcakes and Oilseeds Trading Co. Ld., obtained approval from the Bank of England Foreign Exchange Control under the terms of a notice "Mer-"chanting Trade-Resale of Dollar Raw Materials to E.P.U. "countries" (F.E.C. 461) to purchase in America for resale in Western Germany a quantity of Canadian Barley c.i.f. for a sterling return of £580,000. On August 11, 1952, Oilcakes and Oilseeds Trading Co. Ld. entered into a contract with an American corporation, Sinason-Teicher Inter-American Grain Corporation, whereby they agreed to buy and the American corporation to sell 9,500 tons, 1,016 kilos. each No. 2 Canadian barley, for shipment during October-November, at a price of U.S.$75.15 per 1,000 kilos net, in bulk, delivered weight, c.i.f. Antwerp-Hamburg range, buyers' option, discharging expenses for sellers' account. Payment was to be net cash in London on first presentation of documents, the buyers to give the sellers through their London bank the guarantee that the documents would be taken up on first presentation. The contract incorporated the conditions of the London Corn Trades Association Ld. The contract was part of a switch transaction and the German firms to which the goods were ultimately to be sold guaranteed "the ordered liquidation of the above contract." A number of organizations were concerned in the switch transaction, which was organized by the Commission Internationale Futtermittel G.m.b.H. of Frankfurt-Main, who also acted as agents for the American sellers. The English buyers' agents were a

[1] [1954] 1 W.L.R. 935; [1954] 2 All E.R. 497.

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German firm, Lichtenstein and Mannheimer, Hamburg. The terms of the guarantee required by the sellers were communicated to the buyers on August 12. On August 19 the sellers sent their contract of sale dated August 11 through their agents to the buyers, having previously been informed that the buyers' guaranteeing bank in London was Hambros Bank, but that the bank guarantee called for by the contract could only be established after the German bank guarantee had been obtained. The sellers did not mention to the buyers at that stage, nor was any insertion made in the contract, of a date by which the bank guarantee was to be supplied. On August 31 the sellers informed their agents that they expected the guarantee to be supplied by September 2, and on September 4 they informed the German buyer that they would extend this date to September 9. This information was passed on to the buyers' agents.

Meanwhile, the buyers concluded the formalities required by the Bank of England by submitting, on September 8, 1952, the required sterling transfer forms and the firm contracts for the bank's approval. On September 9 Hambros Bank cabled the sellers stating that they had been instructed by the buyers to issue a guarantee in the sellers' favour subject to Bank of England approval. On September 10 the sellers communicated with their agents, referring to the cable from Hambros Bank and stating that they were compelled to cancel the sale by reason of the failure of the buyers to furnish the guarantee in time, and requesting them to inform the buyers accordingly. This message was duly communicated to the buyers' agents. Also, on September 10, Bank of England approval having been received, Hambros Bank cabled to the sellers the terms of an irrevocable letter of credit opened by the buyers in favour of the sellers, the terms of which were substantially the same as those required by the guarantee provided for by the sellers. On the same day the sellers informed the buyers by cable that as the cable received from Hambros Bank on September 9 had not contained the payment guarantee the "deadline" for supplying the "performance "guarantee" had expired without performance and they had "cancelled the deal" that night. Thereupon, the buyers informed the sellers that no deadline had been received or accepted, and that as the guarantee had already been sent in the form of a letter of credit they insisted upon the execution of the contract. The sellers repeated that they considered the sale cancelled, and did not reply to further communications made to them by the buyers. On September 15 the buyers asked the sellers for a declaration that delivery would be executed within twenty-four hours, and no reply being received, referred the matter to arbitration.

At the hearing by the appeal committee of the London Corn Trades Association Ld. of an appeal by the sellers from the umpire's decision awarding damages to the buyers for the wrongful repudiation of the contract, it was contended for the sellers inter

alia (1) that the buyers through their agents had agreed that the date for the opening of the guarantee should be September 1, and also to the extended date of September 9; (2) that if there was no agreed express date then the buyers' obligation under the contract was to secure that the guarantee was given as soon as reasonably possible, that they did not do this, and that, therefore, they were in default, and the sellers were entitled to treat the contract as at an end; and that it had been properly determined on September 10, 1952; (3) that the letter of credit dispatched by the bank was too late and its terms immaterial in law, but that if it were material the document did not comply with the contract because it was not a bank guarantee.

It was contended for the buyers (1) that it was not a term of the contract that the buyers should cause the bank guarantee to be opened at any date prior to September 10; (2) that the buyers' obligation in relation to the bank guarantee was to cause it to be available to the sellers by the first shipment date under the contract, namely, October 1, 1952; or, alternatively (3) within a reasonable time before the first shipment date, and that such reasonable time had not arrived by September 10; (4) that the sellers having repudiated the contract before the arrival of the letter of credit opened by the buyers were not entitled to rely on the matters complained of in relation thereto as justifying repudiation; (5) that the opening of a letter of credit was a proper and customary compliance with the buyers' obligation under the contract; and (6) alternatively, that if it were not so, that non-compliance did not evince an intention on the part of the buyers to repudiate the contract.

The committee found, inter alia, that, although the sellers purported to require the guarantee by September 9, the buyers had never agreed to any fixed date nor had they authorised their agents so to do. In so far as it was a question of fact they found, and in so far as it was a question of law, they held (1) that the buyers' obligation was to provide a bank guarantee within a reasonable time before October 1, 1952, being the first shipment date, and that such reasonable time had not arrived by September 10, 1952; (2) that as Bank of England approval was not obtained until September 9, the buyers were entitled to a reasonable period of time after that date to obtain such guarantee, and that such reasonable time had not elapsed by September 10. They found further that the letter of credit opened by the buyers was a sufficient compliance with the contract, and that the sellers did not object to its form, but repudiated the contract before its receipt and maintained that repudiation thereafter. They therefore awarded that the sellers had wrongfully repudiated the contract on September 10, 1952, which was accepted as a final breach by the buyers on September 16, 1952, and awarded damages to the buyers.

In the special case stated by the appeal committee the question of law stated for determination of the court was

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whether, on the true construction of the documents and the facts as found, the sellers were entitled to treat the contract as determined. Devlin J. answered the question in the negative.

The sellers appealed.

Ashton W. Roskill Q.C. and *T. G. Roche* for the sellers.

Eustace W. Roskill Q.C. and *R. A. MacCrindle* for the buyers.

Cases cited in argument: *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen* [2]; *Heisler* v. *Anglo-Dal Ld.*[3]

DENNING L.J. This arbitration arises out of a "switch "transaction." An English company, a buyer, called Oilcakes and Oilseeds Trading Co. Ld., bought 9,500 tons of Canadian seed barley from an American company, Sinason-Teicher Inter-American Grain Corporation, who were the sellers. The contract provided that payment was to be in United States dollars. At the same time the English buyers agreed to re-sell the barley to a German concern and under that contract payment was to be in sterling. In order to carry out the "switch transaction," the German concern was to give to the English company a guarantee for the sterling, and the English buyers were to give a guarantee to the American company for the dollars. As the transaction involved the exchange control, it could not be carried out except with the consent of the Bank of England. The essence of it was that the English buyers were paying in dollars and re-selling to the Germans for sterling.

The contract between the American seller and English buyer was concluded on August 11, 1952. The goods were to be delivered c.i.f. Antwerp-Hamburg range. Shipment was to be October/November, 1952, and there was this clause as to payment: "Payment: Net cash against documents on first "presentation in London. The buyers will give the sellers "through their London bank the guarantee that the documents "will be taken up on first presentation." The contract contained no express provision as to the time when the English buyers should give the bank guarantee: and the question is when it should have been given. The American sellers said that it should have been given at latest by September 9, 1952, and that because it was not given by that time they were entitled to, and did, cancel the contract on September 10, 1952. The English buyers said that they were not bound to give the guarantee by that date and that the cancellation by the American sellers amounted to a repudiation of the contract.

The American sellers, at the time that they cancelled, had got a wrong view of the contract. They thought that they had a right

[2] [1951] W.N. 533; [1951] 2 T.L.R. 802; [1951] 2 All E.R. 866; [1951] 2 Lloyd's Rep. 328; *affirmed*, [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.

[3] [1954] 1 W.L.R. 1273; [1954] 2 All E.R. 770.

to be given the guarantee immediately after the making of the contract, which was certainly not the case. Their attitude is well shown by the cable of September 9, 1952, which they sent to the German concern, in which they said: "At sale barley "cargo August 11 agreement was immediate guarantee Hambros "Bank. At buyers request we granted deadline till September 1, "re-extended deadline till September 5 and at urgent request "again until today"—that is, September 9—"Today, instead "of guarantee we receive cable from Hambros Bank that "guarantee still dependent on Bank of England and further "details will follow soonest. Consequently see ourselves com-"pelled to cancel sale herewith and request you inform buyers "accordingly." That was their cancellation. It was made on the basis that the agreement was for an immediate guarantee to be given by Hambros Bank; that they had the right to lay down deadlines; that the last deadline they laid down was September 9; and that, when the guarantee was not given by that date, they were entitled to cancel the contract. Mr. Ashton Roskill, for the American sellers, had to admit that that was not correct. There was nothing about an immediate guarantee and the sellers had no right to lay down those deadlines.

It must have been plain to everyone that the English buyers could not be expected to give the bank guarantee at once. Several things had to be done first. The German importers had to get their import authorization. They had also to give their guarantee to the English company that the sterling would in due course be paid. Then the matter had to be submitted to the Bank of England for approval; the Bank of England would only give their approval if they were satisfied that the purchasing contracts from Germany were all in order and that the payment in sterling would be received. It was not until the Bank of England consent had been received that the English buyers could proceed to give their bank guarantee to the American sellers. All those acts had to be done before the guarantee could be provided.

At the hearing before us the American sellers no longer contended that they had a right to an immediate guarantee (which they had contended in their cable of cancellation) nor did they contend that the guarantee should be given as soon as reasonably possible (which they had contended before the appeal committee). They contended simply that the guarantee should have been given within a reasonable time in all the circumstances. They said that it was not given within that time: and asked for the case to be remitted for a finding on that point.

The English buyers, on the other hand, contended that their obligation was only to provide the guarantee within a reasonable time before the shipment date, that is, within a reasonable time before October 1, 1952, and that that time was still open on September 10, 1952, when the American sellers cancelled the contract. In any case they say that, if the obligation was to

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provide the guarantee within a reasonable time in all the circumstances, that time had not elapsed by September 10, 1952. They point out that they did in fact provide the guarantee (in the form of a letter of credit) on September 10, 1952.

We were referred to *Pavia & Co. S.P.A.* v. *Thurmann-Nielsen.*[1] I agree with what Devlin J. said about that case. It does not decide that the buyer can delay right up to the first date for shipment. It only decides that he must provide the letter of credit at latest by that date. The correct view is that, if nothing is said about time in the contract, the buyer must provide the letter of credit within a reasonable time before the first date for shipment. The same applies to a bank guarantee: for it stands on a similar footing.

The appeal committee of the London Corn Trade Association found all the facts in a most comprehensive statement, and they said: "The sellers were at all times aware of the practice and "procedure with regard to this switch transaction and the need "to obtain the German guarantees before the English buyers "could establish their guarantee or letter of credit. In so far "as it is a question of fact we find, and in so far as it is a matter "of law we hold, that the buyers' obligation was to provide a "bank guarantee within a reasonable time before October 1, "1952, and that such reasonable time had not arrived by "September 10, 1952." That finding of the appeal committee is decisive against the sellers here today.

But, furthermore, the appeal committee found that on any view, even if the obligation was simply to provide the guarantee in a reasonable time in all the circumstances, the guarantee was provided within that time: they said that the proper form "was "lodged with the Bank of England on September 8 and approval "obtained on September 9, 1952. Until such approval by the "Bank of England had been obtained the buyers could not "furnish a guarantee or letter of credit to the sellers and the "buyers were entitled to a reasonable period of time after such "approval to obtain such guarantee; and so far as it is a question "of fact we find, and in so far as it is a matter of law we hold, "that such reasonable time had not elapsed by September 10."

I read that as a finding that, having regard to the amount of work which had to be done on the German side and on the English side before the bank guarantee could be furnished, a reasonable time had not elapsed by September 10, 1952. The result is that, in whichever way the obligation as to time is viewed, the appeal committee has found against the sellers. There is no error of law in the conclusions of the appeal committee or in the judge's judgment, and I think this appeal should be dismissed.

BIRKETT L.J. I am of the same opinion. The point which has to be determined by this court is in its essence one of

[1] [1952] 2 Q.B. 84; [1952] 1 T.L.R. 586; [1952] 1 All E.R. 492.

simplicity and I think it is one which is capable of a simple straightforward solution. The contract with which we are concerned was made subject to the arbitration clause and the form in the contract of the London Corn Trade Association. The matter finally came before what we were told, and I readily believe, was a very expert committee with full knowledge of the Corn Trade Association and of contracts of this nature.

The question in the case which was stated was put in this way: "We were requested by counsel on behalf of the sellers "to state our award in the form of a special case under the "provisions of section 21 (1) of the Arbitration Act, 1940, upon "the following questions of law: Whether upon the true con-"struction of the documents and the facts as found"—No. 1 no longer matters. "(2) The sellers were entitled to treat the "contract as determined." To answer that question would mean in the ordinary way that the whole of the circumstances of the contract ought to be investigated, but it was I think agreed that the answer to this question really turned upon the clause in the contract respecting payment: "Net cash against documents "on first presentation in London. The buyers give the sellers "through their London Bank the guarantee that the documents "will be taken up on first presentation."

Nearly the whole of the contest in this case has been simply that the sellers were saying: "You failed in that contractual "obligation in that you did not provide the guarantee which was "there specified"; the buyers, on the other hand, were saying: "We did and, alternatively, you repudiated the contract before "we had time to do so and you wrongfully broke the contract "in that way." It is to be observed at once that this clause upon which the controversy turns makes no mention of time. It seems to me that it would have been a perfectly simple thing to say: "The buyers give the sellers through their London Bank "a guarantee that the documents will be taken up on first "presentation and they will give that guarantee immediately" or by a specified date. But no time is mentioned, and that is how the difficulty has arisen here. It is common ground, I think, between sellers and buyers, that the time which is not specified in that provision must be ascertained by saying what is a reasonable time. It is said that that reasonable time was to be a reasonable time in all the circumstances of the case.

One of the complaints of the sellers is that the appeal committee and Devlin J. have not considered all the circumstances of the case. My Lord has already pointed out that the sellers took a view about this matter which was not in any sense to be justified by the terms of the contract, for when they announced their repudiation in a cablegram, which was received in London on September 9 and would appear to have been dispatched from New York on September 9, they said: "At sale barley cargo "August 11 agreement was immediate guarantee Hambros Bank "at buyers' request we granted deadline till September 1,

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"re-extended deadline till September 5, and at urgent request "again until today. Today, instead of guarantee we receive cable "from Hambros Bank that guarantee still dependent on Bank of "England and further details will follow soonest. Consequently "see ourselves compelled to cancel sale herewith and request "you inform buyers accordingly." Mr. Ashton Roskill, for the sellers, conceded that that was a mistaken view of the contract. Plainly there was nothing said about the immediate giving of a guarantee. Plainly nothing in the contract justified the fixing unilaterally of a deadline of September 1, 3 or 9, and in that respect they were wrong. To repudiate upon that ground would be to repudiate upon a wrong ground.

But, said Mr. Ashton Roskill for the sellers, if at the time there existed a good ground for their repudiation, that matters not at all and there was in fact a good ground for repudiation. He said that when the committee considered this matter they approached it in the wrong way and applied wrong principles of law, because when they came to their conclusion they said this —and I now put a gloss upon the precise wording of the clause— "Well, we have considered this matter and we observe that by "the contract of August 11 the shipment dates were October/ "November, that is to say, the earliest date of shipment was "October 1. Having regard to the commercial purpose of this "clause relating to payment we think it must bear some relation "in its interpretation and construction to that date of October 1. "The guarantee through the bank is that the documents will be "taken up on first presentation." If the first shipment date is October 1 that date must have some relation to it, and they came finally to the conclusion that the date must be a reasonable time before October 1 and certainly at the date of repudiation, September 10, a reasonable time had not elapsed. Therefore, the sellers were in default in saying: "We are entitled to repudiate "this contract."

Mr. Ashton Roskill says that doing that the committee drew down a curtain and began to go back from the date of October 1, which was a quite reasonable way of doing it. The difficulty that I feel is that in this case stated I do not think the submission of Mr. Roskill is really justified, because by clause 15, under the general heading of "We find the following facts," when they begin to set them out they say: "The buyers had to obtain the "authority of the Bank of England on the E.2 form within one "month of the date of the approval of the switch transaction, "which approval was given on August 8, 1952. The E.2 form "was lodged with the Bank of England on September 8 and "approval obtained on September 9, 1952. Until such approval "by the Bank of England had been obtained the buyers could "not furnish a guarantee or letter of credit to the sellers and the "buyers were entitled to a reasonable period of time after such "approval to obtain such guarantee and so far as it is a question "of fact we find, and in so far as it is a matter of law we hold,

"that such reasonable time had not elapsed by September 10." As I read that particular paragraph that is not looking backwards from October 1, the first shipment date, but is looking forward from August 11.

I find it very difficult to believe that these very expert people who were sitting in this arbitration, with full knowledge of the corn trade, failed to consider all the facts of the case. They had before them counsel who presented their various points, and I think that clause 15 indicates that they were looking at it as a matter of fact both backward and forward. They say: "If you "look forward there comes a date before which the guarantee "could not be given. After that date you are entitled to a "reasonable time and the reasonable time had not elapsed when "the sellers took it into their head to repudiate the contract." In the other way they say the first shipment date was October 1. Looking at the purpose of this clause respecting payment, they say a reasonable time before October 1 had not elapsed at that self-same date of September 10. I must say for my own part that I do not think that it is made out that the committee failed to take into account all the facts of the case and that they came to their conclusion as to reasonable time on any restricted or narrow view of the matter. I think they came to their view upon full consideration of the whole of the case as it was before them.

We have not, of course, had before us all the documents which were used in the various proceedings which took place before the matter came to this court, but I would be content to say that, judging from the material which we have, judging from the findings of fact made by the committee and the very comprehensive way in which this case is stated, it is not made out that they did not give proper legal consideration to this matter. I would agree with the conclusions of Devlin J., supporting the findings of the appeal committee, and say that this appeal should be dismissed.

MORRIS L.J. I am of the same opinion. As has been pointed out, there were two points of law raised when counsel on behalf of the sellers asked the committee to state their award in the form of a special case. We have been concerned only with one of those two. That point is whether upon the true construction of the documents and facts as found the sellers were entitled to treat the contract as determined. Devlin J. has answered that question in the negative, and in my judgment he was correct. It seems to me that ultimately this case depends upon the construction of the terms of this particular contract. I think that it is helpful to have in mind, as Mr. Eustace Roskill for the buyers has reminded us, that there is a difference in the language in the last paragraph and the language in the paragraph in relation to payment. The document that we have before us is, of course, a translation. The last paragraph against the side heading "Remarks" reads as follows: "The firms C. Sachs, Nürnberg,

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"Königstrasse 61, and Internationale Produkten-Handels-Gesell-"schaft m.b.H. Munich, Tal 13, guarantee to the firm Sinason-"Teicher Inter-American Grain Corporation, New York, the "orderly liquidation of the above contract." There is a contrast between those words and the words against the heading "Payment." The wording there is: "Net cash against "documents on first presentation in London. The buyers give "the sellers through their London Bank the guarantee that the "documents will be taken up on first presentation." That being a translation, the phrasing is perhaps not as happy as it would have been if the document had in the first place been drafted in the English language. But I think it is common ground that the words mean that the buyers are to give the sellers through their London Bank the guarantee. Had the sellers wished to have the guarantee that they specified within some particular time it would have been so easy for them to stipulate this. But no time is specified and, therefore, in my judgment, it becomes a question of construction, having regard to the whole terms of the contract and the purpose of the contract, as to when the sellers can require the guarantee to be given. It seems to me that as this is a guarantee in relation to payment, and as what the sellers were ensuring was payment, it is reasonable to look at this obligation in relation to the date of shipment or the date of the first presentation of documents.

It does not seem to me that anything turns on the fact that what was presented was a letter of credit and not a guarantee. As has been pointed out, it is found in the award, paragraph 15, that some time before August 21 the sellers had been requested to state the terms of the guarantee that they desired. The terms so desired are not annexed to the award, but there is the finding that "On September 10, 1952, Hambros Bank cabled to the "sellers a form of letter of credit substantially in the terms of "the guarantee required by the sellers." It still was not, of course, a guarantee. The reason I think why nothing turns on that is because, as is found in paragraph 19, "The sellers never "did raise any objection to the form of the letter of credit—"indeed they repudiated the contract before its receipt and "maintained that repudiation thereafter." The way in which the matter was put on behalf of the buyers is quite clear from the award and, indeed, it is the way in which Mr. Eustace Roskill has principally put the matter before us today. Paragraphs 5 and 6 of the contentions in the award read: "(5) That the buyers' "obligation in relation to the said bank guarantee was to cause "it to be opened so that it should be available to the sellers by "the first shipment date under the contract, namely, October 1, "1952"—that refers to the *Pavia* case.[2] "(6) Alternatively "that the buyers' obligation in relation to the said bank guarantee "was to cause it to be opened so that it should be available to

[2] [1952] 2 Q.B. 84.

"the sellers within a reasonable time before the first shipment "date, namely, October 1, 1952, and that such reasonable time "had not arrived by September 10, 1952."

Mr. Eustace Roskill has referred us to the decision in this court in the *Pavia* case,[3] in which the answer which was given by McNair J. was approved in this court. McNair J. said[3]: "Accordingly, it seems to me that, unless the sellers are to be "deprived of their right of shipment at any time during the "contract period, it necessarily follows that the credit must "be both opened and confirmed, if reasonably practicable, within "such time as will enable the sellers to ship at any moment of "their permissible period." It is, I think, clear that of the two submissions to which I have last referred made to the appeal committee and repeated here by Mr. Eustace Roskill, the committee decided on the basis of the second of those two. That is clear from their findings in paragraph 14, to which reference has been made: "In so far as it is a question of fact we find, and "in so far as it is a matter of law we hold, that the buyers' "obligation was to provide a bank guarantee within a reasonable "time before October 1, 1952, and that such reasonable time had "not arrived by September 10, 1952."

It seems to me that if it can be said there was any error in that at all it was an error in favour of the sellers and I am quite unable to see that the decision that the sellers were not entitled to repudiate the contract was erroneous as a matter of law. On that ground I consider that the learned judge answered this question correctly and I agree that the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Richards, Butler & Co.; Thomas Cooper & Co.*

A. W. G.

[3] [1951] 2 T.L.R. 802.

[PRIVY COUNCIL.]

J. C.†
1954
Nov. 8.

* SAID AJAMI . . . . . APPELLANT;

AND

COMPTROLLER OF CUSTOMS . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Nigeria)—Exchange control—Prohibition of export of notes of foreign legal tender —Whether notes legal tender—Expert evidence on foreign law—Competency of experienced bank manager —"Specially skilled"—Exchange Control Ordinance, No. 35 *of* 1950 (*Nigeria*), *s.* 22 (1).

† *Present*: LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, and MR. L. M. D. DE SILVA.

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Evidence—Expert—Foreign law—Competency of experienced layman—"Specially skilled"—"To the best of my knowledge." Exchange Control.

Not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent expert witness. Accordingly, the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law.

Vander Donckt v. *Thellusson* (1849) 8 C.B. 812, 814, approved.

There is nothing in sections 56 and 57 of the Evidence Ordinance of Nigeria, which enacts in section 56 that the evidence of a person "specially skilled" on a point of foreign law is admissible as expert evidence, which is opposed to that view. The knowledge which entitles a person to be deemed "specially skilled" on some points of foreign law may be gained in appropriate circumstances by a person whose profession is not that of law.

Where, therefore, it was established that a branch bank manager, who had been engaged in banking business in Nigeria for 24 years, had to, and did, in the course of his business keep in touch with current law and practice with regard to notes that were legal tender in French West Africa, his evidence that a number of French colonial bank notes which the appellant had admittedly attempted to export from Nigeria were at the time legal tender in French West Africa was admissible to, and did, prove that fact, and the appellant had therefore contravened section 22 (1) of the Exchange Control Ordinance, 1950, of Nigeria, which prohibited the exportation, amongst other things, of "any notes of a class which are . . . "legal tender in the United Kingdom . . . or in any other "territory."

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 16 of 1953) from a judgment of the West African Court of Appeal (Verity P. (C.J., Nigeria), O. Jibowu and Coussey JJ.) (February 19, 1952) dismissing an appeal from a judgment of the Supreme Court of Nigeria (Bairamian J.) (November 19, 1951). The Supreme Court had by its judgment dismissed an appeal from a judgment in the magistrates court (August 11, 1951) in favour of the respondent.

The respondent, who was the Comptroller of Customs of Nigeria, claimed in the magistrates court against the appellant a penalty of £61,778 2s. 6d. and the forfeiture of 9,884,500 French colonial franc notes on the ground that the appellant had on June 15, 1951, attempted to export the said notes, the exportation of which was prohibited by section 22 (1) of the Exchange Control Ordinance, 1950. On this appeal the appellant did not dispute that he attempted to export 9,884,500 notes from Nigeria on June 15, 1951. It was further not disputed that the respondent was entitled to succeed in this appeal if it was held that section 22 (1) of the Exchange Control Ordinance prohibited the exportation of the 9,884,500 notes.

Section 22 (1) prohibited the exportation, amongst other things, of:—"any notes of a class which are or have at any time

"been legal tender in the United Kingdom or any part of the "United Kingdom or in any other territory. . . ."

It was not disputed on this appeal that French West Africa came within the meaning of the word "territory" in section 22 (1).

It was contended by the appellant that the evidence led by the respondent in the magistrates court did not establish a fact sought to be proved in, and held to be proved by, the courts in Africa, namely, that the notes in question were legal tender in French West Africa on June 15, 1951. That was the sole point raised by the appellant and the sole point for decision by their Lordships of the Board.

1954. July 27, 28. *Ralph Millner* and *Biden Ashbrooke* for the appellant.

B. J. M. MacKenna Q.C. and *D. A. Grant* for the respondent.

The following cases were referred to in argument: *Vander Donckt* v. *Thellusson* [1]; *The Sussex Peerage Case* [2]; *Reg.* v. *Dent* [3]; *In the Goods of Whitelegg* [4]; *Wilson* v. *Wilson* [5]; *Cooper-King* v. *Cooper-King* [6]; *Barford* v. *Barford and McLeod* [7]; *In re Todd, Shand* v. *Kidd* [8]; *Cartwright* v. *Cartwright and Anderson* [9]; *Lazard Brothers & Co.* v. *Midland Bank Ld.* [10]; *Jacker* v. *International Cable Co. Ld.* [11]; *Miller* v. *Babu Madho Das* [12]; *Third National Bank of Chicago* v. *Cosby* [13]; *Third National Bank of Chicago* v. *Cosby* [14]; and *Buffum* v. *Harris.* [15]

November 8. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA, who stated the facts sets out above, and continued: It was necessary to call an expert to prove that the francs were legal tender in West Africa on June 15, 1951, and the expert evidence called by the respondent was that of one Mr. Greenway. The whole of his evidence, given in examination-in-chief, consisted of the following: "Manager, Barclay's Bank, "Kano, in banking business 32 years, 24 years in Nigeria, I look "at these notes, they are to the best of my knowledge French "colonial franc notes, they were legal tender in French West "West Africa on June 15 this year. On that day these francs "were worth 490 to £1 English note. The English value of "9,884,500 francs is therefore, £20,172."

He was not cross-examined and no evidence was led by the appellant to contradict what he said. After the respondent had closed his case the appellant did not give evidence, nor was any evidence led on his behalf.

1 (1849) 8 C.B. 812.
2 (1844) 11 Cl. & Fin. 85.
3 (1843) 1 Car. & K. 97.
4 [1899] P. 267.
5 [1903] P. 157.
6 [1900] P. 65.
7 [1918] P. 140; 34 T.L.R. 306.
8 (1854) 19 Beav. 582.
9 (1878) 26 W.R. 684.
10 [1933] A.C. 289, 298; 49 T.L.R. 94.
11 (1888) 5 T.L.R. 13.
12 [1896] L.R. 23 I.A. 106.
13 (1877) 41 Upper Can.Q.B. 402.
14 (1878) 43 Upper Can.Q.B. 58.
15 (1858) 5 Rhode Is. 243, 250.

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The appellant concedes that Mr. Greenway is a credible witness, but contends that upon the facts deposed to by him he cannot be regarded in law as a competent expert witness. It is further contended that even if it be held that Mr. Greenway was competent to give evidence as an expert, he has so qualified his evidence that it cannot be regarded as proving the facts sought to be established.

It has been argued strenuously that upon a matter which involves a question of law no person who is not a professional lawyer could be regarded as a competent expert. Their Lordships do not agree. In *Vander Donckt* v. *Thellusson*,[1] it was held that a person who though not a lawyer, had become conversant with a point of foreign law by " carrying on a business which made it " his interest to take cognisance " of the point, was a competent witness on that point. Their Lordships share this view. A number of other cases were cited to their Lordships which, although they contain observations relevant to the facts of each case do not, in their Lordships' view, qualify in any way the principle stated in the case referred to above. Their Lordships do not propose to refer to each of these cases separately. A principle which emerges from them considered together is that not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitle him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law.

Their Lordships observe that there is nothing opposed to the views they have expressed above in the relevant statute law of Nigeria, which is to be found in sections 56 and 57 of the Evidence Ordinance of Nigeria and is to the following effect:

" 56.—(1) When the court has to form an opinion upon a " point of foreign law, native law or custom, or of science or art, " or as to identity of handwriting or finger impressions, the " opinions upon that point of persons specially skilled in such " foreign law, native law or custom, or science or art, or in " questions as to identity of handwriting or finger impressions, " are relevant facts (2) Such persons are called experts. " 57.—(1) Where there is a question as to foreign law the " opinions of experts who in their profession are acquainted with " such law are admissible evidence thereof, though such experts " may produce to the court books which they declare to be works " of authority upon the foreign law in question, which books the " court, having received all necessary explanations from the " expert, may construe for itself. (2) Any question as to the " effect of the evidence given with respect to foreign law shall,

[1] (1849) 8 C.B. 812, 814.

"instead of being submitted to the jury, in the case of trial with "a jury, be decided by the judge alone."

The Ordinance enacts that the evidence of a person "specially "skilled" on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed "specially skilled" on some points of foreign law may, in their Lordships' opinion, be gained in appropriate circumstances by a person whose profession is not that of the law.

In the case before them, their Lordships have to be satisfied on two points before they can regard Mr. Greenway as competent. Firstly, that he conducted a business which made it his interest to take cognisance of what notes were legal tender in French West Africa. Secondly, that he did in fact take cognisance of what notes were legal tender in that country.

It would have been prudent for the respondent to have led evidence more clearly directed to establishing both these points. As the recorded evidence is very much compressed their Lordships have had some difficulty in arriving at a conclusion.

It appears from a notification in the Gazette of November 9, 1950, that Barclays Bank had been appointed an "authorized "dealer in foreign currency" within the meaning of that term in the Exchange Control Ordinance (No. 35 of 1950) of Nigeria. It is also clear from sections 5 and 42 (to which their Lordships do not think it necessary to make detailed reference) of that Ordinance that dealings in foreign currency could normally be conducted only by an "authorized dealer."

It is difficult to imagine that an "authorized dealer" would not keep himself informed as to the notes that were legal tender in French West Africa, an adjoining territory, unless special circumstances existed which rendered it unnecessary for him so to do. No such special circumstances have been proved or even suggested in the evidence in the case.

It was suggested by counsel for the appellant that the Gazette had not been properly produced in the courts below as there is no notice in the record of the occasion when this was done. There is, however, a reference to the fact that Barclays Bank was an authorized dealer in the judgment of the magistrates' court, and a reference to the Gazette itself in the judgment of the Court of Appeal. Their Lordships are of the view that the Gazette was properly before the courts in Africa although no entry has been made in the record of its production.

Counsel for appellant argued with force that, although it has been shown that Mr. Greenway was a manager of a branch of Barclays Bank, it has not been shown that as part of his duties he kept in such close touch with the currency of French West Africa as to make him competent to give the evidence which he did give. After anxious consideration their Lordships are of the opinion that the argument should not be accepted. Mr. Greenway is a manager of a branch of Barclays Bank in Nigeria, and has been in banking business for 32 years, 24 years of which have

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been spent in Nigeria. He has been regarded without challenge by the courts below as a credible witness, and he must also be regarded as a person with a sense of responsibility. Therefore the opinion which he has expressed cannot be the result of mere conjecture. It has been suggested by counsel for the respondent that upon a fair view of the evidence as a whole it must be presumed that Mr. Greenway was speaking from adequate personal experience. This suggestion their Lordships accept.

It has also been contended that the use of the words "to the "best of my knowledge" by Mr. Greenway so qualified his evidence as to render it of no probative value. Their Lordships do not agree. The meaning of the words mentioned could be best appreciated by the judge who saw the witness and heard the evidence given and the qualification cannot be said to deprive the witness's evidence of all probative value. No attempt was made by the appellant to contradict what Mr. Greenway said, and their Lordships are of the view that his evidence must be held to have established the facts to which he deposed.

For the reasons given their Lordships are of the opinion that it must be held that Mr. Greenway was a person who in the course of his business had to, and did, keep in touch with current law and practice with regard to notes that were legal tender in French West Africa. They are of the opinion that the notes of which exportation was attempted must be held to be notes which were legal tender in French West Africa on June 15, 1951. They will therefore humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the respondent the costs of this appeal.

Solicitors: *Hatchett Jones & Co.; Charles Russell & Co.*

C. C.

[PRIVY COUNCIL.]

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Nov. 4.

* RICHARD JAMES PYE AND OTHERS . . APPELLANTS;

AND

MINISTER FOR LANDS FOR NEW SOUTH WALES . . . . . RESPONDENT.

ON APPEAL FROM THE FULL COURT OF THE HIGH COURT OF AUSTRALIA

Australia (New South Wales)—Compulsory acquisition—Resumption of land—Closer settlement—For Purposes of War Service Land Settlement Act, 1941*—Compensation—Value as at February* 10, 1942*—Construction of statute—Workability—Technical, but no*

† *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

practical, difficulty—Closer Settlement (Amendment) Act, 1907 (*N.S.W.*), *as amended, s.* 4 (4) (*b*) (i) (ii).
Statute—Workability. Compulsory Purchase.

By section 4 (4) (*b*) of the Closer Settlement (Amendment) Act, 1907, of New South Wales, as subsequently amended and in particular by the War Service Land Settlement and Closer Settlement (Amendment) Act, No. 48 of 1948, and the War Service Land Settlement and Closer Settlement Validation Act, No. 14 of 1950: "The compensation to be paid in respect of any such resumption "[of land under the Act] shall . . . be the value of the land as "assessed by an advisory board, or where an appeal has been made ". . . as determined by the Land and Valuation Court: Provided "that where any such resumption is made for the purposes of "section 3 of the War Service Land Settlement Act, 1941, as "amended by subsequent Acts, the following provisions shall "apply:—

"(i) in the case of any such resumption where the owner has "agreed not to claim compensation in excess of the value of the "land as assessed by an advisory board the value of the land as so "assessed shall not exceed by more than fifteen per centum the "value which would have been so assessed or determined in respect "of an identical resumption as at the tenth day of February, "1942, . . .;

"(ii) in the case of any such resumption other than a resump- "tion where the owner has agreed not to claim compensation in "excess of the value of the land as assessed by an advisory board, "the value of the land as so assessed or determined shall not exceed "the value which would have been so assessed or determined "in respect of an identical resumption as at the tenth day of "February, 1942, . . ."

On the resumption on September 1, 1950, for the purposes of section 3 of the War Service Land Settlement Act, 1941, by the Governor of New South Wales under the provisions of the Closer Settlement (Amendment) Act, 1907, as amended by subsequent Acts, of certain freehold land owned by the appellants, the compensation payable was, on the construction of the Act as amended read as a whole, rightly based on its value as at February 10, 1942, and not on its current value on or about the date of resumption, which admittedly very greatly exceeded the value in February, 1942.

The fact that under the Act the compensation was to be determined by the advisory board in its report before the purpose of the resumption was finally determined by the Governor and confirmed by Parliament, while technically presenting some difficulty, involved no actual difficulty in practice and did not render the Act unworkable. In the present case the advisory board obviously knew of the intention of the Minister and assessed the compensation accordingly, and the requisite steps prescribed by the Act were taken in due course. There was no justification for the view that the advisory board could not know the purpose of the resumption until it had finally been effected, for while it was true that the Minister prescribed the general area from which a choice of the land to be resumed was made, the advisory board were the body by whom both the actual land to be resumed and its value were to be determined. They therefore knew when they were making their report the purpose for which the land was to be resumed and the owner; could make their assessment of value on that basis;

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and could give the owner his option under the proviso to section 4 (4) (*b*) of electing to accept the value in the report or rejecting it. The objection was theoretical only, for in fact the advisory board do, and in the present case did, know both the purpose of the resumption and the owners concerned.

Further, the words of the proviso to section 4 (4) (*b*), "provided "that where any such resumption is made," were descriptive of the purpose of resumption and had no temporal connotation, and should not be construed as meaning "where any such resumption "has been made." Accordingly, the wording of that proviso also gave no support to the contention that the value of land to be resumed could not be assessed until after the resumption was accomplished.

Lastly, where the Minister informs the advisory board that his intention is to resume the land for closer settlement on behalf of those who have been engaged on war service, that body must make the valuation on the basis of the prices which prevailed on February 10, 1942, and before issuing their report must give the owner the opportunity of electing whether he will accept or refuse the figure arrived at, but in the present case a contention that they had failed to do so formed no part of the case stated by the Land and Valuation Court, and even if it did, the appellants having proceeded to that court could not now retain the right to contend that the option given by section 4 (4) (*b*) (ii) was still open for them to exercise.

Order of the High Court of Australia (1953) 87 C.L.R. 469, affirmed.

APPEAL (No. 3 of 1954), by special leave, from an order of the High Court of Australia (March 10, 1953) allowing three appeals (consolidated by order of the High Court) by the Minister for Lands of the State of New South Wales from orders of the Full Court of the Supreme Court of New South Wales (July 22, 1952) and answering in a contrary sense to the Supreme Court certain questions of law in cases stated by the Land and Valuation Court of New South Wales (Sugerman J.) (May 28, 1952).

The question involved in the appeal was the proper measure of compensation to be paid in respect of the resumption (i.e., compulsory acquisition) of land in New South Wales, which was formerly the freehold property of the appellants, but was resumed by the Governor of New South Wales on September 1, 1950, under the provisions of the Closer Settlement (Amendment) Act, 1907, as amended by subsequent Acts.

Before that date the appellants were the respective owners in fee simple of three parcels of land in New South Wales which were worked together as one estate known as Ghoolendaadi, and it was that estate which (except for an area of less than one-tenth of the whole) was resumed under the Act of 1907.

The substantial question for decision on this appeal was whether the compensation payable to the owners on the compulsory acquisition of their land was to be based on its value in February, 1942, or on its current value on or about the date of resumption. Admittedly the current value very greatly exceeded the value in February, 1942.

In the Land and Valuation Court, Sugerman J. held that on the true construction of the relevant legislation the value of the resumed land must be determined, not as at September 1, 1950, which was the date of the resumption, but as at February 10, 1942. The then respondents appealed to the Supreme Court (Street C.J., Owen and Herron JJ.) by way of case stated, and the decision of Sugerman J. was reversed.

The Minister for Lands, being dissatisfied with that decision, appealed to the High Court (Dixon C.J., McTiernan, Williams, Fullagar and Kitto JJ.) which in its turn reversed the decision of the Supreme Court and restored that of Sugerman J.

The relevant statutory provisions, the construction of which and their workability being the main question in the appeal, appear from the judgment of the Judicial Committee.

1954. July 1, 5, 6, 7, 8, 12, 13 and 14. *Sir Garfield Barwick Q.C.* (Australia), *J. G. Le Quesne* and *J. E. Saywell* for the appellants.

M. F. Hardie Q.C. (Australia), *R. Else Mitchell* (Australia) and *Anthony Cripps* for the respondent.

November 4. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above and continued: The resumption was effected under the provisions of the Closer Settlement (Amendment) Act, 1907, which has been many times amended. That Act may be referred to as the Act of 1907. Section 4 (4) makes provision as to the compensation payable in respect of resumptions under the Act. The decision of the present appeals therefore depends upon the true construction of that section in conjunction with the other provisions of the Act. In particular, it depends upon the construction of a proviso which was inserted by the Act No. 48 of 1948 and amended by the Act No. 14 of 1950.

Before they deal with the construction of the Act, however, their Lordships think it essential to recount the sequence of certain changes in it and the reasons for which they were made, but do not think it necessary to set out all the amendments. That task has been fully and accurately performed by the Supreme Court and need not be repeated.

The first Act of 1904 is still referred to as the Principal Act and provided authority to the Governor on taking the prescribed steps either to purchase or to resume land privately owned, i.e., to acquire land for closer settlement. The relevant terms of that Act, as amended, will require to be set out at a later period, but for the moment their Lordships, in order to clarify the position, need only mention in passing that in 1941 the legislature passed a War Service Land Settlement Act which, by section 3, empowered the Minister, by notification published in the Gazette, to set apart any area of land acquired under the Closer Settlement Acts, as amended by subsequent Acts, to be disposed of exclusively to any one or more of the following classes of persons:—

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(a) members of the forces; (b) discharged members of the forces; (c) discharged soldiers; (d) other eligible persons.

In their Lordships' view it is not necessary to deal with the form of the provisions of the Closer Settlement Acts in their earlier stages, but in order to explain the course taken by the New South Wales Government, the relevant provisions in force up to the amending Act of 1946 have been conveniently assembled in a document provided for their Lordships' use and at the date in question contained the following provisions:—

"2. (1) The Governor may, for the purposes of this Act, "constitute three boards to be called Closer Settlement Advisory "Boards, and may dissolve and reconstitute any such board. "Any such board is hereinafter in this Act referred to as an "'Advisory Board.'

"3. (1) Every such board shall, at the request of the Minister "and within such time or extended time as he may appoint, "report to him as follows:—

"(*a*) whether any, and if so what, land within an area to be "specified by the Minister is suitable to be acquired for closer "settlement;

"(*b*) the estimated value of such land;

"(*c*) the price at which the board recommends the acquisition "of the land, and the method of arriving at such price; . . .

"(*f*) on any matter as to which the Minister requires a report.

"4. (1) Where an advisory board reports that any land is "suitable to be acquired for closer settlement, the Governor "may,—

"(*a*) subject to this Act, purchase it by agreement with the "owner, or

"(*b*) resume it under this Act.

"(2) Every purchase or resumption shall be subject to "approval by resolutions of both Houses of Parliament.

"(3) Before resuming any land, the Governor shall, by "proclamation in the Gazette, notify that he proposes to consider "the advisableness of acquiring such land for the purposes of "closer settlement.

"7. (1) The resumption of land under this Act shall be "effected by notification in the Gazette.

"On such notification being made, the land shall, subject to "the right of retainer hereinafter provided, vest in His Majesty "for the purposes of the Closer Settlement Acts and be dealt "with thereunder.

"9. (1) Where any land is resumed under this Act, any "person interested in such land who is dissatisfied with the "value of the land as assessed by the advisory board may appeal "to the Land and Valuation Court against such assessment in "accordance with the rules of court of that court.

"(2) Notice of appeal shall be lodged within twenty-eight "days after the date of publication in the Gazette of the notifica-"tion of resumption or within such further time as the Land and

"Valuation Court may, either generally or in any particular case, "allow.

"10. The Land and Valuation Court shall have jurisdiction "to hear and determine the appeal."

There does not appear to have been any express provision in the Act then in force providing the amount to be paid as compensation to the owner of the resumed land, though in section 5, which is concerned with land the value of which is to be increased by the construction of public works, there is a sub-subsection 5 (7) (*e*) enacting "compensation to be paid on any such resump-"tion shall unless an agreement is entered into under section 11 "of this Act be the value of the land as assessed by the advisory "board or as determined by the Land and Valuation Court on "Appeal," and section 11 gave the Governor power notwithstanding the resumption of any land and any proceedings consequent thereon at any time to agree with the owner as to the price to be paid for the land. But no doubt the intention was that in other cases the price recommended by the advisory board should be adopted.

Under this scheme no difficulty in carrying out its provisions arose. The value as fixed by the board or, in case of an appeal, that fixed by the Land Court, would be the compensation payable unless an agreement with the owner was reached.

The necessary steps preceding resumption would then be: (1) The Minister's request to the board to report; (2) the report; (3) proclamation in the Gazette by the Governor that he proposes to consider the advisableness of acquiring the land for closer settlement; (4) resumption; (5) approval by resolution of both Houses of Parliament; (6) notification of resumption in the Gazette.

On October 5, 1945, whilst this scheme was still in force, there was published in the New South Wales Government Gazette, No. 102 of that date, a proclamation by the Governor of his intention to consider the advisableness of acquiring the present appellants' estates for closer settlement under section 4, Closer Settlement (Amendment) Act, 1907, and on November 8, 1945, before any further steps were taken, the Commonwealth purported to enter into an agreement with the State to provide for the settlement of ex-servicemen and other eligible persons and to bear a portion of the expense. Under the scheme so made the State was to resume land for such closer settlement—the actual provision, so far as is relevant, is contained in clause 11 (ii) (*b*) of the scheme and was in the following terms:—"The "State shall acquire compulsorily or by agreement and at a value "not exceeding that ruling on the tenth day of February, one "thousand nine hundred and forty-two, private land or lands "held under lease from the Crown comprised in an approved "plan of settlement."

This agreement was approved and ratified by the Government

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of New South Wales by the War Service Land Settlement Agreement Act, 1945, passed on January 7, 1946.

Act No. 14 of 1946, of which the short title was "War Service "Land Settlement and Closer Settlement (Amendment) Act," was then enacted, by which certain additions and amendments were made to the Closer Settlement Act. Those material to the present dispute were in the following terms:—"4 (4) (*b*) The "compensation to be paid in respect of any such resumption "shall . . . be the value of the land as assessed by an advisory "board, or where an appeal has been made in terms of section 9 "of this Act, as determined by the Land and Valuation Court. "Provided that where any such resumption is made for the "purposes of the scheme contained in the agreement approved "and ratified by the War Service Land Settlement Agree-"ment Act, 1945, the value of the land as so assessed or "determined shall not exceed the value which would have been "so assessed or determined in respect of an identical resumption "as at the tenth day of February one thousand nine hundred and "forty-two, excepting the value of any improvements effected on "such land since that date."

In 1948 further amendments were made by inserting a provision under paragraph 4 (4) (*a*) of the 1946 Act permitting the price, in case of purchase, to be increased to a sum not exceeding 15 per cent. over the price recommended by the advisory board, and in case of resumption to be increased to a like extent provided that the owner agreed not to claim compensation in excess of the value of the land as assessed by the board but not otherwise.

In the present case no report had been made to the Minister before the decision in the High Court of the case of *P. J. Magennis Pty. Ld.* v. *Commonwealth of Australia*,[1] in which it was held that the provisions in the agreement between the Commonwealth and the State providing for the assessment of compensation for resumed property on the basis of 1942 values was contrary to the "just terms" provision of the Commonwealth Constitution and that the agreement was ultra vires the Commonwealth; that there was accordingly no valid agreement on which the State War Service and Closer Service Settlement (Amendment) Act No. 14 of 1946 could operate and that the State Act was to that extent ineffective.

The War Service Land Settlement Agreement Act was then repealed by the War Service Land Settlement and Closer Settlement Validation Act, 1950, which was by section 2 to be read and construed with the War Service Land Settlement Act, 1941, in the Closer Settlement Acts and was to be deemed to have commenced on January 7, 1946. The substantial result of these changes was to throw back the State upon its own Act of 1941,

[1] (1949) 80 C.L.R. 382.

and to strike out all reference to and dependence upon the agreement with the Commonwealth.

The result was that, so far as is material, section 4 of the Act of 1907 took the following form:—

"4.—(1) Where an advisory board reports that any land is "suitable to be acquired for closer settlement, the Governor "may—

"(*a*) . . .

"(*b*) . . . resume it under this Act.

"(2) Every . . . resumption shall be subject to approval by "resolutions of both Houses of Parliament.

"(3) Before resuming any land, the Governor shall, by "proclamation in the Gazette, notify that he proposes to consider "the advisableness of acquiring such land for the purposes of "closer settlement. . . .

"(4) (*a*) The price to be paid in respect of any such purchase "shall not exceed the price at which an advisory board has "recommended the acquisition of the land: Provided that where "any such purchase is made for the purpose of section three of "the War Service Land Settlement Act, 1941, as amended by "subsequent Acts, the price at which an advisory board recom-"mends the acquisition of the land shall not exceed by more "than fifteen per centum the price which it would have recom-"mended in respect of an identical purchase as at the tenth "day of February, one thousand nine hundred and forty-two, "excepting the value of any improvements effected on such land "since that date.

"(*b*) The compensation to be paid in respect of any such "resumption shall, unless an agreement is entered into in terms "of section 11 of this Act, be the value of the land as assessed "by an advisory board, or where an appeal has been made in "terms of section 9 of this Act, as determined by the Land and "Valuation Court: Provided that where any such resumption "is made for the purposes of the scheme contained in the "agreement approved and ratified by the War Service Land "Settlement Agreement Act, 1945, the value of the land so "assessed or determined shall not exceed the value which would "have been so assessed or determined in respect of an identical "resumption as at the tenth day of February one thousand nine "hundred and forty-two, excepting the value of any improve-"ments effected on such land since that date."

A further change, however, was made by the War Service Land Settlement and Closer Settlement (Amendment) Act, No. 48 of 1948, which amended section 4 (4) (*b*) by striking out the proviso to that sub-subsection and inserting in lieu thereof the following:—

"(i) In the case of any such resumption where the owner has "agreed not to claim compensation in excess of the value of the "land as assessed by an advisory board the value of the land as "so assessed shall not exceed by more than fifteen per centum

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"the value which would have been so assessed or determined in "respect of an identical resumption as at the tenth day of "February one thousand nine hundred and forty-two, excepting "the value of any improvements effected on such land since that "date;

"(ii) In the case of any such resumption other than a "resumption where the owner has agreed not to claim compen-"sation in excess of the value of the land as assessed by an "advisory board, the value of the land as so assessed or deter-"mined shall not exceed the value which would have been so "assessed or determined in respect of an identical resumption "as at the tenth day of February, one thousand nine hundred "and forty-two, excepting the value of any improvements effected "on such land since that date."

The Act of 1950 received the Royal Assent on May 3, 1950. Up to this time the advisory board seems to have made some attempts to come to terms with the present appellants and also to have held their hand pending a settlement of the legal position, but on May 4 of that year they valued the lands, subject to an agreed retention of 3,631 acres by Richard Anthony Pye, on a freehold basis inclusive of improvements, in accordance with section 4 (4) (*b*) (2) of the Closer Settlement (Amendment) Act, 1907, as amended, as at February 10, 1942, and recommended their resumption accordingly.

Thereupon, on September 1, 1950, there was published in the New South Wales Government Gazette a declaration by the Governor that the lands in question were resumed, and that (as the fact was) both Houses of the Parliament of New South Wales had approved of the resumption of these lands.

On September 28, 1950, the appellants lodged notices of appeal to the Land and Valuation Court, against the assessments of value of the resumed land made by the Closer Settlement Advisory Board. Each of those notices of appeal set out the grounds of appeal as follows: "1. That the value of the land "assessed by the Closer Settlement Advisory Board is too low. "2. That the advisory board arrived at the value of the land on "an incorrect basis. 3. That the advisory board did not have "proper regard to the items going to make up the value of the "land in accordance with the relevant Act. 4. That the advisory "board in arriving at the value of the land did not have proper "regard to the productive capacity of the land."

At the hearing before the Land and Valuation Court certain evidence was sought to be given, viz.: (1) questions with the object of establishing the value of the land at the date of resumption, and (2) questions for the purpose of showing that the appellants were not given an opportunity under section 4 (4) (*b*) (ii) of agreeing not to claim compensation in excess of the value of the land as assessed by the advisory board.

Both these classes of evidence were rejected, the first on the ground that only 1942 values could be considered, and the second

on the ground that under the terms of the proviso to section 4 (4) (*b*) (ii) the owner was not entitled as of right to be given the option of agreeing not to claim compensation in excess of the valuation put upon his land by the advisory board, though possibly he might be entitled to an increase limited to 15 per cent. if he claimed to exercise such an option.

Before Sugerman J. as, indeed, before the three courts in Australia and before their Lordships, the argument turned upon whether the statute in the present form was workable.

On behalf of the appellants Sir Garfield Barwick forcefully and analytically contended that it was unworkable. The prescribed sequence of events would not, it was said, permit a valuation based on 1942 values. Substantially the argument ran in the following form: (i) The Minister prescribes an area from which the advisory board may select all or any parts and, until they have done so, the land which will be resumed and its owner are both unknown. (ii) Two at least of the duties which the board must perform are to report the estimated value of the land and the price at which it recommends its acquisition and the method of arriving at such price. (iii) At that time the board cannot tell the purpose for which the Governor may resume the land except that it is for some form of closer settlement, nor can they tell what portion of the prescribed area will be resumed or who will be the owner affected. (iv) Prima facie their duty is to estimate the current value of the land and, until a notification is published in the Gazette under section 7 (1) and that notification is declared under section 4 (4) (*c*) to be for the purpose of section 3 of the War Service Act, 1941, there is no assurance that the resumption will be for the purpose of that Act and, indeed, even then the resumption is still subject to approval of both Houses of Parliament. (v) The board, therefore, in ignorance of the purpose of the resumption and of what land will be chosen for war settlement or other closer settlement, and accordingly ignorant of who the relevant owner may be, will have no means of deciding what land is to be valued at 1942 values or what owner is affected. (vi) How, then, until resumption has actually taken place is it possible to determine which land is to be valued at current and which at 1942 values? (vii) There is no provision in the Act for the estimation of value to be deferred or for a second valuation to be made. (viii) Moreover, even if an owner could be ascertained, section 4 (4) (*b*) (i) and (ii) contemplate an opportunity for the owner to agree before the report is made, whereas, having regard to the ignorance of the board as to the purpose of the resumption, no such opportunity is possible, nor in the particular instance was such an opportunity given.

In face of these arguments the judge put aside the problem as so presented and distinguished between the position of the board and that of the Land and Valuation Court. Let it be assumed, he said, that if the matter had stopped at the report of the board,

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the provisions of section 4 (4) (*b*) (i) and (ii) are unworkable. But it has not stopped there. There has been an appeal to the Land and Valuation Court against the assessment and that court has jurisdiction to hear it—see section 9 (1) and (2). The jurisdiction given to that court is called an appeal, but it is in fact a rehearing at which evidence (if relevant) and argument can be presented. When the matter reaches that stage, the resumption has taken place, the owner is known and the purpose is conclusively evidenced by section 4 (4) (*c*). The argument against workableness therefore falls to the ground and the court is not faced with any difficulty in applying the sections, nor does any question of evidence arise inasmuch as the court is compelled to adopt 1942 values. Moreover, although the Government may give the owner the opportunity of agreeing not to appeal, it is not obliged to do so, and in any case having appealed against the assessment he has thereby chosen not to accept the assessed value.

At the hearing in the Land and Valuation Court the judge was requested to state a case for the opinion of the Supreme Court upon a number of questions all directed to the basis upon which compensation is payable on the true construction of the Act of 1907. None of these questions dealt specifically with the contention that the owners should have been given an option under section 4 (4) (*b*) to elect to accept the value assessed by the board, nor is such a contention to be found in the grounds of appeal, but undoubtedly the question was raised and dealt with by the judge in annexure A to the case stated. He, however, was of opinion that the wording of section 4 (4) (*b*) (ii) applied exactly to the case in issue, that under that subsection 1942 values plus an increase up to 15 per cent. of those values was the utmost that could be given, and that in appealing to the court the owners were appealing on the basis that their case came under section 4 (4) (*b*) (ii) and could only appeal on that basis.

The appellants appealed to the Supreme Court from the judgment of Sugerman J. in the case stated. In that court the judgment was reversed, but upon narrow grounds. It is true that the Supreme Court accepted the argument that the board's assessment must take place prior to resumption and that the taking of 1942 values could only operate after a resumption had been made and made for a purpose which could not be known until a notification of resumption had been published in the Gazette. Accordingly they said: "the proviso cannot apply to "an advisory board when making an assessment and report, "and that board's only duty is, therefore, to assess on the basis "of the general law, namely, on the basis of the values current "at the date of its report. The proviso appears to have been "drafted upon the erroneous assumption that the assessment of "value by the board comes after, and not before, resumption, "whereas the true position is that its only power is to assess "before resumption. The appellants then submit that when an "appeal is brought to the Land and Valuation Court after

"notification of resumption, that court must put itself in the "same position as the board and do what it should have done, "namely, fix a value on the basis of the values current at the "date of the board's assessment."

On the other hand, they agreed with Sugerman J. as to the duties of the Land Valuation Court. Their words were: "It is at "this point that we find ourself in disagreement with this line "of argument. It is true that the matter reaches the Land and "Valuation Court under the name of an 'appeal' from the "board's assessment, but what the Land and Valuation Court is "required to do is to fix the compensation payable on a resump-"tion which has by that time taken place. On this 'appeal' the "basis on which the advisory board at some earlier preresumption "date assesses the value is irrelevant. The function of the "court is to fix the amount payable by way of compensation, "and not to inquire whether the board, in making its assessment, "went right or wrong. This was clearly the position under "section 9 of the 1907 Act in its original form. Though "instituted in name by a 'notice of appeal,' the right given to "an owner who was dissatisfied with the board's valuation was to "apply to have the 'fair market value of the land and improve-"'ments' determined by the court constituted under that Act. "An appeal in the strict sense is an inquiry by the appellate "court whether the order of the tribunal from which the appeal "is brought was correct on the materials which that tribunal "had before it. Under this legislation there is now no prior "hearing in open court or at all and no record of what materials "the board had before it except so far as may appear from its "report. The Land and Valuation Court cannot even rehear the "case, since there has been no prior hearing. Its duty is to "inquire and determine for itself, regardless of the board's views "as reported to the Minister, what is the true value for resump-"tion purposes of the property in question, paying due attention "to any statutory directions given in that regard and in the light "of the facts then existing."

So far the Supreme Court agree with Sugerman J., but they disagree with him in the result because in their view it is a condition precedent that the owner should be given an opportunity of electing whether he would accept the board's valuation or not. The board, as they construe the section, (1) must give this opportunity before it enters on the task of assessing values; (2) must make its report before any resumption takes place, and (3) the 1942 basis of valuation introduced by the proviso is applicable only after a resumption has been made and made for the purpose stated in the proviso. Their view was perhaps most clearly expressed when they said: "It is implicit in the legis-"lative scheme that the owner should first be given an oppor-"tunity of deciding whether he will accept the valuation which "the board is later to make, since it is not until the board

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"knows whether or not the owner is prepared to accept its assess-
"ment as final and abandon his right of 'appeal' in exchange
"for the possibility of obtaining an additional 15 per cent. on the
"1942 values, that it can know what standard of values it is to
"apply. Yet this condition precedent to the application of 1942
"values cannot be fulfilled, because by the very terms of the
"Act in which the proviso appears the board must make its
"assessment before, and not after resumption, and therefore
"before the purpose for which the resumption is made can be
"known."

In support of this view the Supreme Court pointed out that section 4 (4) (*b*) (i) and (ii) form part of a general scheme and must be read together, and that under (i) an owner has to be given an opportunity of agreeing to accept the compensation assessed by the advisory board, not that determined by the Land and Valuation Court. As they had already indicated in their opinion, the values given by the advisory board must necessarily be exercised prior to resumption, and until the board knew of the purpose of the resumption no such opportunity could be or was in fact given.

The grounds of this decision were, as their Lordships think, accurately expressed by the High Court in the words: "The
"value to be stated in the report must be the value at the date
"of the report. The assessment of that value by the advisory
"board having necessarily been completed before the resumption,
"the proviso attempted to achieve an impossibility, when it
"purports after the resumption has been effected to give the
"advisory board a direction as to the manner in which it shall go
"about a task already performed."

The Supreme Court accordingly held that "some of the
"language used by Parliament is so intractable that it cannot be
"given any operative effect" and answered question 2 of the stated case, (A) No, (B) Yes, (C) No, i.e., that the compensation payable was the value at the date of resumption.

From that decision an appeal was taken to the High Court, which allowed the appeal and held that compensation was payable on the values taken by the board, i.e., the values on February 10, 1942. They resolved the difficulty posed by the Supreme Court by holding that the proviso is not in the nature of a command to the advisory board prescribing the basis upon which it shall perform its duty of valuation, but a notice to the board that unless it limited its assessment by reference to 1942 values the assessment would not be effective. Their words are:
"the solution which the draftsman adopted was to add a proviso
"to the subsection which fixed the owner's compensation at the
"amount of the value as assessed by the advisory board, and
"to rely upon the practical effect which this would necessarily
"have upon the mind of the board when making its valuation.
"Thus the key to the problem was found in the fact that in
"actual practice the advisory board would be certain to know

"the purposes for which the resumption was likely to be made, "and a proviso added to section 4 (4) (*b*) while not a command "obligatory upon the board when valuing, would nevertheless "operate as notice to the board at that time that unless it limited "its assessment by reference to the 1942 value (or that value plus "15 per centum if the owner had agreed not to appeal), the "assessment would not be effective to determine the compensa-"tion in the event of the resumption being in fact made for the "stated purposes."

As to the alleged necessity of giving an opportunity to the owner, they held that this provision was inserted for the benefit of the Crown so that if so minded it might offer an inducement to the owner to refrain from appealing. In their view it was an option which the Crown might or might not exercise and, if it did not, the owner had no ground of complaint.

From that judgment the appellants appeal to their Lordships' Board.

Their Lordships agree with the decision of Sugerman J. and of the High Court, though they do not wholly adopt the grounds of their judgments. That decision depends entirely upon the construction of the Closer Settlement Act, as now amended, and the Act in its present form must be read as a whole.

In approaching their decision their Lordships have borne in mind the warning contained in *Magor and St. Mellons Rural District Council* v. *Newport Borough Council*[2] that the duty of the court is limited to interpreting the words used by the legislature and that it has no power to fill in any gaps disclosed, but in the meaning which they have put upon the Act as now framed their Lordships have refrained from adopting any such course and have confined themselves strictly to interpretation.

In reaching a conclusion as to the meaning to be placed upon an Act of Parliament it must always be remembered, as Lord Dunedin stated in *Murray* v. *Inland Revenue Commissioners*[3]: "It is our duty to make what we can of statutes, knowing that "they are meant to be operative, and not inept, and nothing short "of impossibility should in my judgment allow a judge to declare "a statute unworkable." A similar view was expressed by Lord Simon L.C. in *Nokes* v. *Doncaster Amalgamated Collieries Ld.*[4] in the words: "if the choice is between two interpretations, the "narrower of which would fail to achieve the manifest purpose "of the legislation, we should avoid a construction which would "reduce the legislation to futility and should rather accept the "bolder construction based on the view that Parliament would "legislate only for the purpose of bringing about an effective "result."

With these principles in mind their Lordships approach the

[2] [1952] A.C. 189; [1951] 2 T.L.R. 935; [1951] 2 All E.R. 839.

[3] [1918] A.C. 541, 553; 34 T.L.R. 425.

[4] [1940] A.C. 1014, 1022; 56 T.L.R. 988; [1940] 3 All E.R. 549.

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interpretation of the statute which in the hearing before them has been elaborately analysed. The gravamen of the charge that it is unworkable lies in two contentions already referred to, viz.: (1) that the compensation is to be determined by the advisory board in its report before the purpose of the resumption is finally determined by the Governor and confirmed by Parliament; and (2) the owner must be given an opportunity of electing to accept the value in the report or rejecting it and no such opportunity can be or has been given in the present case.

The second of these objections may, in their Lordships' opinion, be shortly dealt with. They agree that, where the Minister informs the advisory board that his intention is to resume the land for closer settlement on behalf of those who have been engaged on war service, that body must make the valuation on the basis of the prices which prevailed on February 10, 1942, and before issuing their report must give the owner the opportunity of electing whether he will accept or refuse the figure arrived at, but as has been already indicated, in the present instance a contention that they failed to do so forms no part of the case stated by the Land and Valuation Court, and even if it did, the appellants having proceeded to that court cannot now retain the right to contend that the option given by section 4 (4) (*b*) (ii) is still open for them to exercise.

The first contention, however, has still to be considered. Technically it presents some difficulty, but in practice no actual difficulty has been encountered. In the present case the advisory board obviously knew of the intention of the Minister and assessed the compensation accordingly, and the requisite subsequent steps were taken in due course. Except for the contention that the board were obliged to take current values no criticism of the procedure gives rise to complaint.

In their Lordships' view the argument that the board could not know the purpose of the resumption, until it had finally been effected, is not justified.

The Minister can have a purpose which he can intimate to the board so soon as he makes his request under section 3 (1) of the Act. No doubt it is conceivable that he or the Governor might change their intention, but in such a case the proper course, if it were intended to resume the land for other closer settlement purposes, would be to withdraw the original request and resubmit the matter to the advisory board.

It is true that the Minister prescribes the general area from which a choice of the land to be resumed is made, but the advisory board are the body by whom both the actual land to be resumed and its value are to be determined. They therefore (1) know when they are making their report the purpose for which the land is to be resumed and the owner; (2) can make their assessment of value on that basis, and (3) can give the owner his option under section 4 (4) (*b*) (ii).

The objection is theoretical only. In fact the advisory board

do, and in this case did, know both the purpose of the resumption and the owners concerned.

But it is contended that the wording of the proviso to section 4 (4) (*b*) "Provided that where any such resumption is "made" shows that the 1942 value can only be applied after resumption has taken place, and it is urged that this expression should be read as equivalent to "where any such resumption has "been made." In their Lordships' opinion no such meaning need be, or should be, ascribed to it. The words, in their view, are descriptive of the purpose of resumption and have no temporal connotation. It is not "has been made," although the High Court in one passage so transcribe it, nor is it "in course "of being made" as the respondent appears at one time to have argued. The simplest and most accurate paraphrase, to their Lordships' minds, is to substitute the words "in a case where "the resumption is made for the purposes of section 3 of the "War Service Land Settlement Act, 1941, as amended," i.e., it indicates the object for which the resumption is made, and does not mean that the value is not to be assessed until after resumption has taken place.

It follows that the wording of the proviso gives no support to the contention that the value of the land to be resumed cannot be assessed until after the resumption is accomplished.

Nor does any difficulty arise from the fact that the approbation of the Governor and of Parliament is required. The Minister represents the Government and the Governor acts as Governor in Council: there is consequently no dichotomy between the Minister who requires a report and the Governor who resumes. Parliament in its turn will be presented with a scheme for resumption for the purpose of the War Service Act, 1941, and it will be for that body to approve or disapprove that scheme.

For these reasons their Lordships are of opinion that the case was rightly determined by the High Court. The grounds of their decision leave it unnecessary to pronounce upon the view held by Sugerman J. (1) that, whatever the value assessed by the advisory board, it is the duty of the Land and Valuation Court to embark upon a fresh inquiry as to values in no way trammelled by the value assessed by the advisory board, or (2) that the facts known when an appeal is made entitle that court to adopt a different basis of valuation from that adopted by the board.

If that were the only ground on which a 1942 valuation could be supported, then, if the advisory board were under a duty or entitled to insert current values in their report, the owner who had been given the advantage of such a valuation might well avoid any appeal, and in such a case it is difficult to envisage any course which the Government could take except under the power given by section 6 (2) to cancel the proclamation made under section 4 (3).

It will be observed that their Lordships have placed no

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reliance on the provisions of section 3 (1) (*f*) of the Closer Settlement Act. In their view that subsection enables the Minister to request a report on matters additional to subsections (*a*) to (*e*) but does not confer a power to omit or change the requirements of those subsections. Nor do their Lordships think that on its true interpretation the Act provides for the making of two or more reports or for the alteration or amendment of one already made.

For the reasons which they have set out above, however, their Lordships are of opinion that the case has been rightly decided by the High Court and will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs incurred by the respondent before their Lordships' Board.

Solicitors: *Waterhouse & Co.; Light & Fulton.*

C. C.

[MANCHESTER SUMMER ASSIZES.]

1954
July 30.
Pearson J.

* LASZCZYK *v.* NATIONAL COAL BOARD.

Mines and Minerals—Coal—Regulations—Breach of statutory duty by employer and employee — Causation — Contributory negligence — Apportionment of liability—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 74 — *Coal Mines (Training) General Regulations,* 1945 (*S.R. & O.* 1945, *No.* 1217).

The plaintiff, a haulage worker in the employ of the defendants, worked at the coal face in breach of the safety directions given to him by the colliery training officer in compliance with section 74 of the Coal Mines Act, 1911. This work was nevertheless carried out for a period of three years in accordance with the instructions of his immediate superior, although such work by a haulage worker was prohibited by the Coal Mines (Training) General Regulations, 1945. As the result of the negligence of a shot-firer's sentry the plaintiff was seriously injured by an explosion at the coal face. On the issues of whether the plaintiff bore any, and if so, how large a share of responsibility for his own injuries on account of his breach of the safety directions:—

Held, the plaintiff bore some responsibility since he abetted the subordinate official in disobeying the safety direction, but that since under the wrongful instructions of his immediate superior he had continued working there, his responsibility was apportioned at five per cent.

ACTION for damages for negligence and breach of statutory duty.

The facts are fully stated in the judgment.

[Reported by JOHN WARD, Esq., Barrister-at-Law.]

D. J. Brabin Q.C. and *Robert Lambert* for the plaintiff.
J. R. D. Crichton Q.C. and *C. M. W. Elliott* for the defendant.

The following cases were cited in argument in addition to those referred to in the judgment: *Harrison* v. *National Coal Board* [1]; *Stapley* v. *Gypsum Mines Ld.* [2]

PEARSON J. The plaintiff, Mr. Herbert Laszczyk, claims against the defendants, the National Coal Board, for damages for negligence and breach of statutory duty in respect of a shot firing accident which occurred on March 11, 1953, at the defendant's Bickershaw colliery. The plaintiff, who is of Polish origin, came to England in 1947, having previously had some one and a half years' experience as a coal miner. He was then trained in Wales as a haulage worker, but was not trained as a coal face worker. After some work at other mines he came to Bickershaw Colliery about three years prior to the accident, which would be early in 1950, and he worked there as a haulage worker. The combined team of haulage workers would, no doubt, on some occasions be bringing the extracted coal back from the coal face along the main roads, but at other times they would be bringing the materials required—timber and iron bars—from what may be called the underground "tramway terminus," along the main roads to a place near the coal face, and then one or more would have to bring the materials along to the coal face to give them to the working colliers who needed such materials. The plaintiff, throughout the three years' period up to and including March 11, 1953, when the accident occurred, did in fact from time to time execute some of this work of bringing materials along the coal face and distributing them to the persons working there.

On February 11, 1953, one Hindley, who was the Bickershaw Colliery training officer, found the plaintiff at the coal face and he told him he had no right to be there, explaining, in effect, the safety requirements under the appropriate training regulations. He then took the plaintiff to some place on the main haulage road and pointed out a particular mark or position beyond which he told the plaintiff he must not go. The plaintiff worked on certain parts of two different shifts. On part of the afternoon shift he was under a deputy or fireman whose name was Sinclair and on part of the day or morning shift he worked under another officer of the same rank, Thompson. On that same day, February 11, 1953, the colliery training officer left for the first of these deputies, Sinclair, this note: "H. Laszczyk is being used on the "face. He is not face trained in any respect; please avoid "using him on the face." Sinclair received this message and I think that he probably did pass it on to the plaintiff. The attitude of the other deputy, Thompson, was quite different. He

[1] [1951] A.C. 639; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

[2] [1953] A.C. 663; [1953] 3 W.L.R. 279; [1953] 2 All E.R. 478.

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Pearson J.

instructed the plaintiff to continue doing the same work of distributing the required materials at the coal face, but to keep out of the way of the colliery training officer if he should happen to be there. The plaintiff carried out these instructions, although he and Thompson knew that this was in breach of the mines safety requirements. Preferring the evidence of the plaintiff to that of Thompson I find that these instructions were given after the colliery training officer's conversation with the plaintiff.

On March 11, 1953, a shot-firer named Melling was about to fire a shot in the stint of a miner called Burton and in accordance with the relevant shot firing regulations he posted himself for security at one end of the determined danger zone and he posted Burton at the other end. Burton gave the necessary warning to another miner, but he failed to give any warning to the plaintiff, who was coming along the coal face in the direction of the determined danger zone. Burton was not keeping a proper look-out and not performing his duty as a shot-firer's sentry with diligence and failed to see the plaintiff at all. The plaintiff went into the danger zone and was severely injured when the shot was fired. The accident was plainly caused by the negligence on the part of the sentry, Burton, and for his negligence the defendants must be held responsible, but there is a question whether some deduction should be made from the full amount of damages by reason of the contributory negligence on the part of the plaintiff himself.

Section 74 of the Coal Mines Act, 1911, provides that "Every "person shall observe such directions with respect to working as "may be given to him with a view to comply with this part "[Part II] of this Act or the regulations of the mine or with a "view to safety." The colliery training officer had given to the plaintiff directions with a view to safety and I think these directions could also be regarded as being given with a view to complying with that part [Part II] of the Act and with the relevant training regulations. At any rate they were given with a view to safety and these directions were disobeyed by the plaintiff, acting under the instructions of his deputy, Thompson.

There are also to be taken into account the Coal Mines (Training) General Regulations, 1945. Regulation 1 provides: "No person shall be employed in or about a mine on any work on "which he has not been employed before the coming into force "of these Regulations [January 1, 1947] except under "competent instruction and supervision, and unless and until "he has been adequately trained and is competent to do the "work without supervision." Regulation 4 (1) provides: "Without prejudice to the generality of the provisions of regulation 1 "of these Regulations, no person who has not been employed on "work at the coal face"—which I think must mean not so employed, looking back at regulation 1, before January 1, 1947—"shall be employed, otherwise than at a training face, on such

"work until . . . (c) there has been issued by a training officer "appointed under these regulations a certificate (in the pre-"scribed form) that such person has duly received such training "as aforesaid and is competent to be employed at the coal face;". No such certificate had been issued in the case of the plaintiff. Regulation 17 (1) defines the expression "work at the coal face" as including, "any work performed within ten yards of a face "(other than work performed by any person employed on the "haulage or on a conveyor-loader in handling or filling tubs, or "as a conveyor-engine attendant, in any part of the area com-"prised within the face and the sides of the road as if the sides "were extended to the face) but does not include work per-"formed at a training face."

In the present case the plaintiff was working within ten yards of the coal face and, therefore, the work which he was doing was work within that definition of "work at a coal face" unless the parenthesis applies. He was employed on haulage, but not, at the material time, in any part of the area comprised within the face and sides of a road as if the sides were extended to the face. As I understand the expression, therefore, he was being employed on work at the coal face in breach of regulation 4, and in that breach—primarily an employer's breach—he was abetting.

There is then the question: Was the plaintiff's breach of section 74 and regulation 4 (1) one cause of the accident? Upon this there was reference to *National Coal Board* v. *England*[1] and there was also offered to me the shorthand transcript of the decision of the Court of Appeal in *Walsh* v. *National Coal Board*.[2] Having regard to the lines of reasoning in these cases I hold that the plaintiff was wrongfully working at the coal face; and that his act was sufficiently proximate to the accident to be regarded as one cause of it.

The next question which arises is what percentage represents the plaintiff's share of responsibility for the accident on the facts, when he had been allowed and ordered wrongfully to be working at the coal face over the whole period of three years. He had been instructed by the official—the deputy who was his "boss" for the time being—to continue this wrongful working and to keep out of the way of the colliery training officer if he should happen to be there. I hold that the proper share must be quite small and I assess it at five per cent.

[His Lordship reviewed the medical evidence and continued:] Having regard to these facts I assess the general damages at £5,500, and to that there has to be added the agreed special damages of £229 5s. 7d. which makes the full amount £5,729 5s. 7d. Five per cent of that has to be subtracted, and

[1] [1954] A.C. 403; [1954] 2 W.L.R. 400; [1954] 1 All E.R. 546.

[2] May 11, 1954 (unreported).

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in the result there will be judgment for £5,442 16s. 4d. for the plaintiff and costs.

Judgment accordingly.

Solicitors: *Adam F. Greenhalgh & Co., Bolton; C. J. Hodgson, Manchester.*

[CHANCERY DIVISION.]

1954 *Nov. 9.*

Roxburgh J.

* *In re* FOLLETT, DECD.
BARCLAYS BANK LD. *v.* DOVELL AND ANOTHER.

[1953 F. No. 1829.]

Will—Construction—Omission—Clause ungrammatical and illogical unless words supplied from precedent—Judicial notice that precedent available—Words inserted.

Where part of a clause in a will which gave a general power of appointment was pure nonsense, and the rest was grammatical on the face of it, but was illogical in the construction of the will as a whole, and the words used appeared to be taken from part of a precedent from Key & Elphinstone's Precedents in Conveyancing (11th ed., vol. 2, pp. 901–2) which was available at the date of the will, and the insertion of omitted words made grammatical sense and created a special power of appointment which was logically consistent with the rest of the will:—

Held, by the court with compelling conviction, that the testatrix had intended to include in the clause the rest of that precedent; and that the will should be construed, therefore, as if the rest of it had been inserted with the appropriate substitutions.

In re Smith [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708 applied.

ADJOURNED SUMMONS.

Georgina Sarah Follett made her will on August 31, 1923, and the codicil thereto on March 14, 1924. After creating two life interests in her residuary estate in favour of two nieces, she provided in clause 5: "Upon the death of both my said two "nieces I direct my trustees to pay the total income from my "residuary trust fund . . . to . . . Beryl Edmonds [the first "defendant, now Mrs. Dovell] during her life . . . On and after "the death of the said Beryl Edmonds my trustees shall hold "my residuary trust fund and the future income thereof in trust "for all or such one or more exclusively or others of her child "or children or remoter issue or any other person or persons "as she should by deed or deeds revocable or irrevocable or by "will or codicil without transgressing the rules against per-"petuities appoint and in default of or subject to any such "appointment in trust for her next-of-kin."

By the codicil she made the following disposition: "Whereas "I have made no provision in my said will in the event of Beryl "Edmonds dying before she becomes entitled to her share of my "estate now therefore in the event of the said Beryl Edmonds "dying before she becomes entitled to any share in my estate "I give devise and bequeath the share or interest to which had "she lived she would have been entitled to my two nephews Cecil "Biddell Follett and Wilfred Howell Follett in equal shares "absolutely. . . ."

The testatrix died on July 21, 1932. The two nieces died in 1950 and 1951 respectively, and the first defendant, who had no children, thereafter received the income from the residuary estate. In purported exercise of the power of appointment conferred by the will she appointed by deed dated June 16, 1953, the whole of the residuary trust fund to herself absolutely. She had requested the trustees to make over to her the capital of the residuary estate, but they were doubtful whether under the terms of the will she had power to appoint in her own favour.

By this summons the court was asked to determine whether on the true construction of the will and codicil and in the events which had happened, the power of appointment conferred on the first defendant in clause 5 of the will was: (1) a general power of appointment enabling her to appoint the fund to herself absolutely, or (2) a special power enabling her to appoint the fund in favour of her children or remoter issue, and in default thereof in favour of any persons (i) including herself or (ii) not including herself.

Mark Cockle for the trustees, Barclays Bank Ld.

I. J. Lindner Q.C. and *G. H. Crispin* (*D. R. Wells* with them) for the first defendant, Beryl Dovell.

J. L. Arnold for the second defendant, who was interested in default of appointment.

Key and Elphinstone's Precedents in Conveyancing, 11th ed., which was published in 1923, contained the following precedent (vol. 2, pp. 901–2): "[After the death of my wife] my trustees "shall stand possessed of the capital and future income of the "trust fund in trust for all or such one or more exclusively of "the others or other of my children or remoter issue, [at such "age or time, or respective ages or times, if more than one in "such shares, and with such trusts for their respective benefit "and such provisions for their respective advancement (either "during the life of my wife or after her death) and maintenance "and education at the discretion of my trustees] or any other "person or persons, as my wife shall from time to time by any "deed or deeds revocable or irrevocable or by will or codicil "without transgressing the rule against perpetuities appoint, and "in default of and subject to any such appointment as aforesaid, "etc."

It was argued by counsel for the second defendant that after

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the word "exclusively" the words "of the others or other" should be substituted for the words "or others" and that the words within the second brackets should be inserted in the will between the words "remoter issue" and "or any other person or "persons."

Cases cited in argument not referred to in the judgment: *In re Haygarth* *; *Mellor* v. *Daintree* †; *In re Redfern.*‡

Roxburgh J., having stated the facts: The peculiar language of the codicil has the effect of interposing (in an event which did not happen) two life interests in equal shares between the first defendant and her issue if she had any. I only refer to the codicil in passing, because one is entitled to read the will and codicil together; although they bear different dates, they both constitute the testatrix's testamentary disposition, and anything more completely muddled than that codicil it would be difficult to conceive. However, if that were all, I would accede to the construction in favour of the first defendant.

The first defendant has treated the clause which I have read from the will as conferring on her a general power of appointment, and has accordingly appointed the residuary estate to herself absolutely, and she now claims the fund. The question is: Was she entitled to do that? If the clause is construed quite literally—and it is possible to construe it quite literally—I am satisfied that she was entitled to do what she did. It seems to me that in this rather absurd clause "other" must be in contrast with issue and not in contrast with herself. But Mr. Arnold has convinced me that this sentence does not embody the intention of the testatrix.

The difficulty, of course, in this connexion, is not to find out what is the law, but to apply it. The law is completely stated in the judgment of Vaisey J. in *In re Smith*,[1] where, after citing from a number of authorities, he said that "necessity"[2] in this connexion (and he was quoting from *Wilkinson* v. *Adam*[3]) meant "'not natural necessity, but so strong a probability of intention, "'that an intention contrary to that which is imputed to the "'testator cannot be supposed.'" That he himself summarized as "a compelling conviction,"[4] and I am happy to adopt that phrase. Vaisey J. also quoted from Jarman and adopted this citation: "Where it is clear on the face of a will that the "testator has not accurately or completely expressed his meaning "by the words he has used, and it is also clear what are the "words which he has omitted, those words may be supplied in "order to effectuate the intention, as collected from the context."

* [1913] 2 Ch. 9.
† (1886) 33 Ch.D. 198.
‡ (1877) 6 Ch.D. 133.
[1] [1948] Ch. 49; 63 T.L.R. 608; [1947] 2 All E.R. 708.
[2] [1948] Ch. 52.
[3] (1812–3) 1 V. & B. 422.
[4] [1948] Ch. 53.

I have reached a compelling conviction on both points, and I do not know what objective test there is. I do not think that there is any objective test, and I do not know what more can be said so far as this court is concerned.

I must, however, give my reasons, because they are of a very particular nature. I have already alluded, as a matter of minor importance, to the absurdities of the codicil, but now I must consider the clause on which everything depends; it is this: "in "trust for all or such one or more exclusively or others of her "child or children or remoter issue." Pausing there, that is pure nonsense; nobody can deny that that does not give effect to any intention at all. There obviously is an accidental omission. Is there any doubt what the accidental omission is? I do not think that there would be any doubt even if no reference books were to hand, but I think that I must be entitled to treat the testatrix, when she sat in her armchair to make her will, as having at her elbow recognized books of precedents. There is no doubt that she did not compose this language for the first time; and, from an examination of Key and Elphinstone's Conveyancing Precedents, 11th ed., vol. 2, p. 901, the edition which was in operation at the date when the will was made, the solution is obvious. There can be no doubt that what she was trying to say was "in trust for all or such one or more exclusively of the "others or other." That seems to me to be quite obvious.

It is that which leads me to accept Mr. Arnold's contention; but for that, I should not have accepted it, because otherwise I should have said that, while I thought that I knew what had gone wrong with the will, I could not be quite sure. The will continues: "in trust for all or such one or more exclusively or "others of her child or children or remoter issue or any other "person or persons." That is not sense from the logical point of view, though it is grammatical sense; because if the intention was to enable Mrs. Dovell to appoint to any person or persons including herself, which is the intention which Mr. Lindner seeks to impute to the testator, there was no conceivable reason for mentioning the child or children or remoter issue, still less for saying exclusively of anybody or anything. The answer might, of course, have been: "Well, the other words are, after all, "merely tautological. Sense can be given to the passage, and "the court ought not to interfere with it."

When I have once been, as I think compulsorily, referred to Key and Elphinstone by reason of the first blunder, I find no difficulty in continuing to read on at the page to which I have thus been compulsorily referred, which goes on: "at such age "or time, or respective ages or times, if more than one in such "shares, and with such trusts for their respective benefit and "such provisions for their respective advancement (either during "the life of my wife or after her death) and maintenance and "education at the discretion of my trustees or any other person

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"or persons as my wife shall from time to time by any deed or "deeds revocable or irrevocable or by will or codicil without "transgressing the rule against perpetuities [which has not been "forgotten in the will] appoint. . . ."

I have not the least doubt that those words "any other person "or persons" came from that precedent, and that it was by inadvertence that the words preceding were omitted. I have a compelling conviction to that effect, and I think that all the words in the precedent after "remoter issue" and before the words "any other person or persons" were intended to be inserted—substituting, of course, the appropriate life tenant—in the clause.

The result of that is, of course, that this is but a special power of appointment enabling her to appoint the fund in favour of her children or remoter issue only. I say no more, because I may have been wrong in reaching that compelling conviction; but the story fits like a glove.

Declaration accordingly.

Solicitors: *Terence O'Shea, Lake & Co.; Moon, Gilks & Moon for Campion, Symons & Co., Exmouth.*

I. G. R. M.

[COURT OF APPEAL.]

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Denning, Morris and Parker L.JJ.

* DRUMMOND *v.* BRITISH BUILDING CLEANERS LD.

[1951 D. No. 2398.]

Negligence — Safe system of work — General precautions — Window-cleaning—Outside of sash window cleaned by window-cleaner standing on sill—Method recognized by trade—Fall of window-cleaner—Practicability of instituting system reducing hazards—"Transom "method"—Employers' liability.

The plaintiff, an experienced and efficient window-cleaner employed by the defendants, was cleaning the outside of a first-floor sash window by standing on a sloping sill outside the window and holding on with one hand by a finger grip under the bottom of the top sash when his foot slipped, his finger hold was wrenched away and he fell to the ground. The window and sill were of sound construction and in good condition. Above the top sash was a transom and above that a fanlight. Although the plaintiff had a safety belt none of the windows in the building had eye-bolts or hooks to which it could be attached. The plaintiff was not instructed to hitch the rope attached to his safety belt round the transom above the window nor to use a ladder provided by the defendants. In an action by the plaintiff alleging negligence on the part of his employers and claiming damages in respect of his injuries:—

Held, that it had been clearly shown by evidence in this and other cases that the practice of cleaning windows by standing on the sill was dangerous and the employers therefore were under a

common law duty to do all they could to reduce the risk and to insist on their workmen taking precautions for their own safety; that the evidence of witnesses for the employers established that the transom method was a reasonably practicable way of securing safety, and the employers were guilty of negligence in failing to inquire into the possibility of attaching the safety belt to a transom, or to instruct their workmen to use that method when available.

Observations of Lords Jowitt, Oaksey and Reid in *General Cleaning Contractors Ld.* v. *Christmas* [1953] A.C. 180, 188, 189, 193–4; [1952] 2 All E.R. 1110 applied.

Decision of Pilcher J. [1954] 1 W.L.R. 501 reversed.

APPEAL from Pilcher J.[1]

The plaintiff, an experienced and efficient window-cleaner with a good head for heights, had for about three years been in the employment of the defendants, a company carrying out the general cleaning and window-cleaning of offices and other premises. The defendants' practice was to pay their employees 50 per cent. of the contract price for any particular job, a system under which the men had an incentive to work expeditiously and usually earned more than if they had been paid by time. One of the defendants' contracts was for the monthly cleaning of windows in Bovril's factory, a building with some 700 windows which, during his employment by the defendants, the plaintiff and his squad had cleaned many times.

On November 14, 1949, the plaintiff was cleaning a first-floor window, some 21 feet above the ground, in Bovril's factory at Bunhill Row, in the City of London. It was an ordinary sash type window with two panes in the top and two in the bottom sash. Above the top sash was a transom and above that a fanlight. Both sashes were about three feet in height and the whole construction of the window and its woodwork was solid and well maintained. In order to clean the outside of the window the plaintiff, adopting the "jumping" method, stood on a sloping sill, also in good condition, outside the window. Having cleaned the panes of the top sash he pushed the bottom sash nearly down, leaving himself a finger grip under the bottom of the top sash. He was holding on to this with his right hand and squatting down to clean the bottom of the left hand pane with his left hand when his right foot slipped, his finger, or hand, hold was wrenched away, and he fell into the yard below, receiving serious injuries.

The plaintiff was provided with a safety belt, with an eight-foot rope with a spring hook attached to it at the end, but there were no eye-bolts or other solid object fitted to any of the windows of the factory, and no instructions had been given to the plaintiff and his fellow workmen to attach their safety belts to a transom when that precaution was available.

The trial judge held that the evidence did not justify a finding that in causing or permitting the plaintiff to clean the window

[1] [1954] 1 W.L.R. 501.

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from the sill the defendants were in breach of their common law duty to provide a safe system of work; that the method adopted by the plaintiff was the one by which upper storey sash windows were almost invariably cleaned and was the normal and general method in the trade; and that the defendants acted as reasonable and prudent employers and had not been guilty of any lack of care for the plaintiff's safety.

The plaintiff appealed.

Marven Everett Q.C. and *Jonathan Sofer* for the plaintiff.
F. W. Beney Q.C. and *Stephen Chapman* for the defendants.

The following cases were referred to in argument: *Smith* v. *Baker & Sons* [2]; *Paris* v. *Stepney Borough Council* [3]; *Winter* v. *Cardiff Rural District Council* [4]; *General Cleaning Contractors Ld.* v. *Christmas* [5]; and *Roberts* v. *Dorman Long & Co. Ld.* [6]

Denning L.J. referred briefly to the facts, and continued: It is clearly shown by the evidence in this case, and in other cases which have come before the court, that the practice of cleaning windows by standing on the sill is dangerous. In those circumstances the employers are under a duty to do all they can to reduce the risk. They should insist on the men taking precautions for their own safety. It is no answer for the employers to say: "We cannot help it. The men will stand on "the sill." The employers should always be on the look-out to see if there is any more that can be done for the safety of the men. As Lord Reid pointed out in *General Cleaning Contractors Ld.* v. *Christmas* [1]: "Where a practice of ignoring an obvious "danger has grown up I do not think that it is reasonable to "expect an individual workman to take the initiative in devising "and using precautions. It is the duty of the employer to "consider the situation, to devise a suitable system, to instruct "his men what they must do and to supply any implements "that may be required such as, in this case, wedges or objects "to be put on the window sill to prevent the window from "closing. No doubt he cannot be certain that his men will do "as they are told when they are working alone. But if he does "all that is reasonable to ensure that his safety system is "operated he will have done what he is bound to do."

In this case the plaintiff suggested several methods of cleaning the window which he said should have been devised by the employers for cleaning this window. The judge disposed of all of them in favour of the employers, and I need say nothing

[2] [1891] A.C. 325; 7 T.L.R. 679.
[3] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.
[4] [1950] W.N. 193; [1950] 1 All E.R. 819.
[5] [1953] A.C. 180; [1952] 2 All E.R. 1110.
[6] [1953] 1 W.L.R. 942; [1953] 2 All E.R. 428.
[1] [1953] A.C. 180, 194; [1952] 2 All E.R. 1110.

about them except for one particular method which is described as the "transom method." It was said on behalf of the plaintiff that if the employers had examined the windows of this particular building, they would have found that the men could have used their safety belts, by putting the rope around a transom, and that they should have instructed the men to do this. By a strange irony, it was the employers themselves who first suggested this method. They raised it by way of a plea of contributory negligence against the plaintiff himself. They said that he was provided with a safety belt and a rope, there was a strong transom at the top of this window, and he ought to have fastened his rope over the top of the transom and attached it to his safety belt. When the plaintiff's advisers saw this plea, they turned it to their own advantage. They amended the statement of claim so as to charge the employers with negligence in not ordering the men to use the transom method. They said, with some force: If the employers can think of this method now for the purposes of their defence, why did they not think of it before the windows were cleaned? The plaintiff's advisers sought thus to hoist the employers with their own petard, just as happened in *General Cleaning Contractors* v. *Christmas*.[1]

At the trial it was the employers themselves who proved that the transom method was practicable. [His Lordship read from the evidence of the defendants' witnesses as to the practicability of using the transom method, including that of the works manager of one of the big firms in the window-cleaning industry, who had agreed that if the transoms appeared to be of suitable strength, it would be the right course to ask the occupier if he minded the transom being used. His Lordship continued:] The employers also called an expert, and the only objection which he raised to the use of the transom was the possibility of damage to the paintwork. It is quite clear, therefore, that the transom method was a practicable way of securing safety subject only to the possible objection of the occupier; but I do not see that the employers can raise that objection. They ought to have asked the occupier whether he minded or not.

In my opinion the employers were guilty of negligence in that they failed to inquire into the possibility of attaching the safety belt to the transom or to instruct their men to use that method. Window-cleaning is a trade which is more dangerous than many other trades, and it is the duty of employers on that account to take all the more care to protect their workmen. They know that their workmen often stand on the sills to do their work; and they know of the many accidents which have happened in so doing. In this small firm, employing 20 men, in the course of 15 or 20 years there had been two fatal accidents, two cases of broken legs, and several other injuries. The employers are not able to prevent danger to the men altogether, but they ought to

[1] [1953] A.C. 180.

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do everything possible to lessen it. Their expert said that the only satisfactory method was to have a safety belt fastened by a rope on to something secure. The London County Council have made regulations with regard to work over the highway, in which they insist on a safety belt attached to something secure. So here, when the employers undertook the task of cleaning the windows of this building, which has 700 windows, they ought to have inspected the building to see what could be done to safeguard the men and particularly to see if there was a secure support to which a safety belt could be fixed. If they had done so, they would have discovered that there were stout transoms which could be used.

If there was any possibility of damage to the paintwork they should have asked Messrs. Bovril whether they minded. Not having asked that question, it does not lie in the defendants' mouth to say that Messrs. Bovril would have refused. It does not look as if Messrs. Bovril would have refused, inasmuch as after the accident they inserted eyes outside the windows so that safety belts can be attached. It seems to me that the employers, not having done any of these things, were guilty of negligence. I know it is the general practice in this trade for men to work on the sills, but that does not excuse the employers from simply folding their hands and doing nothing.

The judge disposed of the "transom method" by saying that he thought that the men "if ordered to take this precaution "before getting out on to the sill would have regarded such an "intervention by their employers as unreasonable and grand-"motherly." But it seems to me that, unless the employers took the step of ordering these men to use their ropes on the transoms, they are not excused. If employers take all proper steps and give all proper instructions, they have done all that they can; and if the men do not obey them it is the men's own fault; but the employers must, first of all, take all proper steps to protect their men and give them proper instruction. In my judgment, therefore, this appeal should be allowed and judgment entered for the amount of damages which the judge assessed at £1,750.

Morris L.J. It was pointed out that the work of the plaintiff was by its nature risky and dangerous. That is beyond question. It was said in the pleadings that the plaintiff had voluntarily run the risks of his employment in that, with full knowledge of the risks involved in a window-cleaner's calling, including the risks of standing on a window sill, he had voluntarily and deliberately decided to run those risks by engaging in that calling and could not now be heard to complain on that account. Alternatively, it had been pleaded that on the occasion in question he voluntarily ran the risk involved in standing on the window sill, although he had a ladder available, and could not now be heard to complain on that account. That matter was

only very faintly put before us, but, although the plaintiff in embarking on this particular occupation may have run the risks that were inevitable in it and the dangers that were unavoidable, it could not, in my judgment, be said that the plaintiff had run the risks which reasonable care, diligence and forethought on the part of his employers could have obviated. There can be no question that the employers knew that the plaintiff would be called on to do something which was fraught with danger.

It was said in the evidence that the sill method, that is to say, the method of standing on a narrow sloping sill with a considerable drop if a grip was lost, was as safe a method as could be devised. But it was plainly something that was fraught with considerable peril, and, therefore, it was the duty of the employers to apply their minds constantly to the question of doing all that reasonably could be done to minimize the dangers and the perils. I do not think that anyone in this case suggested that it would be the duty of employers to lay down specifically in regard to each window what a workman was to do. But the photograph which is before us in this case shows that there are several windows similar to that from which the plaintiff fell. If the employers could have laid down some system, even though referable to some only of the windows that the plaintiff would be called on to clean, which would have obviated dangers or lessened the risks, then it was the duty of the employers to do their best reasonably to adopt and prescribe such a system.

In *General Cleaning Contractors Ld.* v. *Christmas*, Lord Reid said [2]: "The need to provide against the danger of a sash moving "unexpectedly appears to me to be so obvious that, even if it "were proved that it is the general practice to neglect this "danger, I would hold that it ought not to be neglected and "that precautions should be taken. It is at this point that lack "of evidence causes difficulty, for there is no evidence as to "what would be reasonably practicable or effective precautions. "But I cannot believe that there would be any great difficulty "in devising a simple method of preventing the lower sash from "closing. I do not know what the best method would be. "Generally the plaintiff ought to put forward some method which "can be tested by evidence. But in this case I am assisted by "the fact that the appellants in their defence allege negligence "against the respondent." Then Lord Reid sets it out: "'(*b*) if "'he knew of the said defect, [the tendency of this window to "'move easily] in taking no or no adequate steps to wedge or "'secure the said window; (*c*) if he did not know of the said "'defect, in taking no or no adequate steps to ascertain whether "'it was safe to rely on the sashes of the said window for "'handhold.'"

A very similar and comparable position arose in this case, therefore, as arose in the *Christmas* case,[3] for here what was said

[2] [1953] A.C. 180, 193. [3] [1953] A.C. 180.

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by the employers as one part of their defence to the claim presented against them was that the plaintiff was negligent in failing to take any or any adequate steps to ascertain whether there was anything to which to attach the rope to his safety belt, which it was said could have been fixed to the transom below the fanlight. Further particulars were asked and the employers said: "The rope could have been attached to the "transom below the fanlight by passing it around the transom "and then hooking it on to itself." They added: "It could "also have been attached to one of the short ladders, the latter "being put up against the window or laid lengthwise across the "window's breadth." They were therefore saying to the plaintiff as one answer to his claim: "You ought to have attached the "rope to the transom."

When the matter was investigated at the trial the employers were at some pains to show that the method would have been very difficult because it would have caused damage to the paint, and further because it would have been necessary to get the permission of the owners of the building. Those objections when examined do not seem to me really to have substance. In any case they lie somewhat ill in the mouth of the defendants, who themselves have said that there could have been some measure of safety if the plaintiff had attached the rope to the transom. The objection in regard to the paint was investigated and considered by the judge. In regard to getting permission the defendants might have asked for permission and it does not lie in their mouth to say that if they had asked they would not have been given permission; every likelihood is the other way.

It was laid down in *General Cleaning Contractors Ld.* v. *Christmas* [3] that it is not enough merely to advance vague general suggestions; there should be something which the court can examine. Lord Jowitt said [4]: "It may be, in some other case, "that evidence will be called to prove that there is some other "method of securing the end of the safety belt, or indeed that "there is some safer method of cleaning windows for which no "hook is available than standing on a narrow sill, such, for "example, as the provision of a plank projecting on the outside "of the window and in some way secured on the inside. There was "no such evidence called in the present case." But in this present case there has been such evidence. The method of attaching a rope to the transom was first mentioned by the defendants themselves. The plaintiff not unnaturally then said that if he had been given instruction in regard to such method of securing the rope to the transom, his fall to the ground could have been avoided. Lord Oaksey, in the *Christmas* case, said [5]: "It is, I "think, well known to employers, and there is evidence in this "case that it was well known to the appellants, that their work-"people are very frequently, if not habitually, careless about

[3] [1953] A.C. 180. [4] Ibid. 188. [5] Ibid. 189.

"the risks which their work may involve. It is, in my opinion, "for that very reason that the common law demands that "employers should take reasonable care to lay down a reasonably "safe system of work. Employers are not exempted from this "duty by the fact that their men are experienced and might, "if they were in the position of an employer, be able to lay down "a reasonably safe system of work themselves. Workmen are "not in the position of employers. Their duties are not performed "in the calm atmosphere of a board room with the advice of "experts. They have to make their decisions on narrow window "sills and other places of danger and in circumstances in which "the dangers are obscured by repetition."

That passage, in my judgment, meets many of the submissions that have been made to us here. It was said that the plaintiff was an experienced man, that he was best fitted by his knowledge to deal with all situations, and that it was reasonable to leave matters to him. There was evidence which suggested that window-cleaners do not think constantly of the risks that they run. Mr. Gissane said that they did not think of the risks. Mr. Hobday gave evidence to the same effect. It may be a very happy circumstance that those who do perform this work do not constantly get obsessed by the perils that beset them. But it is that very circumstance which makes it so necessary that those who employ them to do this dangerous work should take reasonable care to seek to devise a reasonably safe method.

In this case it has been shown by the evidence that the method of attaching a rope to the transom would have been effective. Mr. Gissane gave evidence of his experience of accidents of which he had knowledge. [His Lordship read from the evidence as to accidents in the firm over the last 20 years, and continued:] Mr. Harrington, in a passage to which our attention was called, referred to his experience as an architect and surveyor of investigating some hundreds of cases where there had been accidents, so that it cannot have been a matter of safety precautions that should not have been constantly in the minds of the employers. Mr. Gissane was asked: "Were you "employing more or less men during those years?—About 20. "And in this one little firm in that period of 20 years two of its "men were killed on window-cleaning work?—That is right. "What sort of method were they using when they were killed?—"Much the same as the court has heard about this last hour or "more. And you made no alteration?—No. And there were "other accidents?—Yes. Pilcher J.: What? Using the jumping "method? Mr. Marven Everett to the witness: What you call "'the in and out'?—We were going on through the years much "the same." Later Mr. Gissane, in answer to the question: "Do you not ever discuss these matters with any of your com-"petitors in the trade?" said "I do not discuss any matters "with competitors." One might have hoped that in a matter

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affecting the whole trade every possible idea might be pooled, every suggestion tested, and every conceivable course tried, in order that, in the interests of all concerned in the community, the maximum degree of safety might be achieved.

There is no suggestion here that these employers were in any way callous or anything of that kind; nobody has suggested that. But this case has shown once again what are the risks in this occupation. One can only hope that in time some additional safety suggestions other than those referred to in the evidence in this case may be considered. But the fact remains that on the evidence here it is shown that the method of attaching the rope to the transom was a practicable method. Mr. Gissane said that very plainly.

[His Lordship read from the evidence of the witnesses as to the practicability of the transom method, and continued:] Mr. Harrington, when he was called, raised the point as to damage to the paint that might result from this method, and in answer to the question: "If they put their rope round the transom the "plaintiff would probably not have fallen. It is not by any "means every window that has got a transom, is it?" he said "Very few proportionately. And I am quite sure that if the "men were told to do that they would not do it." It may be that that was the passage which the judge had in mind when he used the words in regard to this part of the case which my Lord (Denning L.J.) has cited.

It seems to me that that approach is covered precisely by the words of Lord Reid in the *Christmas* case [6]: "It is the duty of "the employer to consider the situation, to devise a suitable "system, to instruct his men what they must do and to supply "any implements that may be required such as, in this case, "wedges or objects to be put on the window sill to prevent the "window from closing. No doubt he cannot be certain that his "men will do as they are told when they are working alone. "But if he does all that is reasonable to ensure that his safety "system is operated he will have done what he is bound to do." It seems to me, therefore, that there was evidence here proving that the method of attaching the rope to such windows as had a firm transom was a method that could have been laid down, and that had such method been prescribed for windows such as that on which the plaintiff was working at the time of this accident, he would not have fallen. Therefore I consider that on the evidence in this case the plaintiff was entitled to recover.

Parker L.J. I agree. The only allegation which calls for serious consideration in this court is that the defendants failed in their duty in not instructing the plaintiff to attach the rope from his safety belt to a transom when he was working on a window with a sound transom. With regard to the many other

[6] [1953] A.C. 180, 194.

points raised, I entirely agree with the conclusions reached by the judge in his careful judgment. In the absence of eyes fitted into the walls of a building to which the rope of the safety belt can be attached, the usual method of cleaning windows on the outside is by standing or squatting on the sill holding on to the sash. That was the method used by the plaintiff at the time of his accident. Moreover, this method was held by the House of Lords in the *Christmas* case [7] to be a reasonably safe method in the absence of those eyes, provided, of course, that precautions are taken to see that the sashes are sound and that they do not creep. The fact, however, that this method is reasonably safe in cases where no other safety measures are possible does not exonerate employers from considering all practicable methods of making it safe by providing, as it were, a second line of defence. After all, the duty is not to subject the employees to unnecessary risk.

In the present case, the defendants appear to have been content to accept the view that a window-cleaner's job is inherently risky in the absence of eyes fitted into the wall, and to have given no consideration at all to further methods of making it safe. Yet, be it observed, as soon as the accident has occurred they themselves, by their pleadings, allege that the plaintiff could have used the transom. In those circumstances they cannot well say that if they had thought about the matter before the accident they would not and could not have devised this method or have said that it was not practicable. On the evidence it is perfectly clear that the use of the transom is a perfectly practicable method. The witnesses almost entirely agree on that. The only doubt which some witnesses had was that it might dirty or injure the paint. On that I desire to add nothing more to what my Lords have said. What the defendants seem to have done is to have left the initiative to the plaintiff, and indeed by their pleading they allege that he was lacking in initiative in not using the transom, when it was really their duty to think of it and to instruct the plaintiff in regard thereto. In that connexion I would refer to the observations of Lord Reid in the *Christmas* case.[8]

In saying that, I hope that I remain conscious of the fact that there may be a real difference between the failure of a workman to devise some method ad hoc for his own safety and the failure of an employer to devise a safe system of working. A window-cleaning employer cannot, for example, be expected to lay out the job window by window, whereas the employee at all times must take reasonable care for his own safety. In the present case the evidence is that the defendants had a contract with Bovril's to clean their windows once a month, an operation which took a matter of four or five days, on which the plaintiff's gang, either alone or with others, appears to have been always

[7] [1953] A.C. 180. [8] Ibid. 194.

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engaged. Again the evidence is that these premises had, according to one witness, 700, and, according to another witness, 1,000 windows. There was, it is true, no direct evidence as to the number of windows with transoms of the type on which the plaintiff was engaged.

Counsel for the defendants urged that we should approach the case on the basis that the only evidence was that the one window from which the plaintiff fell had a transom. Speaking for myself, I feel that I cannot approach the case in this way. The agreed photograph, which is part of the evidence in the case, shows eight windows of that type along one wall of the building, four on the first floor and four on the second floor, and it would be, in my view, highly unlikely that those eight windows were the only windows of this type in this very large block. I feel bound to assume that the building had, to say the least, a considerable number of windows of this type, and the evidence being that the whole building was of very sound construction, that the transoms of the other windows were sound as was the transom of the windows in question. Moreover, the defendants, whose duty it was to consider the risks and the method of minimizing them, are unable to show that they gave this method any consideration at all or that, if it be the case, the number of windows of this character at the Bovril job was so small that specific instructions with regard thereto were impracticable or unnecessary.

In my view the judge in giving judgment on this point took too broad a view in treating the defendants' duty in relation to windows generally rather than in relation to the windows of the job on hand, namely, the monthly cleaning of the windows at Bovril's premises. Further, it may be, as the judge finds, that the plaintiff in this case, even if instructed to use his safety belt on the transom, might have refused. Indeed, there was evidence that window-cleaners refused to use the safety belt even when eyes were fitted. Accordingly, it may be that he would not have used the safety belt and that the accident would not have been avoided. In my view, however, the defendants having failed in their duty by not giving him instructions to use the rope, cannot be heard to say that even if they had he would not have used it: see a passage of Lord Goddard C.J. in *Roberts* v. *Dorman Long & Co. Ld.*[9] For these reasons I would allow the appeal.

Appeal allowed.
Leave to appeal to House of Lords refused.

Solicitors: *Matthew Morris; J. F. Coules & Co.*

A. W. G.

[9] [1953] 1 W.L.R. 942, 946; [1953] 2 All E.R. 428.

[COURT OF APPEAL.]

* BOWLER v. JOHN MOWLEM & CO.

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Nov. 15.

Denning, Hodson and Romer L.JJ.

Practice—Writ—Indorsement—Capacity of plaintiff—Fatal Accidents Acts—Action commenced by widow before grant of letters of administration—Described as "plaintiff" in indorsement and as "administratrix" in title and statement of claim—Writ not thereby rendered null—R.S.C., Ord. 3, r. 4—Fatal Accidents Act, 1846 (9 *&* 10 *Vict. c.* 93), *s.* 2—*Fatal Accidents Act,* 1864 (27 *&* 28 *Vict. c.* 95), *s.* 1.

Fatal Accidents Acts.

In a writ issued under the Fatal Accidents Acts, 1846–1908, and the Law Reform (Miscellaneous Provisions) Act, 1934, the plaintiff widow was described in the title of the action and the statement of claim as "administratrix," but the indorsement of the writ stated: "The plaintiff's claim is for damages" under the Acts. Letters of administration were not granted to the plaintiff until more than a year after the commencement of proceedings. In determining whether the writ had been issued in a representative capacity to which the plaintiff was not entitled and was, therefore, a nullity:—

Held (Romer L.J. dubitante), that the construction of the indorsement on the writ was the crucial matter for, according to R.S.C., Ord. 3, r. 4, it was in the indorsement that representative capacity, if relied upon, was to be shown; and the statements contained in the title and in the statement of claim that the plaintiff was administratrix were merely misdescriptions as to status not affecting the description as to capacity in the indorsement, the wording of which was wide enough to cover the plaintiff's claim as a widow. The writ was therefore good.

Ingall v. *Moran* [1944] K.B. 160; 60 T.L.R. 120; [1944] 1 All E.R. 97; *Hilton* v. *Sutton Steam Laundry* [1946] K.B. 65; [1945] 2 All E.R. 425; *Burns* v. *Campbell* [1952] 1 K.B. 15; [1951] 2 T.L.R. 1007; [1951] 2 All E.R. 965, and *Finnegan* v. *Cementation Co. Ld.* [1953] 1 Q.B. 688; [1953] 2 W.L.R. 1015; [1953] 1 All E.R. 1130 distinguished.

APPEAL from Ormerod J.

On February 12, 1951, one Thomas Henry Bowler died as the result of an accident in the river Thames. On October 19, 1951, his widow, Winifred Bowler, brought an action against the former employers alleging negligence or breach of statutory duty. The proceedings were in the following form: The title of the action was "Between Winifred Bowler (administratrix of Thomas "Henry Bowler, deceased) plaintiff, and John Mowlem & Co. Ld. "defendants." The indorsement of the writ read: "The plain-"tiff's claim is for damages for negligence and/or breach of "statutory duty under the Fatal Accidents Acts, 1846–1908, and "under the Law Reform (Miscellaneous Provisions) Act, 1934." The statement of claim, which was delivered on the same day with the writ, said in the first paragraph: "The plaintiff is the

[Reported by Miss ELAINE JONES, Barrister-at-Law.]

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"administratrix and lawful relict of Thomas Henry Bowler "deceased, hereinafter called the deceased, and brings this action "for the benefit of the deceased's estate under the provisions of "the Law Reform (Miscellaneous Provisions) Act, 1934, and for "the benefit of his dependants under the Fatal Accidents Acts, "1846/1908." Particulars of the persons on whose behalf the action was brought were then set out, namely, the widow, a son aged 14 and a daughter aged 7, and the prayer was: "And the "plaintiff claims: Under the Law Reform (Miscellaneous Pro-"visions) Act, 1934, damages: Under the Fatal Accidents Acts, "1846/1908, damages."

Letters of administration were, in fact, not granted to the plaintiff until November 10, 1952.

At the trial of the action before Ormerod J. and a jury in November, 1953, the employers were found liable and damages were agreed between both sides at £3,375. A point which had been adumbrated at the beginning of the trial was then taken, that the writ was a nullity and the whole trial misconceived because the writ had been issued by the plaintiff, as administratrix, at a time when she was not the administratrix of the deceased's estate.

Ormerod J. held that he was bound by previous authority to enter judgment for the defendant. The plaintiff appealed.

N. R. Fox-Andrews Q.C. and *Ronald Hopkins* for the plaintiff.

Marven Everett Q.C. and *Norman Richards* for the defendants.

The cases cited in argument appear in the judgment.

Denning L.J. referred to the facts set out above and continued: The fact was that, at the date when the writ was issued, the plaintiff was not the administratrix of the estate of Thomas Henry Bowler. No letters of administration had been taken out at that time: they were not in fact taken out until November 10, 1952. It is said that on that account the writ was a nullity and that all the proceedings are bad. It is said to be incurably bad because it cannot be amended, and a new writ would be of no avail in regard to the Fatal Accidents Acts because proceedings under those acts had at all material times to be brought within one year of the matters complained of. The one year has long since past, though I am glad that for future cases the period has now been extended to three years by the Law Reform (Limitation of Actions, etc.) Act, 1954.

The law on this subject as laid down by several decisions of this court is this: if a plaintiff brings an action in a representative capacity as administratrix, then that action is a nullity if she was not at that date by law administratrix with a proper grant. Even if she obtains a grant within a week, a month or a year

afterwards it does not relate back. The writ is a nullity from the beginning. That has been established by the decisions of this court in *Ingall* v. *Moran* [1]; *Hilton* v. *Sutton Steam Laundry* [2]; *Burns* v. *Campbell* [3] and *Finnegan* v. *Cementation Co. Ld.* [4] The whole question in the present case is: Was this action brought by the plaintiff in a representative capacity as administratrix of her husband? In the title of the writ she is described as administratrix but, in my opinion, that does not denote a representative capacity. That is simply a description of her status as it was believed to be. The indorsement on the writ is the crucial matter. Under R.S.C., Ord. 3, r. 4, the indorsement is the place where representative capacity must be shown. That rule says: "If the plaintiff sues, or the defendant or any of "the defendants is sued, in a representative capacity, the indorse-"ment shall show . . . in what capacity the plaintiff or defendant "sues." In this indorsement it is nowhere said that the plaintiff claims as administratrix. In the previous cases in this court, which I have mentioned, the indorsement clearly said that the plaintiff claimed "as administratrix." This indorsement does nothing of the sort. There is no mention of any representative capacity in the indorsement. The statement of claim does not in law affect the matter one way or the other, but even there it is not said that the plaintiff brings the action as administratrix. It simply says that she is the "Administratrix and lawful relict of "the said Thomas Henry Bowler." That is a description of her status and not a statement of any representative capacity.

In those circumstances I am of opinion that this writ was not a nullity from the beginning, because the indorsement is completely clear of any suggestion of representative capacity. It is true that the plaintiff described herself as administratrix in the title of the action and in the statement of claim, but a misdescription in the title is not fatal; it does not make a writ a nullity any more than does a misdescription of a woman as a spinster when she is in fact a married woman. A misdescription in the title is never fatal; it can always be cured by amendment in the same way as a misnomer can. The thing which cannot be cured is the bringing of an action in a representative capacity which does not exist. But the indorsement is the place to find her capacity, and that does not make the error. In my opinion the point which has been raised on behalf of the defendants does not succeed. The appeal should be allowed and judgment entered for the amount ordered by Ormerod J.

HODSON L.J. I have come to the same conclusion. By section 3 of the Fatal Accidents Act, 1846, it was provided that:

[1] [1944] K.B. 160; 60 T.L.R. 120; [1944] 1 All E.R. 97.
[2] [1946] K.B. 65; [1945] 2 All E.R. 425.
[3] [1952] 1 K.B. 15; [1951] 2 T.L.R. 1007; [1951] 2 All E.R. 965.
[4] [1953] 1 Q.B. 688; [1953] 2 W.L.R. 1015; [1953] 1 All E.R. 1130.

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"every such action shall be commenced within 12 calendar "months after the death of such deceased person." That section refers to actions brought by personal representatives. The action if it was brought in a representative capacity, which the plaintiff did not possess, must necessarily fail. That has been made clear by this court in *Hilton* v. *Sutton Steam Laundry*[5] and *Finnegan* v. *Cementation Co. Ld.*[6]: in other words, a wrong capacity cannot be properly cured by amendment so as to destroy the defendant's right to rely on the period of limitation. In the two cases which I have mentioned it was abundantly clear from the indorsement on the writ that the plaintiff was claiming as administratrix of the estate of her husband for damages under the Fatal Accidents Acts.

The sole question which arises in the present case is whether it is true that the plaintiff in this case is so claiming, the materiality being, of course, that under the Fatal Accidents Act of 1864, section 1, where there is no personal representative "in "every such case such action may be brought by and in the "name or names of all or any of the persons (if more than one) "for whose benefit such action would have been, if it had been "brought by and in the name of such executor or administrator, "and every action so to be brought shall be for the benefit of "the same person or persons, and shall be subject to the same "regulations and procedure, as nearly as may be, as if it were "brought by and in the name of such executor or administrator; This section enables the plaintiff to sue as widow where, as here, there was no personal representative. I have said already that in the two authorities to which I have referred there was no question but that the plaintiff's claim was as administratrix. In the second of those cases[7] reference was made to a decision of Donovan J. in *Stebbings* v. *Holst & Co. Ld.*[8] which was very near the case now before this court on its facts, but no disapproval of it was expressed in *Finnegan's* case, the distinction being, as Morris L.J. pointed out in his judgment,[9] that there was a variation in the language of the indorsement. Instead of the plaintiff's claim being indorsed as administratrix, as in *Hilton's*[10] and *Finnegan's*[11] cases, in *Stebbings* v. *Holst & Co. Ld.*[12] the words were: "'The plaintiff's claim is for damages under the "'Fatal Accidents Acts and the Law Reform (Miscellaneous "'Provisions) Act, 1934, as Widow and Administratrix of the "'estate of Alfred Stebbings deceased.'" I compare that with the language of the indorsement here: "The plaintiff's claim is "for damages for negligence and/or breach of statutory duty "under the Fatal Accidents Acts 1846/1908, and under the "Law Reform (Miscellaneous Provisions) Act, 1934." There

[5] [1946] K.B. 65.
[6] [1953] 1 Q.B. 688.
[7] Ibid.
[8] [1953] 1 W.L.R. 603; [1953] 1 All E.R. 925.
[9] [1953] 1 Q.B. 688, 702.
[10] [1946] K.B. 65.
[11] [1953] 1 Q.B. 688.
[12] [1953] 1 W.L.R. 603, 605.

is no reference in the indorsement in this case either to the plaintiff as the widow or to the plaintiff in her capacity as administratrix. The question is whether that indorsement ought, as the defendants contend, to be treated as an indorsement by a plaintiff suing in her capacity as administratrix. I have come to the conclusion that it ought not to be so construed. I recognize that it is not an easy case, for indeed in the title of the action the plaintiff was wrongly described as administratrix. In the statement of claim, which cannot cure defects in capacity shown on the indorsement and similarly ought not to be allowed to detract from the indorsement, she is described as administratrix and lawful relict. The vital matter to be construed is, I think, as my Lord has said, the indorsement itself. In my judgment the language of that indorsement is wide enough to cover the plaintiff's claim as widow. She was the widow of the deceased and there being no administratrix she was entitled to bring this action under the Fatal Accidents Act. In my judgment there is no technical objection to her so doing, and I am of opinion that the appeal should be allowed.

Romer L.J. I confess that if this matter had had to be decided by myself unaided, I should have found great difficulty in reaching the conclusion that the appeal should be allowed. I do not propose to elaborate the grounds of my doubts because I understand that questions of this kind are not likely to arise again. I do feel that there is considerable force in at least one of the submissions which Mr. Marven Everett made on behalf of the defendants when he put it in this way: He said that when a defendant receives a writ he is entitled to know, because it is the object of the writ to tell him, what he is being sued for and by whom. The defendant on receiving this writ and looking at it would see the plaintiff was Winifred Bowler, and then in brackets "Administratrix of Thomas Henry Bowler, deceased." Then the defendant is required to enter an appearance in the action at the suit of Winifred Bowler, again "administratrix of "Thomas Henry Bowler, deceased." If he looked to see what relief was claimed he would find a claim under two statutes, the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. Of those two Acts relief under the second one can only be sought by a personal representative, and that relief therefore conforms to the description of the plaintiff. The other relief, damages under the Fatal Accidents Act, is relief which may be sued for by a personal representative. Again, therefore, there is nothing inconsistent with relief under that Act with the description of the plaintiff. There is no reference in the indorsement to the plaintiff's widowhood. I feel therefore, that the natural conclusion of the defendant to be derived from the writ, framed in that way, would be that he was being sued by the plaintiff in a representative capacity, and none the less because

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the requirements of R.S.C., Ord. 3, r. 4, had not been expressly complied with. That is, in brief, the submission which Mr. Marven Everett put, and which I think is an attractive one, and if I had had to decide this case unaided I would have accepted it. As, however, my brethren take a different view, the appeal must be allowed.

Appeal allowed.

Solicitors: *J. H. Fellowes*; *E. P. Rugg & Co.*

[CHANCERY DIVISION.]

1954
Nov. 4, 24.
Harman J.

* *In re* FORSTER'S SETTLEMENT.

[1954 P. 792.]

Chapman v. *Chapman—Variation of trusts—Inherent equitable jurisdiction — Statutory jurisdiction — Contingent interests of infant beneficiaries mortgaged by orders of court — Scheme to clear incumbrances by dissolution of trust—Purchase by trustees of life tenant's interest an administrative matter—Trustee Act,* 1925 (15 *Geo.* 5, *c.* 19), *s.* 57.

Under a settlement made in 1919, F. received a protected life interest in the trust funds, with remainder to his then wife (the first defendant) for life, with remainder as to capital and income to the issue of F. by any marriage as he should by deed or will appoint; and in default of appointment to the children of F. by any marriage who should attain 21 or being a female marry, and if more than one in equal shares. The marriage between F. and the first defendant, of which there was no issue, was dissolved in 1924. In 1927 F. remarried; of the second marriage there was issue, the second and third defendants, who were of age, and the fourth defendant who was aged 19 at the date of the hearing of the summons.

F. died in 1941 without having exercised the power of appointment. It having become necessary to obtain funds for the maintenance of the children, the sum of £2,100 was obtained between 1942 and 1945 from one D. under a mortgage and charges sanctioned by the court, on the terms that D. should not call in the loans until the expiration of a year from the death of the life tenant (the first defendant), but that nevertheless the borrowers should have liberty to redeem at any time by the payment of the principal and all interest due at the rate of 5 per cent.

In 1952 D. died, and his executors desired that the mortgage debt and interest should be repaid. In 1953 a demand was made for some £500 in respect of estate duty accruing due on the death of F. It was agreed by all the beneficiaries that the trusts of the settlement should be determined, and a summons was taken out to sanction the execution of a draft deed of family arrangement whereby the first defendant was to surrender her life interest to the trustees for a sum less than its actuarial value, the defendants

of full age were to be paid out, and the infant defendant's share put aside until he attained 21. On the hearing of the summons:—

Held, (1) that, under the general jurisdiction of the court, the dissolution of the settlement trusts could not be sanctioned, as the circumstances did not warrant the application of the principle of salvage.

Chapman v. *Chapman* [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798 applied.

(2) That the purchase by the trustees of the interest of the tenant for life could be properly sanctioned under section 57 of the Trustee Act, 1925, as an expedient act in the management or administration of the trust.

Observations in *Municipal and General Securities Co. Ld.* v. *Lloyds Bank Ld.* [1950] Ch. 212; 65 T.L.R. 744; [1949] 2 All E.R. 937; *In re B.'s Settlement* [1952] 2 T.L.R. 489; [1952] 2 All E.R. 647, and *In re Downshire Settled Estates* [1953] Ch. 218; [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103 applied.

Quaere, whether section 57 could have been applied if the mortgage transaction had not been sanctioned by the court.

ADJOURNED SUMMONS.

By a settlement made in 1919 a sum of £10,000 was vested in trustees (of whom the plaintiff was the survivor) on trust to pay the income to Eric Forster for life on protective trusts, and after his death to pay the income to his wife (the first defendant) if she should survive him for her life; and after the death of the survivor of them to hold the capital and income for the issue of Eric Forster by any marriage as he should by deed or will appoint, and in default of and subject to such appointment for all or any the child or children of Eric Forster by any marriage who should attain the age of 21 or being female marry under that age, and if more than one in equal shares.

There was no issue of the marriage of Eric Forster and the first defendant, which was dissolved in 1924. In 1927 Eric Forster remarried, and had issue three children, the second, third and fourth defendants, who were born in 1928, 1931, and on October 9, 1935.

On the death of Eric Forster in 1941 intestate and without having exercised the power of appointment, the income of the trust fund became payable to the Custodian of Enemy Property, as the first defendant had married an Austrian national and was resident in enemy territory. The children of the second marriage were in urgent need of money for their maintenance, and by orders of the court made in 1942, 1943, 1944 and 1945, authority was given for capital sums amounting to £2,100 in all to be advanced for this purpose by one Henry Dagger, on the security of their contingent reversionary interests in the trust funds, on the terms that the mortgagee should not call in the loan until the expiration of a year from the death of the first defendant, but that nevertheless the mortgagors should be at liberty at any time to redeem by payment of the principal together with all the interest due at the rate of 5 per cent. from the date of the

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Forster's Settlement, *In re.*

mortgage. The orders of the court were not made pursuant to section 57 [1] of the Trustee Act, 1954.

In 1952 Henry Dagger died; no further advances could be made from his estate, and his executors and trustees became anxious that the mortgage should be paid off together with accrued interest, which amounted to some £1,140 at the date of the summons. Further, in 1953, that a demand was made for some £504 in respect of estate duty leviable on the death of Eric Forster.

The value of the trust fund was some £7,750; it was invested in mortgages at 4 per cent., 4½ per cent., and 5 per cent. It was considered desirable by all concerned that the incumbrances and claim for estate duty should be paid off, and that the trust fund should be freed from further accumulations of mortgage interest. A draft deed of agreement was accordingly agreed and prepared, under which the first defendant was to accept a capital sum of £2,000 out of the trust fund in consideration of the release of her life estate, which sum was substantially less than its actuarial value; the trusts of the settlement were to be determined, the shares of the defendants of full age being paid to them, and the contingent interest of the infant defendant being made absolute, and his share set aside for him until he reached his majority. This summons was taken out on May 4, 1954, asking the sanction of the court to the execution of the deed.

R. R. D. Phillips for the trustee.
Raymond Walton for the adult defendants.
E. M. Winterbotham for the infant defendant.

Case cited in argument not referred to in the judgment: *In re Wells.*[2]

Cur. adv. vult.

November 24. Harman J., reading his judgment, after stating the facts, continued: The originating summons recently came before me in chambers when I directed it to be adjourned into court for argument; for it seemed to me at first sight that to sanction the scheme was beyond the powers of the court having regard to the recent decision of the House of Lords in *Chapman*

[1] Trustee Act, 1925, s. 57 (1): "Where in the management or "administration of any property "vested in trustees, any sale, lease, "mortgage, surrender, release, or "other disposition, or any purchase, "investment, acquisition, expendi-"ture, or other transaction, is in the "opinion of the court expedient, but "the same cannot be effected by "reason of the absence of any power "for that purpose vested in the "trustees by the trust instrument, if "any, or by law, the court may by "order confer upon the trustees, "either generally or in any particular "instance, the necessary power for "the purpose, on such terms, and "subject to such provisions and condi-"tions, if any, as the court may "think fit and may direct in what "manner any money authorized to be "expended, and the costs of any "transaction, are to be paid or borne "as between capital and income."

[2] [1903] 1 Ch. 848.

v. *Chapman.*[1] When the case came on for argument a difference of opinion appeared between counsel concerned to prevail upon me to accede to the application. Mr. Walton, for the adult defendants, appeared to agree that *Chapman's* case [1] was a bar to success under the general jurisdiction of the court, but argued that the transaction was one which it was open to the court to sanction under section 57 of the Trustee Act, 1925. Mr. Winterbotham, for the infant beneficiary, while disclaiming the possibility of bringing the application within section 57, suggested it might be effected under the general jurisdiction of the court; and pointed out that it appeared to be exactly such a transaction as was referred to by Lord Morton in *Chapman's* case where, seeking to distinguish *In re Trenchard* [2] and holding, as Lord Simonds L.C. had already done, that no compromise in the true sense was there involved, he suggested that the order might have been justified in these words [3]: "This decision appears to me to "be no more than the sanctioning by the court of a purchase "by the trustees of the widow's rights." I confess to being puzzled by these words, which seem to suggest that there is some general power in the court to sanction a re-arrangement of the beneficial interests, and this is the very thing which the House declined to allow except in what are called salvage cases. In my judgment, I am not at liberty to sanction such a transaction under the court's general jurisdiction unless it can be brought within the salvage principle as explained by Sir Robert Romer L.J. in *In re New* [4] quoted by Evershed M.R. in *In re Downshire Settled Estates.*[5] Is there such a situation here? In my judgment, there is not. True it is that £500 must be raised to meet the claim for estate duty. No doubt also it is desirable to put an end to the accumulation of interest on the mortgages sanctioned by the court during the war. But these transactions, having been so sanctioned, cannot be treated as improvident or improper, and I do not think their existence raises such an emergency as will entitle the court to interfere. The infant defendant will attain his majority in less than two years and will be able then to consent to the winding up of the trust if he is so minded. Under these circumstances, I do not feel that the applicant has brought the case within the salvage principle, and in its absence I am of opinion, for the reasons given, that the court has no jurisdiction to interfere under its general jurisdiction.

It remains to consider whether the proposed transaction, or at least the first step in it, can be brought within section 57 of the Trustee Act, 1925. Counsel putting forward this view was content in the end to submit that there was jurisdiction under the section to sanction the purchase by the trustees of the life tenant's interest, this being, as he submitted, a purchase,

[1] [1954] A.C. 429; [1954] 2 W.L.R. 723; [1954] 1 All E.R. 798.
[2] [1902] 1 Ch. 378.
[3] [1954] A.C. 429, 463.
[4] [1901] 2 Ch. 534.
[5] [1953] Ch. 218, 235; [1953] 2 W.L.R. 94; [1953] 1 All E.R. 103.

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acquisition or other transaction expedient in the management or administration of the trusts of the settlement but beyond the powers of the trustees. This kind of question is now not without authority. First, Wynn-Parry J., in *Municipal and General Securities Co. Ld.* v. *Lloyds Bank Ld.*,[6] sounded a note of warning in these words. I ought to say that the nature of the transaction is explained at the beginning of his judgment[7]: "The summons asks that there may be conferred on the trustees, "so as to be exercisable at the request of the managers for the "time being of the trust, a power to sell the stocks issued under "the three Acts in question, as to which I have held that, on the "terms of the trust deed as it stands, there is no power to sell. "It is further asked that there be a general power to sell all or "any other stocks or securities, if any, which may from time to "time hereafter be received by the trustee, so as to form part "of a unit pursuant to any statutory provisions for compensation. "That is a power looking to the future and anticipating further "possible schemes for nationalization. It is further asked that "power shall be given to reinvest, not only the net proceeds of "the sale of any of the stocks coming within the purview of the "power of sale to which I have referred, but also the whole or "part of the net proceeds of any sale of investments or rights "effected in accordance with the existing provisions of the trust "deed and the supplemental trust deeds, in a manner set out in "detail in this question. That manner, in effect, would involve "investing the proceeds in buying further ordinary shares of the "holding which at the time of the proposed investment was the "smallest in value of the holding of ordinary shares comprised "in each unit, and so on upwards with a view to achieving, so far "as possible, a perfect balance in the spread among the invest-"ments constituting the units. The first point which I have to "decide is whether there is jurisdiction in the court under "section 57 of the Trustee Act, 1925, to make an order, giving "authority to sell or authority to reinvest. The section is "couched in wide language, and there is little guidance in the "reported cases, a circumstance which, of course, is explained "by the fact that most applications under this Act are heard in "chambers. It appears to me that there must be some limit to "the scope of this section. It cannot be construed as having "such wide import as would allow a complete re-writing of a "trust deed or a substitution of a completely different object "from that for which the trust was brought into being." He then discusses the matter in detail and decides that the section has a very limited effect.

This aspect of the matter was emphasized by Roxburgh J. in his judgment in *In re B.'s Settlement.*[8] He was considering

[6] [1950] Ch. 212; 65 T.L.R. 744; [1949] 2 All E.R. 937.

[7] [1950] Ch. 212, 222.

[8] [1952] 2 T.L.R. 489; [1952] 2 All E.R. 647.

there the question whether a transaction could be effected under the Trustee Act, 1920, and he says that he was being asked to sanction the transaction under the general jurisdiction of the court or under the Trustee Act. He then turns to the statutory provisions and, having looked through them, he says that section 57 of the Trustee Act and section 64 of the Settled Land Act, 1925, should be construed together. That view, however, has been differed from in the Court of Appeal; but what he says about section 57, in my opinion, stands. He says this[9]: "It "was argued that the leglislature cannot have intended by these "elaborate sentences to leave the rule in *In re New*[10] unchanged. "It certainly has not done that. The jurisdiction is no longer "'extraordinary.' It extends to transactions which are neither "urgent nor of an emergency character, but does it extend to a "re-writing of the trusts of the settlement, to a re-arrangement "of the beneficial interests thereunder for the advantage of the "beneficiaries generally where there is no administrative problem? "As I look at these two sub-sections together, it seems to me that "they have been carefully framed so as to imply a negative "answer. If it be asked why, in that case, the Act does not "in its express terms supply the negative answer, I would reply "that it could not do so without defining the boundary between "administrative action and re-writing the trusts, and that is a "boundary which is incapable of precise definition. It seems to "me that neither section authorises a transaction which is not "of an administrative character, and that the court cannot confer "on tenant for life or trustees the power to execute a re-settle-"ment or deal with the trust estate on the footing that a "re-settlement has been executed. No language could be less apt "than this for conferring such a novel and extensive power on "the court. If I am wrong in this view, I would hold in the "alternative that the legislature has by its language given clear "indication that the court ought not to exercise its discretion in "favour of a transaction or series of transactions which, in its "opinion, are not of an administrative character, but involve a "substantial re-writing of the trusts in order to re-arrange "beneficial interests to greater advantage." This part of the judgment was affirmed by the Court of Appeal in *In re Downshire Settled Estates*,[11] where Evershed M.R., giving the majority decision, says this: "In our opinion the word 'administration' "is not capable, in the context in which it appears, of bearing "the meaning which the appellants seek to attach to it. It is "clear, in our judgment, that the subject-matter both of "'management' and of 'administration' in section 57 is trust "property which is vested in trustees; and in our opinion 'trust "'property' cannot, by any legitimate stretch of the language, "include the equitable interests which a settlor has created in

[9] [1952] 2 All E.R. 647, 649.
[10] [1901] 2 Ch. 534.
[11] [1953] Ch. 218, 247.

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"that property. We think that the reason for the appearance of "the word 'administration' as an alternative to 'management' "in the section is that, although the words do largely overlap, it "was thought possible that an unduly narrow interpretation "might be adopted, if only one word were to be used without "the other. Be that as it may, we are satisfied that the applica-"tion of both words is confined to the managerial supervision "and control of trust property on behalf of beneficiaries. Such is "the natural scope of both expressions, and to attribute to them, "or either of them, an additional association with the beneficial "interests themselves, would be to superimpose upon their "ordinary significance an interpretation that is both unnatural "and unwarranted." Then he says [12]: "the object of section 57 "was to secure that trust property should be managed as advan-"tageously as possible in the interests of the beneficiaries and, "with that object in view, to authorize specific dealings with the "property which the court might have felt itself unable to "sanction under the inherent jurisdiction, either because no "actual 'emergency' had arisen or because of inability to show "that the position which called for intervention was one which "the creator of the trust could not reasonably have foreseen; but "it was no part of the legislative aim to disturb the rule that "the court will not rewrite a trust, or to add to such exceptions to "that rule as had already found their way into the inherent "jurisdiction." This part of the judgment formed no part of the appeal to the House of Lords which disapproved the rest of the Court of Appeal's decision in that case.

With these warnings before me, I must consider what are the limits of "administrative" purposes. The courts have long come to the rescue in cases where tenants for life have so encumbered their interests that there is no money to support the family. In such a case the court authorizes capital money to be expended in paying off the encumbrances on the life interest and provides for its replacement as a rule by a policy of insurance. *In re Salting* [13] was such a case, and it is to be observed that the order there was made under section 57 of the Trustee Act, 1925, and no doubt has since been expressed of the court's jurisdiction, except for the point, not here material, about discretionary trusts, which was discussed by the Court of Appeal in *In re Downshire Settled Estates.*[14] If then, it is argued, the court can authorize the use of capital to buy up the tenant for life's debts, why may it not sanction a similar expenditure of capital to purchase the life tenant's interest? One answer suggested is that this comes at least very near to altering the beneficial interests of the tenant for life.

I have the gravest doubt whether in an ordinary case this is a power which can be conferred on trustees under section 57, but

[12] Ibid. 248.
[13] [1932] 2 Ch. 57.
[14] [1953] Ch. 218.

this is not an ordinary case. Here the court has already authorized four transactions, namely, the charges executed in 1942, 1943, 1944 and 1945, which have affected the beneficial interests under the settlement of the remaindermen. The result is that these interests are subjected to an annual wastage, and it seems clearly expedient to stop that wastage if possible. The trustees must also raise out of capital the money necessary to pay the estate duty on the death of Mr. Forster. At this juncture, the tenant for life comes forward and offers to sell her life interest at an advantageous price. If the trustees may lay out money in accepting the offer, that will free the rest of the fund and make it possible to pay off the charges and the estate duty at once, so preserving something for the remaindermen. In my judgment, this is a matter of management or administration in the circumstances, and it being, in my judgment, expedient, I propose to confer on the trustees the necessary power.

The order I make will be to confer on the trustees power to purchase at a price not in excess of £2,000 the interest of the first defendant in the trust fund.

Order accordingly.

Solicitors: *Smith & Hudson for Harold Michelmore & Co., Newton Abbot; Kingsford, Dorman & Co. for Bailey, Strickland & Bryant, St. Leonards.*

F. R. D.

[COURT OF APPEAL.]

* PEARLMAN (VENEERS) S.A. (PTY.) LD. *v.* BERNHARD BARTELS.

C. A.
1954
Nov. 23.
Denning and Hodson L.JJ.

Practice—Parties—Misdescription—Amendment—Defendant sued in his trade name—Defendant appearing and defending action—Judgment for plaintiffs—Proceedings abroad to enforce judgment—Defendant's name differing from trade name—Leave to amend title of action.

The plaintiffs, having obtained judgment in the courts of this country against "Bernhard Bartels" for breaches of contracts, sought to enforce that judgment in Germany, but were met by the defendant with a plea that the judgment of the British court was invalid and unenforceable because his forename was "Josef" and there was no such person as Bernhard Bartels. The defendant had entered into the contracts as Bernhard Bartels, and had defended the action in that name. In anticipation of possible difficulties in the German courts the plaintiffs asked leave to amend the title of their action to "Josef Bartels trading as Bernhard Bartels":—

Held, that since the substantive judgment would not thereby be altered, the court had jurisdiction to correct such misnomer or misdescription at any time, whether before or after judgment was given; and that the amendment should be made.

MacCarthy v. *Agard* [1933] 2 K.B. 417 distinguished.

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Pearlman (Veneers) S. A. Pty. Ld. v. Bernhard Bartels.

Appeal from Slade J.

In 1950 the plaintiffs, Pearlman (Veneers) S.A. (Pty.) Ld., entered into contracts in writing with a concern which described itself on its notepaper as Bernhard Bartels, of Langenberg in Germany. In 1951, the plaintiffs, complaining that Bernhard Bartels had not fulfilled their contracts, brought an action for damages in the English courts and were in June, 1952, awarded £47,353 damages by Sellers J. When, however, the plaintiffs sought to enforce the judgment in the German courts they were met by the defendant with a plea that the judgment was invalid and unenforceable, on the ground that the defendant's name was Josef and not Bernhard Bartels; that Bernhard Bartels was only the name in which he traded, and therefore the judgment was directed against a supposed natural person who did not exist. The court of first instance in Germany rejected the defendant's contention, but an appeal having been entered by the defendant in Germany the plaintiffs applied to a master for leave to amend the name of the defendant to "Josef Bartels trading as Bernhard "Bartels." The master made the desired amendment and on appeal it was approved by Slade J.

The defendant appealed.

Gerald Gardiner Q.C. and *Neil Lawson* for the defendant.

Maurice Lyell Q.C., for the plaintiffs, was not called upon for argument.

Denning L.J. The plaintiffs, Pearlman (Veneers) S.A. (Pty.) Ld., entered into contracts in writing with a concern which described itself on its notepaper as Bernhard Bartels of Langenberg in Germany. The contracts were made in 1950. Afterwards the plaintiff company complained that Bernhard Bartels had not fulfilled the contracts and they brought an action for damages in the English courts. It was tried for four days in June, 1952, before Sellers J., and in the result the judge ordered judgment to be entered for the plaintiffs for £47,353 and costs.

In due course the plaintiff company sought to enforce that judgment in the German courts. In answer to that application in the German courts Bernhard Bartels said that the judgment was invalid and unenforceable, upon the ground that the true name of the defendant was Josef Bartels, that Bernhard Bartels was only the name in which he trades, and that there was no such person as Bernhard Bartels. He said that the judgment was directed against a supposed natural person who did not exist.

That plea sounds very ill in the mouth of the defendant, who instructed solicitors in this country in the name of Bernhard Bartels, made a contract in the name of Bernhard Bartels, entered appearance and fought the whole action in this country in the name of Bernhard Bartels and now, when it is a matter of enforcing the judgment in Germany, says there is no such person as Bernhard Bartels, but only Josef Bartels.

In that situation, to overcome this very technical point, the plaintiff company apply to the English courts and say "Please "amend the name of the defendant to the name which he now "says it is, change it to Josef Bartels trading as Bernhard "Bartels." The master and Slade J. have made the necessary amendment. An appeal comes to this court in which it is said that these courts have no jurisdiction to amend a judgment once it has been entered. Reliance was placed on the decision of this court in *MacCarthy* v. *Agard*.[1] The distinction between that case and the present was drawn by Slade J. in a judgment with which I fully agree. In *MacCarthy* v. *Agard*[1] the plaintiff did not seek only to amend the name or the description of the defendant, he sought to alter the very judgment itself, which was in a special form applicable to a married woman. He sought to get rid of the operative and substantive part of the judgment. This court, by a majority, held that that could only be done by way of appeal. Nevertheless, in the course of that case it appears that this court gave leave to amend the title of the action.

When the substantive judgment is not being altered, but only the title of the action, it is to my mind plain that this court has ample jurisdiction to correct any misnomer or misdescription at any time whether before or after judgment. That is what the master and the learned judge have done in the present case. The judgment is not altered or amended in any way; it is for £47,353 2s. 6d., with costs against the defendant. All that is necessary to be done, which this court has ample power to do, is to alter the title by describing the defendant in the name which he now says is his correct name, Josef Bartels, but adding, so that there should be no possibility of misunderstanding, "trading "as Bernhard Bartels." It is to be hoped, this amendment being made, that there should be no difficulty in this judgment being enforced in Germany according to its true intent. I think this appeal should be dismissed.

HODSON L.J. I agree. I also agree with the careful judgment of Slade J., and with his analysis of what happened in *MacCarthy* v. *Agard*,[2] to which reference has been made. There is, in my view, no question of altering the judgment itself, which could not be done either under the slip rule or under the general power to amend contained in R.S.C., Ord. 28, r. 12, which provides: "The court or a judge may at any time, and on such terms as "to costs or otherwise as the court or judge may think just, "amend any defect or error in any proceedings, and all necessary "amendments shall be made for the purpose of determining "the real question or issue raised by or depending on the "proceedings." In think the wording of that rule is wide enough to cover the amendment of the title and I do not accept the objection which Mr. Gardiner has raised that the rule must necessarily only apply to proceedings before judgment.

[1] [1933] 2 K.B. 417. [2] Ibid.

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The only question which to my mind has caused doubt is whether the court ought to have been troubled with this matter at all. Judgment was given against Bernhard Bartels. He went to the German courts and said that the first name of those two was wrongly attributed to him; it was only a trading name and his real name was Josef. How he acquired the name of Josef I do not know and the German courts seem to have taken the view which I have suggested was the obvious one, namely, that there was really nothing in the point and no need to amend. There has been an appeal from the court of first instance in Germany and the plaintiffs, out of abundance of caution, have come to this court to have the title of the judgment altered in order that they may be quite certain that no technical difficulty will arise on the appeal. In think, in the circumstances, the learned judge having dealt with the matter, his decision ought not to be disturbed and the appeal should be dismissed.

Appeal dismissed.
Leave to appeal to House of Lords refused.

Solicitors: *Buckeridge & Braune; Sidney Pearlman.*

A. W. G.

[COURT OF APPEAL.]

C. A.
1954
Nov. 17, 18.
Evershed M.R., Jenkins and Birkett L.JJ.

* BAMBRIDGE *v.* INLAND REVENUE COMMISSIONERS.

Revenue — Income tax — Transfer of assets to company incorporated abroad — Death of transferors — Settlement of shares in company — General bequest of shares — Liability of beneficiary to tax — "Associated operation" — Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18 (1), (2).

In 1933 the taxpayer's father and mother transferred certain assets to Kamouraska Investments Ld., a company incorporated in Canada. By two identical settlements, dated January 12, 1934, each of them transferred certain shares and debentures in the company to trustees on trust to pay the income from each settlement to the settlor during his (or her) life, and on the death of the settlor to pay the whole income to the other spouse during his (or her) life, and on the death of the surviving spouse to pay the whole of the income to the taxpayer during her life. The settlements were revocable.

The taxpayer's father died on January 18, 1936, without having revoked his settlement. The mother revoked her settlement on June 16, 1937. She died on December 19, 1939, and by her will, dated December 6, 1938, the taxpayer became entitled under a general bequest to a life interest in her mother's residuary estate, which included the shares and debentures in the company formerly comprised in her mother's settlement.

The Crown claimed that the income of the company was deemed

to be the taxpayer's income for income tax purposes by section 18 of the Finance Act, 1936:—

Held, (1) that the taxpayer was liable to tax in respect of the securities received under her father's settlement, since her rights were acquired by means of the transfer in conjunction with an associated operation—the settlement—within the meaning of section 18 (2).

(2) that she was also liable to tax in respect of the securities received under her mother's will which was the means by which the taxpayer acquired her interest and was an "associated operation" within the meaning of section 18 (2) in relation to all the property disposed of by the will, and there was no justification for distinguishing a general from a specific bequest.

The deaths of the parents were not "associated operations" but merely incidents leading to the falling into possession of the rights.

Quaere whether devolution of similar property on intestacy could amount to an associated operation.

Congreve v. *Inland Revenue Commissioners* [1948] W.N. 197; [1948] 1 All E.R. 948; 30 T.C. 163 applied.

Decision of Harman J. [1954] 1 W.L.R. 1265; [1954] 3 All E.R. 86n. varied.

APPEAL from Harman J.[1]

Mrs. Elsie Bambridge, appealed against assessments to income tax under Schedule D for the years 1948–49 and 1949–50, and to assessments to surtax for the same years, on the ground that these assessments incorrectly included the income of a Canadian company, Kamouraska Investments Ld.

The circumstances in which these claims for tax were raised against Mrs. Bambridge were as follows:

On December 14, 1933, the parents of Mrs. Bambridge, Mr. and Mrs. Rudyard Kipling, made transfers of assets to Kamouraska Investments Ld., a company formed by them in that year and incorporated in the province of Prince Edward Island. They had already in 1915 transferred certain investments to another Canadian company, Sussex Investment Co. Ld., incorporated in the province of Nova Scotia, but that company was later put into liquidation and all its assets were acquired by Kamouraska Investments Ld. It was agreed, for the purposes of the appeal, that the matter could be regarded as if all the assets acquired by Kamouraska Investments Ld. had been directly transferred to it by Mr. and Mrs. Kipling on December 14, 1933.

On January 12, 1934, Mr. Kipling settled the shares and debentures in Kamouraska Investments Ld., which he had received as consideration for the assets transferred by him, upon trusts whereunder, so far as material, Mr. Kipling received a first life interest with remainder to Mrs. Kipling for life, with remainder to Mrs. Bambridge for life. The settlement reserved a power of revocation to Mr. Kipling, which was never, in fact, exercised.

On the same date, Mrs. Kipling made a settlement in similar terms of the shares and debentures in Kamouraska Investments

[1] [1954] 1 W.L.R. 1265; [1954] 3 All E.R. 86n.

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Ld. which she had received as consideration for the assets transferred by her to that company. The trusts of her settlement closely resembled those of the settlement made by Mr. Kipling, the only difference being that the first life interest was taken by Mrs. Kipling with remainder to Mr. Kipling for life, followed by a remainder to Mrs. Bambridge for life, as in Mr. Kipling's settlement. There was also in this settlement a similar power of revocation exercisable by Mrs. Kipling which, as will appear in a moment, was in fact exercised.

On January 18, 1936, Mr. Kipling died; on December 19, 1939, Mrs. Kipling died, and Mrs. Bambridge, on the death of both her parents, became entitled in possession to the life interest given to her under Mr. Kipling's settlement. Mrs. Kipling, after Mr. Kipling's death, wholly revoked the trusts of her settlement, that revocation being dated June 16, 1937. On December 6, 1938, Mrs. Kipling made a will containing a residuary gift under which her residuary estate was to be held on trusts which included a first life interest to Mrs. Bambridge. That will contained no specific reference to Mrs. Kipling's shares and debentures in Kamouraska Investments Ld.

Mrs. Kipling died on December 19, 1939. She never revoked or altered her will and it was duly proved on February 19, 1940. As a result Mrs. Bambridge became entitled to virtually the whole of the share and loan capital of Kamouraska Investments Ld., and it was claimed by the Crown that in those circumstances she had acquired the rights by virtue of which she had power to enjoy the income of Kamouraska Investments Ld. within the provisions of section 18 of the Finance Act of 1936 [2]; that the whole

[2] Finance Act, 1936, s. 18: "For "the purpose of preventing the avoid- "ing by individuals ordinarily resi- "dent in the United Kingdom of "liability to income tax by means of "transfers of assets by virtue or in "consequence whereof, either alone "or in conjunction with associated "operations, income becomes payable "to persons resident or domiciled out "of the United Kingdom, it is hereby "enacted as follows:—(1) Where "such an individual has by means "of any such transfer, either alone "or in conjunction with associated "operations, acquired any rights by "virtue of which he has, within the "meaning of this section, power to "enjoy, whether forthwith or in the "future, any income of a person "resident or domiciled out of the "United Kingdom which, if it were "income of that individual received "by him in the United Kingdom, "would be chargeable to income tax "by deduction or otherwise, that "income shall, whether it would or "would not have been chargeable to "income tax apart from the pro- "visions of this section, be deemed "to be income of that individual for "all the purposes of the Income Tax "Acts: . . . (1B) The last two fore- "going subsections shall not apply if "the individual shows in writing or "otherwise to the satisfaction of "the Special Commissioners either— "(a) that the purpose of avoiding "liability to taxation was not the "purpose or one of the purposes for "which the transfer or associated "operations or any of them were "effected; or (b) that the transfer "and any associated operations were "bona fide commercial transactions "and were not designed for the "purpose of avoiding liability to "taxation."

"(2) For the purposes of this sec- "tion an associated operation means, "in relation to any transfer, an "operation of any kind effected by "any person in relation to any of "the assets transferred or any assets "representing, whether directly or "indirectly, any of the assets trans-

of the income should be treated as being hers for the purposes of income tax and surtax, and she was assessed accordingly.

The special commissioners upheld the assessments. On appeal Harman J. held that the assessments should stand so far as they related to the proportion of the income of Kamouraska Investments Ld. attributable to the shares and debentures comprised in Mr. Kipling's settlement; but the judge held that the assessments should be discharged so far as they related to the proportion of the income of Kamouraska Investments Ld. attributable to the shares and debentures taken by Mrs. Bambridge under her mother's will. The judge's reason for that view was that, inasmuch as the will did not dispose specifically of Mrs. Kipling's shares and debentures, the making of it could not be said to be an operation effected "in relation to" any relevant assets within the meaning of subsection (2) of section 18 and, therefore, could not be regarded as an "associated operation" for the purposes of the section. As regards Mrs. Bambridge's interest under Mr. Kipling's settlement the judge held that the settlement was an associated operation within the meaning of the section and, consequently, that the claim to tax was made out as regards the corresponding part of the income of the Canadian company.

Both parties appealed, the Crown contending that the special commissioners' decision should be restored, and Mrs. Bambridge contending that the assessments should be wholly discharged, as neither Mr. Kipling's settlement nor Mrs. Kipling's will could rightly be regarded as associated operations within the meaning of the section.

John Pennycuick Q.C., *Sir Reginald Hills* and *J. H. Stamp* for the Crown.

Roy Borneman Q.C. and *Roderick Watson* for Mrs. Bambridge.

In addition to the case referred to in the judgments, the following were cited in argument: *Latilla* v. *Inland Revenue Commissioners* [3]; *Howard de Walden (Lord)* v. *Inland Revenue Commissioners* [4]; *Sudeley (Lord)* v. *Attorney-General*.[5]

EVERSHED M.R. I will ask Jenkins L.J. to deliver the first judgment.

JENKINS L.J., having stated the facts and read section 18 of the Finance Act, 1936, as set out above, continued: The case was stated by the special commissioners with great amplitude and

"ferred, or to the income arising "from any such assets, or to "any assets representing, whether "directly or indirectly, the accumu-"lations of income arising from any "such assets."

[3] [1943] A.C. 377; 59 T.L.R. 163; [1943] 1 All E.R. 265; 25 T.C. 107.

[4] [1942] 1 K.B. 389; [1942] 1 All E.R. 287; 25 T.C. 121.

[5] [1897] A.C. 11.

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elaboration but, in truth, the matters debated before us fall within a narrow compass. There is no doubt that Mr. and Mrs. Kipling did, within the meaning of section 18 of the Finance Act, 1936, make transfers of assets by virtue of which or in consequence whereof, either alone or in conjunction with associated operations, income became payable to a person resident or domiciled outside the United Kingdom, namely, Kamouraska Investments Ld. There is further no doubt that Mrs. Bambridge did, within the meaning of the section, acquire rights by virtue of which she had power to enjoy the income of Kamouraska Investments Ld., partly under the provisions of her father's settlement and partly under the provisions of her mother's will. But it is contended on the part of Mrs. Bambridge that she did not acquire those rights by means of the transfers, either alone or in conjunction with associated operations, within the meaning of the section.

The argument for the Crown as regards Mrs. Bambridge's interest under her father's settlement is to the effect that she acquired the rights in question by means of the transfer to Kamouraska Investments Ld. made by her father, in conjunction with an associated operation in the shape of his settlement of his shares and debentures in Kamouraska Investments Ld.; and this argument was accepted by the judge.

The argument for Mrs. Bambridge as regards this same interest is to the effect that she acquired the rights in question not by means simply of the transfer and the settlement, but by means of those two transactions together with the deaths of her father and mother. It is said that those deaths constituted essential links in Mrs. Bambridge's title to the rights in question; that the links were not associated operations within the meaning of the section; and that, in order to bring the rights in question within the mischief of the section, it must be shown that Mrs. Bambridge acquired them strictly in the way postulated by the section, that is to say, by means either of the transfer alone or of the transfer in conjunction with associated operations, and by no other alternative or ancillary means.

I agree with the submission that the deaths of Mr. and Mrs. Kipling were not associated operations within the meaning of the section, but I cannot accept the conclusion sought to be adduced from that submission. In my opinion, Mrs. Bambridge did acquire the rights in question by means of the transfer and settlement within the meaning of the section, and the deaths of Mr. and Mrs. Kipling were merely events upon the happening of which the rights acquired by Mrs. Bambridge by means of the transfer and settlement, or, in other words, her interest under the settlement, fell into possession by virtue of the terms and provisions of the settlement itself. It would, to my mind, be an abuse of language to say that Mrs. Bambridge acquired her interest under the settlement by means of the deaths of her father and mother. An interest in remainder, or, for that matter a contingent interest, given by a settlement is given by means

of the settlement and not by means of the happening of the event which brings the interest into possession or, as the case may be, which fulfils the contingency. The prior interest or, as the case may be, the contingency, is in the nature of a qualification upon the interest given, and forms no part of the instrumentality or the means whereby the interest is given by the settlor or acquired by the beneficiary, which consist in the settlement and nothing but the settlement. The point is not one which can be usefully further elaborated, and on this part of the case I am content to accept the judge's conclusion and the reasons on which it is based.

As regards Mrs. Bambridge's interest under her mother's will, the argument on her side was to the effect that while the making of the will might have been an associated operation, if it had referred specifically to Mrs. Kipling's shares and debentures in Kamouraska Ld., the mere making of the will effected nothing, as it was also necessary, before Mrs. Bambridge could acquire any interest under it, that Mrs. Kipling should die in the lifetime of Mrs. Bambridge, leaving her will unrevoked. It was further argued that as the will only disposed of Mrs. Kipling's shares and debentures in Kamouraska Investments Ld. by means of the general residuary gift contained in it, the making of the will was not an operation "in relation to the assets transferred" within the meaning of subsection (2) of section 18. The judge rejected the former branch of this argument but accepted the latter. In my opinion he should have rejected both.

I agree with the submission made on Mrs. Bambridge's side that the compound event in which alone the provision made for Mrs. Bambridge in the residuary gift could become effective, namely, the death of Mrs. Kipling in Mrs. Bambridge's lifetime leaving the will unrevoked, was not an associated operation within the meaning of the section; but I think that the happening of this compound event amounted to no more than the fulfilment of the conditions essential to the efficacy of any testamentary disposition. In the events which happened, the testamentary disposition in this case became effective and, accordingly, Mrs. Bambridge acquired the relevant interest under and by virtue of, or in other words by means of, her mother's will. Certain events might have happened which would have prevented her from so taking, but none of them happened. One event had to happen before she could take anything under the will, namely, the death of her mother, the testatrix, and that event, of course, happened. But it does not follow that she acquired her interest otherwise than by means of the will, which, by its very nature, could only take effect on the death of the testatrix. I would say that Mrs. Bambridge took by means of the will on the happening of the event in which alone the will could take effect.

As to the second branch of the argument on this part of the case, which the judge accepted, namely, the argument to the effect that the residuary gift, although it undoubtedly disposed of

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the shares and debentures in question, did not suffice to make the will an operation "in relation to" such shares and debentures, I confess I find myself wholly unable to follow it. I fail to see how a will which disposes of property can reasonably be said not to have been made "in relation to" the property of which it disposes; nor can I see any justification for distinguishing between property specifically disposed of and property comprised in a residuary gift, and holding that the will relates to the former but not to the latter. It seems to me abundantly plain that where a testator has made a will containing a residuary gift, he has made a will in relation to every item of property comprised in that gift, just as much as he would have done if he had disposed specifically of each item comprised in the residuary gift. I am not impressed by the argument, by way of reductio ad absurdum, which the judge seems to have found conclusive, to the effect that if a will containing a residuary gift, under which relevant assets passed, amounted to an associated operation, any will containing a residuary gift would amount to an associated operation, even though made before the date of any transfer, provided only that a transfer was made between the date of the will and the date of the testator's death, and that on the happening of the latter event relevant assets passed under the residuary gift. It is not necessary for the purposes of the present case to decide whether this would be so or not, but if the supposition is well-founded I cannot see anything manifestly absurd in it. If a testator makes a will containing a general residuary bequest, and then embarks on what I may call "a section 18 transaction," as a result of which he receives shares and debentures in a foreign company, and leaves his will unrevoked, he must be taken to know that if he retains the shares and debentures until his death they will pass under the residuary gift, and he must be taken to intend that result, just as much as if, after acquiring the shares and debentures, he had made a fresh will in identical terms.

Mr. Borneman and Mr. Watson for Mrs. Bambridge urged upon us as a reason for rejecting the Crown's arguments the extension of liability to an indefinite succession of persons, which acceptance of those arguments would entail. The answer to this submission in terrorem, if I may so describe it, seems to me to be that once it is recognized, as in view of the decision of the House of Lords in *Congreve* v. *Inland Revenue Commissioners*,[1] it must be recognized, that liability under the section extends to persons who are in no way parties to the offending transfer, the result must be that the liability attaches to every person who, for the time being, has power to enjoy the income in question, and has acquired the right giving rise to such power by means which bring him within the mischief of the section, and continues so long as there is any person who fulfils these conditions.

A further point was taken that, if the making of a will was to be considered as an associated operation, a capricious result

[1] 30 T.C. 163; [1948] W.N. 197; [1948] 1 All E.R. 948.

would ensue inasmuch as a case in which shares or debentures of a foreign company devolved under a will would, or might, fix the legatee with liability, whereas a devolution of similar property on an intestacy could have no such result. I agree that it is indeed difficult to see how mere inactivity resulting in intestate succession could be held to amount to an associated operation, and it may well be, therefore, that in such a case the person taking under the intestacy would escape liability under the section. But the mere fact that such a case may be outside the net is no ground for excluding from the net cases which appear to fall fairly within the terms of the section.

Paying the best attention I can to its terms, I am of opinion that Mrs. Bambridge acquired the rights which gave her power to enjoy the income of Kamouraska Investments Ld. wholly by means of transfers and associated operations within the meaning of section 18. For these reasons I would allow the appeal of the Crown and dismiss the cross-appeal of Mrs. Bambridge, and direct that the assessments should be restored.

EVERSHED M.R. I am of the same opinion. Upon the cross-appeal our view is coincident with that of Harman J. and the special commissioners, and I say but little upon it. I can appreciate the point of view which underlay Mr. Borneman's argument, that until the House of Lords in the *Congreve* case [1] had pointed out the true scope of the language used by Parliament in section 18 of the Finance Act, 1936, it was not, perhaps, generally realized how far-reaching that section might be. Mr. Borneman sought, on a priori grounds, to give a construction to the Act which would exclude it from operating on a person like Mrs. Bambridge, not herself a transferor or a party to the transfers or any of the operations associated therewith, but a daughter of the transferors, taking as a beneficiary under their dispositions, testamentary or inter vivos, as the case might be. But having regard to the decision in the *Congreve* case,[1] and on a fair construction of the language of the section, it seems to me that the limitation which Mr. Borneman seeks to put upon the section is not open to him.

Upon the appeal we have taken a different view from that which commended itself to Harman J. I shall not, I hope, be thought disrespectful to him if I content myself again with but very few observations on this part of the case, for in truth, as my brother has observed, the argument is within a narrow compass and is not capable of long reasoning or, indeed, of much analysis. In the language of the judge [2]: "Can this will be said "to have been made 'in relation to any of the assets trans-"'ferred'? . . . . If it had contained a specific bequest of these "securities that would no doubt have been in relation to them, "but a mere general bequest does not seem to me properly to be

[1] 30 T.C. 163.

[2] [1954] 1 W.L.R. 1265, 1269.

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"described as made 'in relation to' any assets that happen to "fall within it because they belong to the testator at his death." I confess that upon my first approach to the case I was inclined to be sympathetic to that view; but I have since been persuaded by the argument that it cannot be sustained.

Mr. Stamp posed the question: To what property does a will relate? The answer must, I think, be as Mr. Stamp submitted; that it relates to all the property that is comprised in it when it takes effect, whether the property is the subject of a specific devise or bequest, or is comprised within a residuary gift. In the light of that question and answer, it seems to me that this will was made "in relation to" the assets here in question. For that reason, and for those which my brother has already expressed, I think that the appeal should be allowed. The cross-appeal, as I have already indicated, will be dismissed.

BIRKETT L.J. I agree.

Appeal as to the securities under the mother's will allowed.
Cross-appeal as to the securities from the father's settlement dismissed.
Assessments upheld.

Solicitors: *Solicitor of Inland Revenue; Field, Roscoe & Co.*

E. D.

[QUEEN'S BENCH DIVISION.]

1954
Oct. 21.
Lord Goddard C.J., Lynskey and Ormerod JJ.

* LOVELACE *v.* DIRECTOR OF PUBLIC PROSECUTIONS.

Theatre—Play licensed for presentation—Unauthorized addition—Stage directions included in licensed script—Instructions by licensee that script to be adhered to—Performance by actor substantial departure from script—Whether licensee "caused to be presented" unlicensed part—Theatres Act, 1843 (6 *&* 7 *Vict. c.* 68), *s.* 15.

The manager and licensee of a theatre, at which an English translation of a French play was to be performed by a company of actors directed by the principal male actor, warned the latter that the police were interested in the play and twice instructed him to ensure that the licensed script was strictly adhered to. At the first performance the actor, contrary to the manager's orders, departed from the stage directions included in the licensed script and played the final scene in a way which was objected to by the police. The manager was convicted under section 15 of the Theatres Act, 1843, as a person who "caused to be presented" part of a play before such part had been allowed by the Lord Chamberlain:—

Held, that the magistrate was wrong in holding that the manager had "caused" the actor to present the unauthorized incident, as a

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[Reported by Mrs. E. M. WELLWOOD, Barrister-at-Law.]

charge of "causing" must follow some act equivalent to "causing," namely, a command or direction to do the act; and that as the manager had given no express or positive mandate or authority to the actor to present that part of the play objected to, his mandate being on the contrary to present the play authorized and no other, he was wrongly convicted and his appeal must be allowed.

McLeod (or Houston) v. *Buchanan* [1940] 2 All E.R. 179 applied.

CASE STATED by Liverpool stipendiary magistrate.

On January 27, 1954, an information was preferred by the respondent James Francis Cowley, a police constable, for and on behalf of the Director of Public Prosecutions against the appellant, James Lovelace, alleging that he on November 2, 1953, at Liverpool unlawfully for hire caused to be presented part of a stage play entitled "The Respectable Prostitute" before such part had been allowed by the Lord Chamberlain, contrary to section 15 of the Theatres Act, 1843.

At the hearing of the information on March 30 and April 8, 1954, the magistrate found the following facts. The appellant was the licensee of the Pavilion Theatre, Liverpool. The play "The Respectable Prostitute," a translation from a French play by Jean Paul Sartre, was licensed by the Lord Chamberlain on May 22, 1947, in a script which included stage directions and which was published in book form. The play was booked by the owners of the theatre for nightly performances at the Pavilion Theatre during the week beginning November 2, 1954, by a company of actors directed by one Patrick Laurence; and the appellant caused theatre programmes to be printed and the usual notices advertising the play to be exhibited. The appellant was responsible for paying and in fact paid the actors' salaries. On October 29, 1953, a police inspector visited the appellant and asked to see the script of the play. No complaints had been received but the title of the play prompted the visit. The appellant satisfied himself that the play was fully licensed and sent a copy to the police inspector on the morning of November 2. At the same time he informed Laurence, who was not only directing the play but acting the principal male part, that the police were interested in the play and that he (Laurence) and the company must keep strictly to the script. Laurence assured the appellant that he need have no fear of any departure from the script and that the company had been playing the script in theatres all over England without criticism or complaint. On the evening of November 2 the respondent attended the theatre, accompanied by a woman police officer, to see the first performance of the play. The appellant told Laurence that the police were in the house and again informed him that the licensed script must be adhered to. Laurence again assured him that the play would be performed exactly to the script, and the script was in fact adhered to until the final scene at which stage the play, according to the stage directions, should have ended with the

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principal woman actress relaxing into the arms of the principal male actor. At the performance in question however, Laurence, departing from the stage directions, carried the actress to a bed on the stage, laid her on it and went through certain movements simulating sexual intercourse.

It was contended by the appellant that the word "caused" in section 15 of the Theatres Act, 1843,[1] must be construed as involving some express or positive mandate from the appellant, or some authority from him to Laurence, or some personal responsibility based on knowledge or on some act or omission of the appellant, and that there was no evidence of any such mandate or authority or personal responsibility. The respondent contended that the final scene as played by Laurence was a substantial departure from the script; that the prohibition in the statute was absolute; and that the position of the appellant as licensee of the theatre was such that he must be regarded as responsible in law for any unlicensed production thereat.

The magistrate was of opinion that the appellant, as the person who provided the means whereby the play was performed, namely, a licensed theatre, and to whom a theatre licence had been granted making him responsible for the maintenance of good order in the theatre, and being the person who paid the salary of the players, was the person who caused the play to be presented, and that the act complained of constituted a substantial departure from the script. He was further of opinion that the prohibition of section 15 of the Act being absolute proof of scienter was unnecessary. He held the appellant guilty of the offence charged and convicted him. The question for the opinion of the court was whether upon the above statement of facts, the magistrate came to a correct determination and decision in point of law.

J. Robertson Crichton Q.C. and *J. M. Kennan* for the appellant.

J. P. Ashworth for the respondent.

In addition to the cases referred to in the judgment *Shave* v. *Rosner*[2] was cited in argument.

Lord Goddard C.J. stated the facts and continued: The appellant was charged with causing the play to be produced with an unauthorised addition. We are not concerned to consider what the position would have been if he had been charged with

[1] Theatres Act, 1843, s. 15: "Every person who for hire shall act "or present, or cause to be acted or "presented, any new stage play, or any "act, scene, or part thereof . . . until "the same shall have been allowed "by the lord chamberlain . . . shall "for every such offence forfeit such "sum as shall be awarded by the "court in which or the justices by "whom he shall be convicted, not "exceeding the sum of fifty pounds; ". . ."

[2] [1954] 2 Q.B. 113; [1954] 2 W.L.R. 1057; [1954] 2 All E.R. 280.

presenting the play. Section 15 of the Theatres Act, 1843, provides that "Every person who for hire shall act or present, "or cause to be acted or presented, any new stage play, or any "act, scene, or part thereof . . . until the same shall have been "allowed by the lord chamberlain" shall incur a penalty. In the present case the actor was charged and convicted of acting a part of the play which had not been authorized by the Lord Chamberlain, and there is no appeal by him, nor do I think there could be. The question for the court is whether the appellant, the manager, can be convicted of the offence with which the information charged him, namely, causing the presentation of this unauthorized addition. We are certainly not going to decide whether he would have had a defence if he had been charged with presenting the play, because I do not think that matter calls for decision. There are certain passages in *Grade* v. *Director of Public Prosecutions* [1] which indicate that at any rate in the opinion of one of the members of the court he might well have a defence. We will decide that when a case comes before us which directly raises the point. We are asked in the present case to say that the conviction was wrong because the charge was "causing," and there was no evidence of any causation here; in fact, the facts found by the magistrate show that the appellant took every precaution and every step he could take to prevent that being done which was done. There is a long line of cases in which it has been held repeatedly that although the prohibition of doing an act is absolute, so that scienter or mens rea is not necessary, different considerations apply where a person is charged with causing or permitting the act to be done, because a person cannot cause an act to be done or permit an act to be done unless he has knowledge of the facts. In *McLeod (or Houston)* v. *Buchanan*,[2] Lord Wright put it in this way [3]: "To 'cause' "the user involves some express or positive mandate from the "person 'causing' to the other person, or some authority from "the former to the latter, arising in the circumstances of the "case."

Mr. Ashworth's argument was that, as the appellant undoubtedly caused the performance of the play, he caused the performance of that part of the play which was unauthorized, but I think it would be unreal to hold that. However much one may dislike turning these cases upon whether the prosecution chose the word "use" or, as in the present case, "present" or "cause to be presented," the fact is that if a man is charged with causing or permitting something, it follows that that must result by reason of some act of his which is equivalent to causing, such as a command or direction to do the act. There was no causing here. It cannot be said that there was an express or positive mandate or authority to present that part of the play

[1] 58 T.L.R. 327; [1942] 2 All E.R. 118.

[2] [1940] 2 All E.R. 179.

[3] Ibid. 187.

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which was objected to and which had not been authorized by the Lord Chamberlain. The mandate here was to present the play which had been authorized by the Lord Chamberlain and no other. It was therefore wrong to hold that the manager and licensee of the theatre caused the actor to present one particular incident at the end of the play to which objection was fairly taken. I wish to stress that we are not deciding what the position would have been if the appellant had been charged with presenting the play with that incident in it. We are deciding that on the facts found by the magistrate there was no ground for saying that he caused that incident to be presented, and for that reason this appeal should be allowed.

Lynskey J. I agree.

Ormerod J. I agree.

Appeal allowed.

Solicitors: *Arthur Taylor & Co. for Mace & Jones, Liverpool; Treasury Solicitor.*

[PROBATE, ETC., DIVISION.]

1954 *Nov.* 3.

Lord Merriman P. and Karminski J.

* FOX *v.* FOX.

Husband and Wife—Justices—Practice—Party in person—Duty of court—Questions to be put to other party—Magistrates' Courts Act, 1952 (15 *&* 16 *Geo.* 6 *&* 1 *Eliz.* 2, *c.* 55), *s.* 61.

A wife was granted an order by a court of summary jurisdiction on the ground of desertion. At the hearing she had been represented but her husband had not, and his case was not put to the wife either by him or by the court:—

Held, that, in view of the failure by the court to assist the husband in accordance with the provisions of section 61 of the Magistrates' Courts Act, 1952, there should be a re-hearing.

Appeal by husband from decision of the Chelsea Domestic Proceedings Court dated September 2, 1954.

The parties had been reconciled in April, 1954, after a separation of some months which had begun by the husband leaving the matrimonial home, which was at the house of the wife's parents. On July 17, 1954, the husband again left the home, taking with him some two-thirds of the furniture, which was being bought by the parties on hire-purchase, including the bed. The wife made a complaint that the husband had deserted her, and an order was made in her favour.

At the hearing before the justices the wife was represented by a solicitor; the husband appeared in person. The husband's case seemed from his evidence to have been that the reconciliation in April, 1954, had taken place on the basis that he was to find a

home which was with neither of the parties' families; that although, admittedly, he had not previously consulted his wife about a flat which he had in fact taken, he had asked his wife to go there with him; and that she had refused. He stated in court that he had told his wife that she could come; that there was a flat for her; and that he wanted her back.

This case was not, however, put to the wife either before or after the husband had given evidence.

L. I. Halpern for the husband.
D. R. Ellison for the wife.

Lord Merriman P. referred to the nature of the appeal and said: The short point is this and, in my opinion, it is a point of vital importance. The wife was represented by a solicitor; the husband was not represented at all. In those circumstances section 61 of the Magistrates' Courts Act, 1952, comes into play, and it reads: "Where in any domestic proceedings, . . . it "appears to a magistrates' court that any party to the proceed-"ings who is not legally represented is unable effectively to "examine or cross-examine a witness, the court shall ascertain "from that party what are the matters about which the witness "may be able to depose or on which the witness ought to be "cross-examined, as the case may be, and shall put, or cause "to be put, to the witness such questions in the interests of that "party as may appear to the court to be proper."

This is a case in which, without going into the background or expressing any opinion whatever upon the merits, the husband's real case (whether it be a good case or a bad case is for determination), first emerged after the wife had left the witness box, and had called one other witness whose evidence did not add very much to her own. [His Lordship stated the facts and referred to the nature of the husband's case.]

In the reasons for their decision the justices state certain facts. They say that they were satisfied that the husband intended to bring the marriage to an end; they did not accept his evidence that he wanted his wife to continue to live with him and felt that evidence to be inconsistent with the facts which were proved—that he had left her on a previous occasion, and that he left again on July 17, 1954, taking with him his personal belongings and two-thirds of the furntiure.

Mr. Ellison, who has dealt with this case with his customary frankness, acknowledges, quite properly, that all that reasoning may be subject to the qualifications which are given in the husband's own evidence, for it may be that the significance of taking two-thirds of the furniture, including the bed, instead of telling heavily against the husband, as it has with the justices, might quite conceivably support the husband's story, or lead to an inference which might legitimately be derived from it, namely, that his taking the furniture which had been paid for and which

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he would therefore be entitled to move, with the bed, so far from showing an intention of leaving the wife, might be with the intention of inducing her to go with him. Moreover, to decide the case against him on the footing that he had left her on a previous occasion, in view of the husband's evidence appears to ignore altogether the consideration that it was his case that he had come back in April, 1954, on the express condition that he should find a flat, that he had done so and had asked his wife to go with him, and that she would not. It is quite clear that with that issue, at any rate, the justices' reasons do not deal at all.

The difficulty in this trial is a perfectly plain one. The moment the husband had developed that story, I go so far as to say, it was the bounden duty of the court, through the chairman, to put that case to the wife and see what her answers to it were, and then to adjudge the case on all the information before them. In other words, this case, in my opinion (and I regret to have to say it), has not been tried, and it is inevitable that the order must be set aside. The appeal must be allowed, the order set aside, and the case referred to a fresh panel of the domestic proceedings court for Chelsea. I am glad to know that there is no difficulty about a reconstitution of the court, because all the metropolitan magistrates have jurisdiction anywhere within the metropolis, so that there will be no difficulty in getting another chairman. As regards the other members of the court, different members must sit, and the case be heard afresh.

Karminski J. I agree and have nothing to add.

Appeal allowed.
Rehearing ordered.

Solicitors: *Harry Rose; Samuel Coleman.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* JONES *v.* JONES.

1954
Oct. 28.

Lord Merriman P. and Karminski J.

Husband and Wife—Justices—Practice—Defence of belief in adultery —Notice.

A wife's complaint of wilful neglect to maintain was dismissed on the ground, inter alia, that she had induced in her husband a reasonable bona fide belief in her adultery. No notice had been given of the nature of the defence relied upon:—

Held, that the case should be remitted for a re-hearing, for if it had been intended to make such an allegation, proper notice should have been given.

Appeal by a wife against the dismissal by the Mold justices of her summons on the ground of wilful neglect to maintain.

The wife had left the matrimonial home, leaving a note from which it appeared that there had been a quarrel the previous night, and in which she said: "You told me to clear out and "now I have cleared out. I know Harold [one Dyment] wants "a housekeeper, and that is where I am going." She went to the man's house that day.

The justices dismissed the summons, inter alia, on the ground that they accepted the husband's evidence that the wife's conduct had induced a bona fide reasonable belief in her adultery. No notice had previously been furnished of the nature of the defence, and the matter is reported solely upon that point.

Emlyn Hooson for the wife.
Ronald Waterhouse for the husband.

LORD MERRIMAN P., after referring to the finding of a bona fide belief in adultery, said: It will be remembered in the course of the observations which I am obliged to make about this case, that that statement of the reasons lacks precision in a most vital particular. It is only fair to the justices and their clerk to say that nobody on either side has asked for any elucidation of that statement. [His Lordship referred to the note written by the wife, and continued:] Believing it to be common ground that she was still living in Dyment's house at the date of the hearing, and, indeed, for all I know may be still living there now, it would, of course, be impossible, if that statement led the husband to the conclusion that she was living there in adultery, to say that her action in living there, in this house, I suppose alone save for her own children, had not contributed to the reasonable belief. No doubt what happened earlier, and was dealt with at length in the evidence, would have a bearing upon whether it was right to suppose that the so-called housekeeper was, in fact, an adulteress, but it was not until the point was clarified in Mr. Waterhouse's argument that it became clear to my mind that that was the case which was being put forward in the court below, in other words, that what the husband was relying on as exempting him from paying maintenance to his wife was the fact that she was living at that very moment in adultery, from the time of the parting, with this man Dyment.

That brings me to another point of procedure which I consider has a vital bearing on the view which we ought to take about this appeal. Many years ago it was laid down in this court in *Broadbent* v. *Broadbent*,[1] that it was necessary that, in any substantive charge of adultery brought against a wife under the married women's code, proper and particular notice should be given to her of the substance of the charge. That has been, I may say, a commonplace ever since, and is constantly acted upon. But that is not restricted merely to cases where the husband is

[1] (1927) 43 T.L.R. 186.

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making a substantive complaint of adultery, for in *Duffield* v. *Duffield*,[2] the same principle was expressly extended to cases in which the husband was relying on adultery as an answer to the charge, or as vitiating or removing the jurisdiction of the justices to try the matter. Even that was not the end of the matter, because, coming a bit closer to the present case, it appears that in *Frampton* v. *Frampton*,[3] this court extended the same principle to the sort of thing we are dealing with here, where, in answer to the charge, the husband does not actually assert that adultery has been committed, but puts forward a reasonable belief that adultery has been committed, and if there ever was wanting an illustration of the propriety of that ruling, this case affords an overwhelming example.

I ought, perhaps, in fairness to say that the only *Frampton* v. *Frampton*[3] referred to in the index to Stone's Justices' Manual is one which does not touch this particular point, directly at any rate. But, even if the solicitors were not aware of the direction of this court in that respect, even if it has not got into any other textbook, about which we have not really been informed, there is such a thing as taking the ordinary precaution to make sure that the other side is not taken by surprise, with the unnecessary expense of an adjournment. Alternatively, of course, there is such a thing as applying for an adjournment oneself, so as to put things on a regular footing before bringing the case before the court.

Karminski J. I agree. This case is an excellent example of the evil against which *Frampton* v. *Frampton*[3] was aimed. No notice of any kind was given to the wife of the defence that the husband had a reasonable belief, based on her conduct, in her adultery, and in the result the real issues in this case were never formulated. The least that the wife's adviser should have been told before the summons was heard was the time and place of the conduct which had induced the reasonable belief and, above all, the name of the man or men with whom the husband thought she had committed adultery. None of that was done, though I appreciate that the fault probably lay very much more with the husband himself than with his solicitor, whom he consulted only the night before the hearing. Be that as it may, it might have been desirable in this case for the husband's solicitor to have asked for an adjournment. The matter which was not formulated rapidly became a hopeless tangle of undefined issues.

As my Lord has pointed out, the matter was, if possible, further complicated by the introduction into the cross-examination of the wife of a number of incidents and documents, some of which dated over no less than 14 years, which clearly suggested, at any rate to the justices, that this woman might have committed

[2] [1949] W.N. 159; [1949] 1 All E.R. 1105.

[3] [1951] W.N. 250.

adultery a good many years before with several men. It might also tend to show her as a woman of frivolous or indecorous behaviour with other men.

When the justices gave what they call their reasons they merely said that they accepted the husband's evidence that the wife's conduct induced a bona fide reasonable belief in her adultery. I ask myself "What adultery, and with whom?" Having asked myself that question, in spite of the excellent argument of counsel to which my Lord has referred, I am still unable to answer it. I do not know what the justices found, or on what evidence.

I agree with my Lord that this has been a thoroughly unsatisfactory trial. I adopt the words used by my Lord in this court in *Frampton* v. *Frampton* [3]: "This case seems to have gone as "wrong as it is possible for a simple case to go wrong from the "very start."

My Lord has pointed out that, perhaps unfortunately, *Frampton* v. *Frampton* [3] is not mentioned in the current volume of Stone's Justices Manual, 86th ed. While my Lord was giving his judgment I did look at two other well known textbooks, the sixth edition of Rayden on Divorce and the fourteenth edition of Latey on Divorce, and the principle laid down by this court in *Frampton* v. *Frampton* [3] is mentioned in both.

Appeal allowed.
Case remitted for rehearing.

Solicitors: *Lovell, Son & Pitfield for Walker, Smith & Way, Chester; Jaques & Co. for Cyril Jones, Son & Williams, Wrexham.*

J. B. G.

[3] [1951] W.N. 250.

[COURT OF APPEAL.]

* WATSON *v.* SECRETARY OF STATE FOR AIR.

C. A.
1954
Nov. 12.
Evershed M.R., Jenkins and Birkett L.JJ.

Compulsory Purchase—Compensation—Agricultural land—Method of assessment—Defence Act, 1842 (5 *&* 6 *Vict. c.* 94)—*Acquisition of Land (Assessment of Compensation) Act,* 1919 (9 *&* 10 *Geo.* 5, *c.* 57), *s.* 2.
Agriculture—Agricultural land — Compulsory acquisition — Compensation.

The claimant was the yearly tenant of 150 acres of agricultural land. The tenancy ran from May 12, 1934. The Secretary of State for Air served notice to treat in respect of some 38 acres of the land on May 18, 1951, and he entered into possession in August and September, 1951, thus rendering the harvesting of the cereal crops impossible.

On the basis of compensation:—

Held, that what had to be valued for the purpose of compensation was an agricultural tenancy liable to be determined on, but not

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before, May 12, 1953, and that under the Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2, rule (2), the question to be answered was what would the 38 acres have fetched in the open market if the claimant, being a willing seller instead of being forcibly evicted, had put his interest up for sale; and accordingly that, so far as the first season was concerned, he must be entitled to compensation in respect of the profits which he would have made, and he also had a claim for compensation for his interest in the land which would have subsisted until May 12, 1953, over and above what was allowed for the first year; but that if the compensation for the further year's interest were properly assessed under rule (2) of section 2 the claimant was not entitled to claim further under rule (6) for loss of profit in respect of the further year.

APPEAL by case stated by Mr. E. P. C. Done as arbitrator pursuant to section 3 (4) of the Lands Tribunal Act, 1949.

The claimant, Peter Watson, was tenant from year to year of Stob Hill Farm, Stamfordham in Northumberland, consisting of 146·491 acres, under an agreement of March 6, 1934, the tenancy running from May 12. The tenancy agreement by clause 1 (*c*) empowered the landlord "to resume possession at any time if "any part or parts of the farm for any purpose whatsoever not "being a purpose of an agricultural nature, the landlord allowing "to the tenant reasonable compensation in respect of the part "or parts of which possession shall be resumed. . . ."

On May 18, 1951, the respondent, the Secretary of State for Air, served notice to treat under the Defence Act, 1842, in respect of 38·189 acres of the farm and entered into possession of part of the premises on August 1, 1951, and of the remainder in September, before it was reasonably possible to harvest the cereal crops.

The arbitrator held that the compensation payable to the claimant was limited, having regard to clause 1 (*c*) of his tenancy agreement, to his loss suffered during the first farming season.

The claimant appealed, contending that the provisions of clause 1 (*c*) were unenforceable at law. That contention was accepted by the Secretary of State and the question at issue was as to the correct basis for assessing the compensation payable to the claimant pursuant to the provisions of the Acquisition of Land (Assessment of Compensation) Act, 1919.[1]

James Kekwick for the claimant.

B. S. Wingate-Saul for the Secretary of State.

The following cases were cited in argument: *Venables* v. *Department of Agriculture for Scotland* [2]; *The Queen* v. *Abbott* [3];

[1] Acquisition of Land (Assessment of Compensation) Act, 1919, s. 2: "In assessing compensation, an "official arbitrator shall act in accordance with the following rules:— ". . . (2) The value of land shall . . . "be taken to be the amount which "the land if sold in the open market "by a willing seller might be expected "to realise. . . . (6) The provisions of "rule (2) shall not affect the assessment of compensation for disturbance or any other matter not "directly based on the value of the "land."

[2] 1932 S.C. 573.

[3] [1897] 2 I.R. 362.

In re The Principal Secretary of State for War v. *Richardson*[4]; *Blundell* v. *King*[5]; *In re Sion College*[6]; *University College, Oxford* v. *Secretary of State for Air*[7]; *Raja Vyricherla Narayana Gajapatiraju* v. *Revenue Divisional Officer, Vizagapatam.*[8]

EVERSHED M.R. This is an appeal from a decision in the form of a case stated by Mr. Done in regard to an area of approximately 38 acres of land being part of the claimant's farm near Stamfordham in the county of Northumberland.

The claimant held under the terms of a tenancy agreement which is scheduled to the case, and which was in fact entered into as long ago as 1934, whereby, as is common enough with agricultural land, the tenant's interest was that of a yearly tenant, and the year ran from May 12. The total area of the farm is approximately 150 acres, slightly less. The Secretary of State for Air on May 18, 1951, served a notice to treat, and in fact entered into possession of the 38 acres in the months of August and September following.

The question is, what compensation is payable by the Secretary of State? To dispose of one matter at once, the tenancy agreement contained an unusual clause [clause 1 (*c*)], which was that the landlord was to have power—I am paraphrasing it—to resume possession at any time of any part of the farm for any purpose whatever other than purposes of an agricultural nature, the landlord allowing to the tenant reasonable compensation in respect of the parts so occupied.

The view taken by Mr. Done was that, whatever the interest of the tenant might properly be described as being, it was subject to this severe limitation, that it was liable at any time, without any specified notice, as to part or as to the whole of it, to be reoccupied by the landlord; and that led him to the conclusion that, whatever otherwise might have been the result, the claimant could not make any claim in respect of any period or interest beyond the first farming season, which occurred immediately after the notice to treat; in other words, he limited the claimant's claim, in effect, to what he would have got had he remained in occupation until the end of the current 1951 season and had gathered his crops.

It is conceded by the Secretary of State that in that matter Mr. Done erred. The claimant here has claimed that clause 1 (*c*) of the tenancy agreement was, having regard to the statutes regulating agricultural tenancies, unenforceable at law and therefore should be disregarded; and that contention has been accepted on behalf of the Secretary of State.

It is, therefore, plain that the basis upon which compensation was assessed was not correct and the case will have to go back

[4] [1903] 2 I.R. 192.
[5] [1905] 1 K.B. 516.
[6] (1887) 57 L.T. 743; 3 T.L.R. 521.
[7] [1938] 1 K.B. 648; 54 T.L.R. 258; [1938] 1 All E.R. 69.
[8] [1939] A.C. 302.

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for reconsideration. In those circumstances it is obviously not desirable that we should say more than is strictly necessary in order to lay the foundation for any further assessment by the tribunal.

The argument has, in effect, become narrowed down in the course of the discussion, and I think that it now stands thus: The Secretary of State was requisitioning this land in pursuance of powers which were derived indirectly from the Defence Act, 1842. It follows that the provisions of the Lands Clauses Consolidation Act, 1845, do not strictly apply. I say "strictly," because it may well be that for practical purposes, certainly in many cases, the principle of assessing compensation does not, or does not substantially, differ under that Act from the principle to be applied under the Act of 1842. This much, however, seems clear, that in the present case it is necessary, in assessing compensation, to refer to the terms of the Acquisition of Land (Assessment of Compensation) Act, 1919, and to section 2 thereof in particular. I think that the argument before us has really turned on the exact effect of two paragraphs of section 2, upon which I accordingly propose to say a few words. [His Lordship read section 2, rules (2) and (6), and continued:]

By section 12 of the same Act the word "land" is by definition to comprehend any interest in land. We therefore arrive at the following position: The claimant was in occupation of these 38 acres, and he had beyond any question an interest in the land, namely, that which he derived from his tenancy agreement. At the date of the notice to treat and of the subsequent entry his interest was one which could not be determined, according to the terms of his agreement, at any date earlier than May 12, 1953; and it appears to me, therefore, that the thing to be valued for the purpose of compensation was that interest, an agricultural tenancy liable to be determined on, but not before, May 12, 1953. In arriving at a solution of the question what is the value of that interest, the Act requires one to assume that the claimant, instead of being evicted from this land, was a willing seller; and therefore the question which must be answered is, what would those 38 acres have fetched in the open market if the claimant, instead of being forcibly evicted from them, had put up for sale his interest, the interest being such as I have described but subject, of course, to the other terms in the tenancy agreement including any restrictions on assignment.

It is conceded that, so far as the first season is concerned, he must be entitled to recover, in effect, the profits which he would have made. I have already indicated that his crop was sown and was waiting to be gathered in the summer and autumn of that year; but he still has a claim for the interest in the land which would have subsisted until May 12, 1953, over and above what has been allowed for the first season or year. It must, therefore, be ascertained, what would some purchaser in the market have given for that further year's interest?

Obviously, the profit which this claimant had made in farming these acres is a highly material consideration, because it may well be that a purchaser, who bought the claimant's interest in these 38 acres, would have fixed the price he was prepared to pay on the basis that he, too, would be likely to make such a figure of profit by farming. It is then a matter entirely for the arbitrator to decide what sum should be allowed to compensate for that part of the interest which the claimant must be taken to have willingly sold.

It was suggested by Mr. Kekwick that, apart from anything which can be attributed to that landed interest, rule (6) entitles the claimant in addition to say: "I must be also com-"pensated for disturbance or loss measured by the profit which "I can show I did lose during that second year." But if the figure is properly arrived at under rule (2), it seems to me that any further sum of that nature is necessarily excluded, for otherwise he would be having the same thing twice over. Compensation for disturbance, in the sense of meaning the cost or expense he was put to in actually moving, has already been allowed, and the sum of £76 has been agreed for that; but if rule (2) is construed as I think it ought to be, and if a figure is arrived at to compensate the claimant for that second year of the interest which he has lost, subject, as I have said, to all its incidents under the tenancy agreement, then I think that rule (6) would have no further application.

That being the situation, I think I have covered all that need be said on the present occasion. The case must go back in order that the arbitrator should decide what that figure is, and he must decide to what extent it is desirable or proper to allow any further opportunities for evidence to be given. On that I say nothing, because that is a matter which he will have to decide; but in view of the basis upon which he limited his award, it seems to me that this appeal must be allowed, so as to enable us to direct a reference back for a reassessment of the amount to be awarded on the footing that clause 1 (*c*) of the agreement should be treated as excluded from consideration.

JENKINS L.J. I agree.

BIRKETT L.J. I also agree.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Treasury Solicitor.*

B. A. B.

[COURT OF APPEAL.]

C. A.

1954
Oct. 29;
Nov. 5.

Denning, Jenkins and Morris L.JJ.

* ADLER *v.* DICKSON AND ANOTHER.

PRACTICE NOTE.

House of Lords—Appeal to—Leave to appeal—Court of Appeal, by—Preliminary point of law.

In an action by the plaintiff for damages for personal injuries the master directed the hearing of a preliminary point of law before the trial of the action under R.S.C., Ord. 25, r. 2. The question of law having been determined, both in the Queen's Bench Division [1] and in the Court of Appeal [2] against the defendants, they applied for leave to appeal to the House of Lords.

DENNING L.J. I have discussed this matter with Jenkins L.J. and Morris L.J., and what I am about to say has the agreement of all of us. If this were a final appeal it would certainly be of sufficient importance to be taken to the House of Lords, but it is only an interlocutory appeal. The issue on the facts are yet to be tried. The procedure by way of preliminary point is satisfactory when appeal is limited to the Court of Appeal, because a decision can be reached cheaply and speedily. Our decision today is only four and a half months after the preliminary issue was ordered, but if the preliminary point is to be taken to the House of Lords the plaintiff will inevitably be put to much expense and the day when the facts will be tried is postponed still further. It is now well over 20 months since the action was commenced. We do not view with equanimity the prospect of still further delay while the memories of witnesses become still more blunted. Nor do we look with favour on the incurring of further costs of an issue which was ordered so as to save expense. Two courts have already unanimously decided it. The plaintiff should be kept from the trial no longer.

Michael Kerr for the defendants. If the plaintiff should succeed on the facts, at that stage might we make a further application to your Lordships for leave to go to the House of Lords?

DENNING L.J. After the matter is finally determined. Mr. Le Quesne, supposing the action was tried on the facts and the plaintiff won on the facts, the matter could be taken to the House of Lords if we gave leave out of time to appeal from our decision, could it not?

J. G. Le Quesne for the plaintiff. I should have thought, with respect, that it would be a possible course for your Lordships,

[1] [1954] 3 W.L.R. 450; [1954] 3 All E.R. 21.

[2] [1954] 3 W.L.R. 696; [1954] 3 All E.R. 397.

as it were, to reserve the matter of leave on this point until the facts have been decided. It occurred to me that if my friend were left at that stage to go to the House of Lords to ask for leave he might be met with the answer that he should have got it at this stage.

DENNING L.J. Mr. Kerr, if you wanted to go to the House of Lords now we should refuse leave so that you could go now to the Appeal Committee. On the other hand, we could reserve the matter until the final appeal came before us.

Kerr. I would like to consider the matter and take instructions.

DENNING L.J. At the moment we do not make any ruling on the question of leave to appeal to the House of Lords. We stand it over for not more than a week.

A. W. G.

November 5, *A. A. Mocatta Q.C.* and *Michael Kerr* for the defendants. A difficulty is that, under the House of Lords Rules, an appeal must be lodged within six months from the date of the last order appealed from, and there is no method by which that could be extended. There is uncertainty as to when the trial will take place. It is suggested that the court might postpone judgment on the preliminary point until the action has been determined.

[DENNING L.J. The court have delivered their judgments and I do not think that they could follow that suggestion.]

[JENKINS L.J. If we refuse leave to appeal to the House of Lords for the reasons given, and the defendants went to the House of Lords and asked for leave, they might grant it and make conditions under which there would be no hearing before them until after the trial of the action. The House of Lords heard the preliminary issue in *Donoghue* v. *Stevenson* [1] and when the trial was finally heard there was no snail in the bottle at all.]

DENNING L.J. If the defendants went to the House of Lords immediately, and they took the view that all the facts should be tried first, they could make the necessary order. The proper course is for us to refuse leave and then for the defendants to go to the House of Lords and for them to make the appropriate order as to time and costs.

Leave to appeal to House of Lords refused.

C. J. E.

Solicitors: *Ince, Roscoe, Wilson & Griggs; Neil Maclean & Co.*

[1] [1932] A.C. 562; 48 T.L.R. 494.

[PRIVY COUNCIL.]

J. C.†
1954
Dec. 1.

* ASSOCIATED BROADCASTING CO. LD. AND OTHERS . . . . . APPELLANTS;

AND

COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario)—Copyright—Infringement—Musical work—Relayed public performance—Transmission and reception equipment—Use of wires of independent telephone company—Equipment not a "gramophone"—No exemption from fees, charges or royalties—Copyright Amendment Act (S.C. 1938, c. 27, s. 4), s. 10B (6) (a). Copyright. "Gramophone."

By section 10B (6) (*a*) of the Copyright Amendment Act, S.C. 1938, c. 27, s. 4: "In respect of public performances by means of "any . . . gramophone in any place other than a theatre . . . "to which an admission charge is made, no fees, charges or royalties "shall be collectable from the owner or user of the . . . "gramophone, . . ."

The appellant broadcasting company had in its studio equipment consisting, inter alia, of turn-tables, operated by an electric motor, on which records of musical works were placed, and the resulting sound impulses were transmitted, under agreement, over wires of a telephone company to the premises of subscribers who had contracted with the broadcasting company to receive the programmes thus relayed. At the subscribers' premises an acoustic reproduction of the musical works so transmitted was given in public by means of amplifiers and loud-speakers which were owned, installed and maintained by the broadcasting company pursuant to the contract, but were under the control of the subscribers:—

Held, that there had not been a public performance of the musical works by means of a "gramophone" within the meaning of section 10B (6) (*a*) of the Canadian Copyright Amendment Act. The word "gramophone" appeared not to have acquired a scientific meaning other than its popular or commercial meaning, and in the latter meaning did not, to take a crucial test, embrace a mechanism which included an undefined length of wiring laid, perhaps under or over public streets, under the powers given by Parliament not by the manufacturer or user of the apparatus, but by an independent authority.

Order of the Court of Appeal for Ontario [1952] O.R. 322 affirmed.

APPEAL (No. 21 of 1953), by special leave, from an order of the Court of Appeal for Ontario (March 5, 1952) reversing an order of Schroeder J. (January 29, 1951).

The Court of Appeal awarded to the present respondents, Composers, Authors and Publishers Association of Canada Ld.,

† *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD SOMERVELL OF HARROW.

$75 damages and an injunction restraining the present appellants, Associated Broadcasting Co. Ld., H. Reibstein, Beecher Dennis and Westminster Hotel Ld., from infringing the respondents' copyright by performing in public a number of musical works, including *Sophisticated Lady* and *Ol' Man River*.

The question in this appeal was whether the performances, which were relayed from the studio of the appellant broadcasting company to premises in Toronto occupied by the other appellants, were given by means of a "gramophone" within the meaning of section 10B (6) (*a*) of the Canadian Copyright Amendment Act (S.C. 1938, c. 27, s. 4), which provided that: "In respect of public performances by means of any radio "receiving set or gramophone in any place other than a theatre "which is ordinarily and regularly used for entertainments to "which an admission charge is made, no fees, charges or "royalties shall be collectable from the owner or user of the "radio receiving set or gramophone, but the Copyright Appeal "Board shall, so far as possible, provide for the collection in "advance from radio broadcasting stations or gramophone manu-"facturers, as the case may be, of fees, charges and royalties "appropriate to the new conditions produced by the provisions "of this subsection and shall fix the amount of the same. In so "doing, the Board shall take into account all expenses of collec-"tion and other outlays, if any, saved or saveable by, for or on "behalf of the owner of the copyright or performing right con-"cerned or his agents, in consequence of the provisions of this "subsection."

The equipment in the appellant broadcasting company's studio was operated by an employee placing a record on a turntable, which was then made to revolve by an electric motor, and a stylus or needle was then placed in contact. The sound waves were converted into electrical impulses in the playing-head and carried to an amplifier. The electrical impulses were then transmitted over the Bell Telephone Company's wires to the premises of the other appellants—over distances up to a mile—where, by means of loud-speakers, an acoustic reproduction of the musical work was given.

The facts appear more fully from the judgment of the Judicial Committee.

The trial judge (Schroeder J.) held that, notwithstanding the separation of the component parts of the equipment, the broadcasting company was, at the time and place in question, providing a public performance "by means of a gramophone," and that the same could be said of the co-appellants.

The Court of Appeal for Ontario (Roach, Hope and Bowlby JJ.A.) said that the only question was whether or not the totality of the equipment was a gramophone, within the meaning of the statute, and they held that it was not and allowed the appeal.

J. C.

1954

ASSOCIATED BROADCASTING CO. LD. v. COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA LD.

1954. Oct. 7, 11, 12, 13. *Harold Fox Q.C.* (Canada) and *P. Stuart Bevan* for the appellants.

H. E. Manning Q.C. (Canada) and *Skone James* for the respondents.

The following cases were referred to in argument: *Micheal Borys* v. *Canadian Pacific Railway Co.*[1]; *In re Gramophone Co. Ld.'s Application*[2]; *Attorney-General* v. *Edison Telephone Company of London*[3]; *Vigneux* v. *Canadian Performing Right Society Ld.*[4]; *Parkyns* v. *Preist*[5]; *Waters* v. *Eddison Steam Rolling Co. Ld.*[6]; *Taylor* v. *Goodwin*[7]; *Canadian Performing Right Society* v. *Ford Hotel*[8]; *Regina* v. *Commissioners under Boiler Explosions Act*, 1882[9]; *Cillis* v. *Oakley*[10]; *Hughes* v. *Sutherland*[11]; *Performing Right Society Ld.* v. *Hammond's Bradford Brewery Co. Ld.*[12]; and *Mellor* v. *Australian Broadcasting Commission.*[13]

Dec. 1. The judgment of their Lordships was delivered by Viscount Simonds. The short question in this appeal, which is brought by special leave from an order of the Court of Appeal for Ontario, is whether the appellants have infringed the copyright in certain musical works which, so far as concerns the sole right to perform those works in public throughout Canada, is vested in the respondents, the Composers, Authors and Publishers Association of Canada Ld. The answer to this question turns on the true meaning and effect of section 10B (6) (*a*) of the Copyright Amendment Act, chapter 27 of the Statutes of Canada, 1938, section 4, which is in these terms: [His Lordship stated the terms of the section and continued:] It is not disputed either that copyright subsists in the works in question or that it is vested in the respondents or that they have been performed in public. The performances were in fact given in certain premises in Toronto occupied by the appellants Reibstein, Dennis and Westminster Hotel Ld. respectively. None of these premises was a "theatre which is ordinarily and regularly used "for entertainments to which an admission charge is made." No fees were therefore collectable from the appellants or any of them if within the meaning of the section the performances were given by means of any radio receiving set or gramophone, or, more specifically, by means of any gramophone, as it is not alleged that they were given by means of any radio receiving set.

[1] [1953] A.C. 217, 222; [1953] 2 W.L.R. 224; [1953] 1 All E.R. 451.
[2] (1910) 27 R.P.C. 689; 26 T.L.R. 597.
[3] (1880) 6 Q.B.D. 244, 253.
[4] [1945] A.C. 108, 121; 61 T.L.R. 195; [1945] 1 All E.R. 432.
[5] (1881) 7 Q.B.D. 313, 315–7.
[6] [1914] 3 K.B. 818, 820; 30 T.L.R. 587.
[7] (1879) 4 Q.B.D. 228.
[8] [1935] 2 D.L.R. 391, 393.
[9] [1891] 1 Q.B. 703; 7 T.L.R. 371.
[10] (1914) 31 O.L.R. 603, 607.
[11] (1881) 7 Q.B.D. 160, 164.
[12] [1934] Ch. 121; 50 T.L.R. 16.
[13] [1940] A.C. 491, 499–500; 56 T.L.R. 413; [1940] 2 All E.R. 20.

It is necessary, then, to consider in some detail what are the means by which the performance is given, and their Lordships find an accurate and sufficiently comprehensive account of this in the judgment of the Court of Appeal from Ontario which they substantially adopt.

The equipment (to use a neutral word) which in this case is alleged to constitute a gramophone can best be described by reference to a drawing which was filed as an exhibit in the case. A verbal description of its component parts as shown and numbered on that drawing is as follows: Part No. 1 is an electric motor. No. 2 is a turn-table. No. 2a is a spindle of the motor operating the turn-table. No. 3 is a stylus or needle. No. 4 is a playing head holding the needle and having a magnetic pick-up; that is, a coil in a magnetic field. No. 5 is a suspension arm. No. 6 are electric connecting wires from the coil in the playing head leading to an amplifier which is No. 7. No. 7a are electrical connecting wires. No. 8 is a loudspeaker connected with the amplifier (No. 9) by electrical wires. No. 9 is an amplifier.

The instrumentalities numbered 1 to 7 inclusive are located in the studio of the appellants the Associated Broadcasting Company Ld. (hereinafter called A.B.C.) and are under the sole control of A.B.C., its servants or agents.

Instrumentalities numbered 9 and 8 are located in the premises of each of the other appellants and are under their control. They are owned by A.B.C. and were installed in the premises of the other appellants by A.B.C. pursuant to its contract with those other appellants.

Instrumentalities numbered 7a are wires of the Bell Telephone Company of Canada running between the building in which A.B.C. has its studio and the buildings in which the other appellants carry on their respective businesses.

That drawing is not quite complete. Inserted between No. 7 and No. 7a is a step transformer. This is made necessary by the fact that in order to prevent electrical induction interfering with parallel wires of the Bell Telephone system serving other customers only a low current is transmitted over the wires shown as the 7a on the drawing.

The drawing shows only one turn-table. In fact there are four turn-tables connected by gears so that the operator in the studio of A.B.C. may disengage one turn-table and engage another without any appreciable interruption of the programme.

The equipment in the premises of each of the appellants other than A.B.C. may be disconnected from the balance of the equipment by the operation of a switch, not shown in the drawing, so that at any given time, one or more subscribers and the patrons in his or their premises may be hearing a musical programme originating in the studio of A.B.C. and other subscribers and their patrons may not. If all the subscribers leave

J. C.

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the instrumentalities which are located in their premises connected with the balance of the system, they all hear the same programme. By throwing out that switch, any subscriber may use parts numbered 8 and 9 together with microphones to make more audible programmes originating in his own premises.

The contracts between A.B.C. and the other appellants are all similar in form. They are headed "Arrangement for 'Music "'by Muzak' service." By these contracts A.B.C. agrees to supply to the subscriber "Music by Muzak" programme service to the localities therein described between the opening and closing hours of the subscribers' establishment. As part of the Muzak Service A.B.C. agrees to instal and keep in operating condition for the reception of Muzak programmes in the subscribers' premises certain equipment specified in the contract.

This system is operated as follows:—An employee of A.B.C. places a record or disc on turn-table No. 2. That turn-table is then made to revolve by the power of the motor No. 1. The stylus or needle No. 3 is placed in contact with the sinuous groove in the record and transmits to the playing head, No. 4, sound waves identical with those which impressed the record when it was made. Those sound waves are converted into electrical impulses in the playing head by the action of the magnetic coil and are carried along the wires No. 6 to the amplifier No. 7.

At that point, all the operations in the studio of A.B.C. end. The electrical impulses leave the amplifier No. 7 and are transmitted over the Bell Telephone wires to the premises of the subscriber. The step transformer—not shown in the sketch—increases the force of those electrical impulses and they are carried to the No. 9 and thence to the loud speaker No. 8 where they are transmitted back into sound vibrations and emitted into the air as an acoustic reproduction of the musical work contained in the record.

It is claimed, and so the trial judge found, that a public performance by means of this equipment, mechanism, or sum total of instrumentalities is a public performance by means of a gramophone within the meaning of the section. The argument in favour of this claim is neatly summed up in the appellants' case by saying that "the component parts or means used by the "appellants for the performance in public of musical works are "the component parts or means composing a gramophone and "producing the same result." It appears to their Lordships, however, that the short answer to this argument, and therefore to the appellants' case, is that it begs a question, what is the meaning of the word "gramophone" in the section, by assuming that whatever mechanism upon an analysis of its functions is seen to do what a gramophone does is therefore properly called a gramophone. It was, as their Lordships understood the argument, conceded that each one of the several components of the mechanism that has been described was an essential part of the

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gramophone. Therefore, to take a crucial test, the wires under the control of the Bell Telephone Company, which were laid under Parliamentary authority and might have extended for any distance, were a part of the gramophone. Their Lordships agree with the judges of the Court of Appeal in thinking that this is nothing less than to distort the meaning of the word "gramophone". It does not appear that that word has acquired a scientific meaning other than its popular or commercial meaning, and in the latter meaning it clearly does not embrace a mechanism which (to take the same test) includes an undefined length of wiring laid, perhaps under or over public streets, under the powers given by Parliament not by the manufacturer or user of the mechanism, but by an independent authority.

This concludes the case, and their Lordships do not think it necessary to examine the arguments which were based on the use in the section of the words "owner," "user" or "manufacturer" in connexion with "gramophone," though they appear to support the view they have taken. Nor can they derive any assistance from an examination of the section in the light of the alleged policy of the Act. It is no doubt proper and useful to be informed of the state of the law and of the development of the industry at the time when the relevant section of the Copyright Act was enacted, but, to whatever conclusion such an examination might lead, their Lordships find it impossible to ascribe to the familiar word "gramophone" a meaning which, now as then, it is incapable of bearing.

Their Lordships will therefore humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors: *Sydney Morse & Co.; Syrett & Sons.*

C. C.

[COURT OF APPEAL.]

* LADD *v.* MARSHALL.

[1952. L. No. 2382.]

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Nov. 23, 24, 25.

Denning, Hodson and Parker L.JJ.

Court of Appeal—Evidence—Fresh evidence—Witness confessed liar. Evidence.

Leave to adduce further evidence on appeal will only be granted (1) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial, (2) if the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (3) if the evidence is such as is presumably to be believed.

So, where it was sought to recall a witness who at the trial denied recollection of a material fact and now was prepared to say that she had told a lie and wanted to tell the truth, leave was

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refused, for in the absence of proof of a good reason for the first evidence, such as bribery or coercion, a confessed liar could not be accepted as a witness presumably to be believed.

Dictum of Lord Loreburn L.C. in *Brown* v. *Dean* [1910] A.C. 373 applied.

Appeal from Glyn-Jones J., and motion for leave to call further evidence.

The following facts are taken from the judgment of Denning L.J.: The plaintiff Ladd claimed repayment of a sum of £1,000 which he said he had paid to the defendant Marshall in April, 1952, in connexion with negotiations for the sale by the defendant to him of a bungalow and land for £2,500. He said that the defendant advertised the bungalow for sale at £3,600, but because of the limited permissible sale price of the bungalow imposed under the Building Materials and Housing Act, 1945, the defendant told him that he was not allowed to sell bungalow and land for more than £2,500, though if a deal was to be agreed upon he, the defendant, wanted the £1,000 in cash, outside the sale. He said that an informal agreement for the sale at £2,500 was signed and that he paid the £1,000 in cash at the defendant's house on April 2, 1952, in the presence of the defendant's wife. He gave evidence to this effect himself and called as witnesses to the payment Mr. Warren, a friend of his, and the friend's secretary, Miss Andrews. Counsel for the plaintiff then called as a witness the defendant's wife, who, after at first saying that she did not wish to give evidence, professed to remember nothing of the matter. Upon counsel pressing her, the judge said that he could not allow him to cross-examine a witness he had called.

The only witness called for the defence was the defendant himself, who denied that he had received the £1,000.

Glyn-Jones J., in giving judgment, said: "I strongly suspect "that taking advantage of the difference between the £3,600 in "the first set of particulars, and £2,500, at which the contract "was actually entered into, the plaintiff and Mr. Warren "endeavoured to try and get £1,100 or £1,000 out of Mr. "Marshall, but I am not bound to pronounce any findings about "that. This is a pure question of fact, and the decision of the "case rests on whether or not the plaintiff and the witnesses "whom he has called have persuaded me that it is true that "£1,000 was paid to the defendant. I am not so persuaded. I "prefer on every point where the evidence is in conflict the "evidence of the defendant to the evidence of the plaintiff and "his witnesses. There will therefore be judgment for the "defendant with costs."

On May 6, 1954, the defendant's wife obtained a decree nisi of divorce from her husband, and later made a statement to her solicitors (who were also the plaintiff's solicitors) in which she said that the evidence she had given at the hearing before Glyn-Jones J. was false; that she did remember what had happened

at the meeting of April, 1952; that she was there when the money was counted out; and that the £1,000 was counted out and handed over by the plaintiff to the defendant.

In those circumstances, leave having been given to extend the time for appealing, the plaintiff appealed and moved for leave to adduce further evidence by Mrs. Marshall, who, in an affidavit sworn by her, said that at the trial she was afraid of telling the truth because she was then living in the house of her husband who, she said, would almost certainly have resorted to physical violence.

The case is reported only on the question of leave to call further evidence.

F. W. Beney Q.C. and *T. M. Eastham* for the plaintiff.
Ewen Montagu Q.C. and *H. W. Sabin* for the defendant.

The following cases, in addition to those referred to in the judgments, were cited by counsel: *Taylor* v. *Grange* [1]; *The Olympic and H.M.S. Hawke* [2]; *Nash* v. *Rochford R.D.C.* [3]; *Rex* v. *Copstake* [4]; *Sinanide* v. *La Maison Kosmeo* [5]; *Anderson* v. *Titmas* [6]; and *Young* v. *Kershaw.* [7]

DENNING L.J., having stated the facts set out above, continued: It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied when fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

We have to apply those principles to the case where a witness comes and says: "I told a lie but nevertheless I now want to "tell the truth." It seems to me that the fresh evidence of such a witness will not as a rule satisfy the third condition. A confessed liar cannot usually be accepted as being credible. To justify the reception of the fresh evidence, some good reason must be shown why a lie was told in the first instance, and good ground given for thinking the witness will tell the truth on the second occasion. If it was proved that the witness had been bribed or coerced into telling a lie at the trial, and is now anxious to tell the truth, that would, I think, be a ground for a new

[1] (1880) 15 Ch.D. 165.
[2] [1913] P. 214; 28 T.L.R. 319.
[3] [1917] 1 K.B. 384.
[4] [1927] 1 K.B. 468.
[5] [1928] W.N. 164; 44 T.L.R. 574.
[6] (1877) 36 L.T. 711.
[7] (1899) 81 L.T. 531.

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trial and it would not be necessary to resort to an action to set aside the judgment on the ground of fraud. Again, if it was proved that the witness made a mistake on a most important matter and wished to put it right, and the circumstances were so well explained that his fresh evidence was presumably to be believed, then again there would be ground for a new trial: see *Richardson* v. *Fisher*.[1] But this is not a case of bribery or coercion, nor of a mistake. It seems to me that Mrs. Marshall is not a person who in the new situation is presumably to be believed. She endeavoured to show that she was coerced by her husband, but on reading through the affidavits on both sides, it seems to me that the suggestion of coercion comes to nothing. She does not seem to have been in fear of her husband at all. I am afraid it is simply a case where a witness who has told a lie at the first hearing now wants to say something different. It would be contrary to all principle for that to be the ground for a new trial. In my judgment this appeal and the motion should be dismissed.

HODSON L.J., having agreed that the appeal for a new trial should be dismissed, continued: That brings me to the matter which really brought this appeal into existence, that is the fact that the wife of the defendant, the reluctant witness who said she did not remember anything, has now said, very shortly after the trial, having divorced her husband, that she told lies at the trial and now wants to tell the truth, the truth being, as she says, that she was present when this £1,000 was handed over. I think it is somewhat bold to ask this court to allow fresh evidence to be adduced in circumstances of that kind, because Mr. Beney, as one would expect, fairly recognized that here is a woman who, on her own showing, has told lies, and if there was a hearing of her evidence by this court, or at a fresh trial at which her evidence could be heard again, she could never be better than a discredited witness on whom it would be very difficult for any court to place any reliance. But Mr. Beney says that R.S.C., Ord. 58, r. 4, is wide in its terms and that there is a complete discretion in this court, which ought not to be fettered, to receive further evidence if the justice of the case requires it. But that discretion has been always exercised in the light of the maxim interest reipublicae ut sit finis litium. This seems to me to be particularly a case where one might envisage no end to litigation if people who had given evidence were allowed to come again and say "I told lies last time. I "want to tell the truth now." The principles on which further evidence is admitted have been recently discussed by this court in *Braddock* v. *Tillotsons Newspapers Ld.*[2] I would only make a brief reference to the well-known case of *Brown* v. *Dean*,[3]

[1] (1823) 1 Bing. 145.
[2] [1950] K.B. 47; 65 T.L.R. 553; [1949] 2 All E.R. 306.
[3] [1910] A.C. 373, 374.

where the House of Lords affirmed a decision of the Court of Appeal and gave guidance on this topic. The passage which is often discussed and may be said perhaps to have been modified in part, is the portion of the speech of Lord Loreburn L.C., where he says: "When a litigant has obtained a judgment in a "court of justice, whether it be a county court or one of the "High Courts, he is by law entitled not to be deprived of that "judgment without very solid grounds; and where (as in this "case) the ground is the alleged discovery of new evidence, it "must at least be such as is presumably to be believed, and if "believed would be conclusive." With regard to the word "conclusive," Lord Shaw, who also made a speech in the same case, was doubtful whether he could accept the word "conclusive," and the more modern cases have proceeded on the view that perhaps "conclusive" is too strong a word. But none of their Lordships dissented in any way; in fact, they agreed with the earlier part of the Lord Chancellor's proposition that new evidence must at least be such as is presumably to be believed.

It seems to me that the evidence of Mrs. Marshall is not such as is presumably to be believed, on the face of it, from the facts which I have already recounted. In addition, when one looks at the affidavit which she has made in support of this motion, she seeks to say, in effect, that the defendant, who is a retired boxer, has on several occasions treated her with violence and attacked her with clenched fists and she has been obliged to seek the protection of the police. I suppose the only point of that paragraph was to suggest, if no more, that she refused to give this evidence in the first instance because she was afraid of her husband. But there is no suggestion that she did not give evidence because of any threats that her husband had made to her, nor was there any request for protection made by her at any time. In a further affidavit which she has filed in reply to affidavits put in on the other side she has admitted that since the date when she made this affidavit, May 26, she has been with her husband. She has been seen with him on apparently friendly terms and has gone to a public house and spent the night in the same house with him and other people. I am paying no attention to the affidavits put in on the other side but I am looking at her affidavit and the subsequent affidavit which she put in in reply. The story that she was acting under the duress of her husband has become exceedingly thin. In my judgment, there is no ground for allowing this fresh evidence to be admitted.

PARKER L.J. I agree. I would only add one word on the application for leave to call further evidence. The further evidence which it is desired to call in this case is the evidence of one of the plaintiff's witnesses, Mrs. Marshall, who, it is said, will now say that what she said at the trial was a lie and that she is now prepared to tell the truth. The circumstances

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in which the court on such an application will grant leave to adduce that further evidence must be very, very rare, for the very good reason that such evidence on the face of it does not comply with the test as laid down by Lord Loreburn L.C. in *Brown* v. *Dean*,[4] where he said that new evidence must at least be "such as is presumably to be believed." It may be that if it could be shown that the witness told a lie originally because he or she had been bribed, or because he or she had been coerced, nevertheless it could be said in those circumstances that her evidence was such as is presumably to be believed. But in this case there is no suggestion that the defendant bribed his wife; there is no suggestion that he coerced his wife to give the evidence which she did give at the trial. All that is said is that Mrs. Marshall, whose relations with her husband were strained, was afraid of his hitting her and afraid of physical violence. As regards that, the one thing which the further affidavits clearly show is that this woman was nothing like as afraid of her husband as she has made out, and she has utterly failed to satisfy me that the reason she gave her evidence as she did originally was through fear of her husband. As she has failed to prove any such ground, it is impossible, in my view, for any court to say that her evidence could be credible. In those circumstances, I would refuse the application and dismiss the appeal.

Appeal and motion dismissed.

Solicitors: *G. Swinburne Raynes, for Atkins, Walter & Locke, Guildford; Owen White & Catlin, Feltham.*

A. W. G.

[4] [1910] A.C. 373.

[QUEEN'S BENCH DIVISION.]

1954
Nov. 25.
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* WINDSOR RURAL DISTRICT COUNCIL *v.* OTTERWAY & TRY LD.

Building—Contract—Certificate—Architect's certificate to be final and conclusive—Arbitration—Power of arbitrator to reopen certificate—Royal Institute of British Architects Contract No. 6.

Certificate. Arbitration—Case stated—Form—Questions of law—How they have arisen to be stated.

In a building contract (R.I.B.A. contract No. 6) clause 24 (*f*) provided: ". . . the architect shall, . . . issue a final certificate "and such final certificate . . . shall be conclusive evidence as "to the sufficiency of the said works and materials." Clause 27, after providing for arbitration in case of dispute, stated: ". . . "the arbitrator shall have power . . . to open up, review and "revise any certificate . . . in the same manner as if no such "certificate . . . had been given." A dispute having arisen under the contract, the question arose whether on the true construction

of clause 27 the arbitrator had power to reopen the architect's final certificate:—

Held, that the words "final" and "conclusive" in clause 24 had to be read subject to the express provision in clause 27; that the architect's certificate was final and conclusive subject to the arbitrator's powers under clause 27, which were as wide as they possibly could be; and that the arbitrator had power to reopen the final certificate.

Observations on form of special case to be stated by an arbitrator.

SPECIAL CASE stated by an arbitrator.

By a building contract (Contract No. 6) dated March 21, 1949, written on a form prepared by the Royal Institute of British Architects and specially adapted for the use of local authorities, and made between the claimants, the Windsor Rural District Council, the owners of a building site, and the respondents, Otterway & Try Ld., building contractors, the latter agreed to erect certain houses on the site. Clause 24 (*f*) of the contract provided: "... the architect shall ... issue a final certificate of the value of "the works executed by the contractor and such final certificate, "save in cases of fraud, dishonesty or fraudulent concealment "relating to the works or materials or to any matter dealt "with in the certificate and save as regards all defects and "insufficiencies in the works or materials which a reasonable "examination would not have disclosed, shall be conclusive "evidence as to the sufficiency of the said works and materials." Clause 27 provided: "Provided always that in case any dispute "or difference shall arise between the employer or the architect "on his behalf and the contractor, either during the progress or "after the completion or abandonment of the works, as to the "construction of this contract or as to any matter or thing of "whatsoever nature arising thereunder or in connexion therewith "... then either party shall forthwith give to the other notice "in writing of such dispute or difference. . . ." The clause then provided for the appointment of an arbitrator and ended: "Without prejudice to the generality of his powers the arbitrator "shall have power to direct such measurements and/or valua-"tions as may in his opinion be desirable in order to determine "the rights of the parties and to ascertain and award any sum "which ought to have been the subject of or included in any "certificate and to open up, review and revise any certificate, "opinion, decision, requisition or notice and to determine all "matters in dispute which shall be submitted to him, and of "which notice shall have been given as aforesaid, in the same "manner as if no such certificate, opinion, decision, requisition "or notice had been given."

In pursuance of the contract, the contractors carried out the work and were paid by the owners sums totalling £27,238 1s. 6d.; the last payment being made on June 15, 1952, pursuant to a final certificate from the architects dated June 5, 1952, and

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issued after the completion of the works. The owners, as appeared from their points of claim, claimed that in consequence of the remeasurement of the works on September 24, 1953, they and the architects discovered that the contractors had been overpaid by the sum of £1,056 5s. 5d., which they were not entitled to retain since the owners had made the overpayment in the mistaken belief that it was due to the contractors. No complaint was made as to the quality of the works or materials, and the owners' claim related solely to overpayments made in consequence of an error in the calculation of sums due to the contractors in respect of the foundations and/or substructures of the houses erected. The architects, on behalf of the owners, informed the contractors by letters of the overpayments, but the contractors refused to admit the same and refused to repay the sum to the owners. Accordingly the owners gave the contractors notice of a dispute and the matter was referred to arbitration.

The contractors disputed the owners' claim on the grounds (inter alia) that, as provided by clause 24 (*f*), the architect's final certificate was conclusive as to the sufficiency of their works and materials. By their reply the owners further contended (a) that in the circumstances the dispute did not relate to the sufficiency of the works and materials within the meaning of clause 24 (*f*); (b) alternatively, that inasmuch as the final certificate was not issued until after the completion of all the works provided by the contract, the dispute related, within the meaning of clause 24 (*f*), to an insufficiency or insufficiencies which a reasonable examination would not have disclosed.

The arbitrator, having set out the above facts in his award, stated: "Having regard to the matters hereinbefore set out I "am of the opinion that before any further steps are taken by "me in investigating or determining the matters at issue between "the parties, this court should decide the following questions "which are questions of law: (i) whether the complaint of the "claimants as to an error or errors in the calculations of the "sum due to the respondents in respect of the foundations and/or "substructures of the said houses is a complaint as to the "sufficiency of the said works and materials within the meaning "of clause 24 (*f*); (ii) whether the 'reasonable examination' "referred to in clause 24 (*f*) aforesaid relates to a reasonable "examination at or about the date of the final certificate or to "a reasonable examination at some other and what date; "(iii) whether or not I have jurisdiction as arbitrator as aforesaid "to review and/or to revise the said final certificate and/or any "other certificate given by the said architects and/or to determine "the matters submitted to me and the amount (if any) by "which the respondents have been overpaid by the claimants "in respect of the said works and the rights of the parties in "regard thereto and to make such an award in respect thereof

"as may be proper in the same manner as if no such final "certificate or certificates had been given."

J. G. K. Sheldon for the owners.
K. J. P. Barraclough for the contractors.

The following cases were cited in argument: *Clemence* v. *Clark* [1] and *Lloyd Bros.* v. *Milward.*[2]

DEVLIN J. Section 21 (1) of the Arbitration Act, 1950, provides: "An arbitrator or umpire may, . . . state—(*a*) any question "of law arising in the course of the reference; . . . in the form of "a special case for the decision of the High Court." The arbitrator states in paragraph 2 of the special case: "Having "regard to the matters hereinbefore set out I am of the opinion "that before any further steps are taken by me in investigating "or determining the matters at issue between the parties, this "court should decide the following questions which are questions "of law." He then sets out three questions, and I shall find it necessary to consider only the third.

I have referred to the provision of the Act because I do not think that the form which the arbitrator adopted is the proper way in which these matters should be stated. He has power to state questions of law arising in the course of the reference, and I think that to enable the court to determine whether the questions of law do or do not arise in the course of the reference he ought to set out in his case something which shows what has arisen under the reference, and what the contentions of the parties are on either side, so as to show how the question of law has arisen. It is not a mere matter of words: the court is not at the beck and call of the arbitrator to answer whatever questions the arbitrator may want to put to it, and it is not here to indulge in legal exercises. It is here only to answer questions which it is satisfied do arise in the course of the reference and are material to be determined. I think, therefore, that it is important that arbitrators should, when they are stating their case, state enough to make it plain how the questions of law arise so that the court can itself judge of their materiality. The point is not of importance in this case since I have now been told by counsel the circumstances of the case to enable me to answer the only question which seems to me to be material, and I am not going to answer any others.

That question is whether or not the arbitrator has jurisdiction to review and/or to revise the final certificate and/or any other certificate given by the architects and/or to determine the matters submitted to him. That is not a question which really goes to his jurisdiction; if it did, of course, it could not be

[1] (1880) 2 Hudson's Building Contracts (4th ed.) 54.

[2] (1895) 2 Hudson's Building Contracts (4th ed.) 262.

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determined by way of a case stated; because if he has no jurisdiction to determine the dispute he would have no jurisdiction to state a case about it. What he means is whether, on the true construction of the clause, he has power to reopen the final certificate that has already been given by the architects. That comes about in this way. The work under the building contract was completed, and the architects gave their final certificate. The owners paid, and afterwards they alleged (and I think it is disputed by the contractors) that the architects had made a mistake. I think it was alleged by the owners that the architects agreed they made a mistake and that the result of the mistake was that the building contractors had been overpaid by about £1,000. The building contractors rely on the certificate which they have and say that it cannot be reopened.

Two clauses in the contract are material to that matter. The first is clause 24, which provides for the certificates and payments, and provides by paragraph (*f*) that on the expiration of a certain period which is there stated the architect shall "issue a final "certificate of the value of the works executed by the contractor "and such final certificate . . . shall be conclusive evidence "as to the sufficiency of the said works and materials." A question might arise on that whether the certificate was final and conclusive in any respect except in so far as it related to the sufficiency of the said works and materials, and if it has that limited effect, then whether the matter that is raised in this case goes to the sufficiency of the said works and materials. I do not propose to enter into that. I shall assume for the purpose of this case that clause 24, if taken by itself, provides that the architect's certificate is to be final and conclusive for all purposes that are relevant to this case.

[His Lordship read clause 27 and continued:] The latter part of clause 27 is conferring in express terms a power on the arbitrator to open up, review and revise any certificate and to determine all the matters in the dispute which are submitted to him as if such certificate had not been given. In those circumstances it appears to me to be quite plain that by the express words of the clause he is entitled to open up the final certificate given under clause 24. I do not feel that either of the two decisions which have been cited to me, and which concern the powers of the arbitrator where no words are present such as the words that are contained in the last sentence of clause 27, really can help in the least. All these questions turn on the construction of a particular contract and no case has been cited to me in which the court has had to construe the wide words at the end of clause 27 in the present case. The first point that Mr. Barraclough submitted was that the words which I have read refer only to any interim certificate and not to any final certificate. I can find no justification for so limiting them. The words are quite general—"any certificate"—and if they

were to be construed as meaning any final certificate, then it would follow, of course, that although the interim certificates could be reopened the final certificate could not be the subject of any reopening at all. I see no justification for limiting the terms of the clause in that way.

Mr. Barraclough's second point is that since the word "conclusive" is used in clause 24, some meaning must be given to clause 27 which gives effect to that word. Well, the trouble about that is, what meaning? What meaning that does not destroy the effect of clause 27? If clause 27 itself is to be given any meaning at all, once one accepts, as I do, that it applies to final certificates, then there must be some conclusive certificates that the arbitrator can reopen and some that he cannot. I can find nothing in the contract which would enable me to draw any dividing line. One cannot invent one. One must get it from the words of the contract itself and one must decide what sort of certificates the arbitrator can reopen and what sort he cannot reopen. It is suggested by Mr. Barraclough that he would be able to reopen certificates that had not been accepted and not able to reopen certificates that had been accepted.

I am afraid I am still not quite clear what Mr. Barraclough means by "acceptance." He said that a certificate was normally accepted by the contractor before it was issued, because the architect would consult with the contractor and obtain his agreement to it. I understood him also to say that it was normally accepted by the owner in the same way. Of course, if it is accepted by both parties, then it is always accepted before it comes into existence. If, on the other hand, he means that the making of the payment amounts to an acceptance of the certificate, I cannot find any words in the clause which would justify drawing the line, or anything in any part of the contract which suggests that acceptance is in any way the test of anything that the arbitrator has to do. I, therefore, think that the only way in which the contract can be construed is to say that the words "final" and "conclusive" in clause 24 must be read subject to the express provisions of clause 27. Clause 24 must be read as meaning simply that they are final and conclusive subject to the arbitrator's powers under clause 27. The arbitrator's powers under clause 27 are as wide as they could possibly be. They refer to any sort of dispute, and they refer to any certificate, and he has power to deal with the whole matter as if no such certificate had been given.

That is the conclusion at which I would arrive by looking at the contract as a whole. But if one is permitted to use one's experience, or even one's common sense, as to how these contracts are built up, I think it is clear enough how the two clauses come to be there. The contract is not one that has been drafted as a whole and fully formed at one given moment: it is a

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contract which is built up from time to time by clauses being added. It is plain enough from the authorities that have been cited to me that in earlier days clause 27 was a much less wide clause than it is now. I think it is clear that at some time whoever is responsible for drafting this document decided, perhaps with a view to getting round the previous decisions of the courts (I do not know and it does not matter), that it would be desirable to give the arbitrator these very wide powers. He does that by putting some words on to the end of clause 27 and it does not occur to him to go back and redraft clause 24 in the light of what he had done in clause 27. That is probably the explanation of any apparent discrepancy there may be between the two; but whether that is the true explanation or not, reading the two together and reading them as both of equal authority, I think it is plain that clause 24 must be read subject to clause 27. I, therefore, answer the third question by saying that the arbitrator has power to make such an award in respect of the rights of the parties as he might think proper in the same manner as if no final certificate had been given.

Case remitted.

Solicitors: *Bower, Cotton & Bower, for T. W. Stuchbery & Son, Windsor; McNamara, Ryan & Co., Chertsey.*

C. J. E.

[CHANCERY DIVISION.]

1954
Nov. 30.

Vaisey J.

* *In re* WEBBER. BARCLAYS BANK *v.* WEBBER.

Charity—Education—Boy Scouts movement—Validity of bequest.

A testator, by his will dated August 23, 1940, directed that certain surplus income should be devoted to "the furthering of the "Boy Scouts Movement, by helping to purchase sights for camping, "outfits, etc."

By a royal charter granted to the Boy Scouts Association (which had general control over the Boy Scouts movement) in 1912, its purpose was stated as the instruction of "boys of all classes in the "principles of discipline, loyalty, and good citizenship":—

Held, that the objects of the Boy Scouts Association came within the definition of an educational charity and that the bequest, therefore, constituted a valid charitable trust.

Originating summons.

By his will, dated August 23, 1940, the testator, Alexander Webber, after making provision for his widow during her life or until her remarriage, directed that the remaining income from his estate should be devoted "to the furthering of the Boy Scouts

"Movement by helping to purchase sights for camping, outfits, "etc."

The testator died on February 20, 1954, and the executors took out a summons to determine (inter alia) whether that direction constituted a valid charitable trust or was void for perpetuity or uncertainty or otherwise.

In 1912 a royal charter was granted to the Boy Scouts Association, which was formed in that year for the purpose of carrying out the objects of the movement, which had been founded in 1908 by Lieutenant-General Sir Robert Baden-Powell, K.C.B. The charter stated that the purpose of the association was that of instructing boys of all classes in the principles of discipline, loyalty and good citizenship.

R. Cozens-Hardy Horne for the plaintiffs.

R. O. Wilberforce Q.C. and *Ian Campbell* for the testator's widow.

N. Browne-Wilkinson for persons interested in any property as to which the testator died intestate.

Geoffrey Cross Q.C. and *R. R. A. Walker* for the Boy Scouts Association.

Denys Buckley for the Attorney-General.

VAISEY J. The point which I have to consider is the meaning and effect of a very few words in the will of the testator by which he directed that certain surplus income should be devoted to the furthering of "the Boy Scouts Movement, by helping to purchase "sights for camping, outfits, etc." The orthography of the will is imperfect, but I have no doubt what the words were meant to convey, that is to say, "sights," in my view, means "sites," and not as written in the will "sights."

I am bound to say that I am surprised to hear that anyone suggests that the Boy Scouts movement, as distinguished from the Boy Scouts Association, or the Boy Scouts organization, or any other form of words, is other than an educational charity. I should have thought that it was well settled and well understood that the objects of the organization of boy scouts is an education of a very special kind no doubt, but still, none the less, educational. Where the testator directs this income to be devoted to the purposes which I have mentioned, the furthering of the Boy Scouts movement, and then particularizes it by saying that he wants to help it by helping them in the purchase of sites for camping, for outfits, and so forth, I should have thought that that is a very good and correct description of one of the most notable activities of the movement, association, or organization, whatever it may be called.

I do not think that it is necessary for me to go into the constitution of the association, which in point of fact was incorporated by royal charter on January 4, 1912. The outstanding

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Webber, *In re.* Barclays Bank *v.* Webber.

Vaisey J.

purpose of the association appears in the first paragraph of the first clause, namely, the instruction of "boys of all classes in the "principles of discipline, loyalty and good citizenship." That seems to me to be a description of one of the most important elements in education.

The association, that is to say, the body incorporated by royal charter, has been treated as a charity ever since 1912. Nobody seems to have doubted that it was a charity, and it has been so recognized for very many purposes.

It is rather strange that this exact point, that is to say, the exact position of the Boy Scouts Association under the law relating to charities, does not seem to have come before the courts, except on one occasion to which I will refer in a moment. But, apart from authority, I feel, in spite of Mr. Wilberforce's argument, which was very properly devoted to endeavouring to analyse the particular words of the will and to find from them something which fell short of a charitable purpose, that on my own understanding of these matters and from what I know of the Boy Scouts movement, it is quite plainly a charitable body established for charitable purposes.

It appears that on June 29, 1932, a similar question arose before Clauson J. in *In re Alexander*, which is reported in "The "Times" newspaper of June 30, 1932. There there was a direction that the income should be applied "for the purpose of "creating a fund for providing holiday camps for the boy scouts "of Clapham and Brixton." A summons was taken out in that case by the trustees of the will asking whether the gift was a charitable trust, and Clauson J. declared that the gift was a good charitable trust, and gave liberty to apply for a scheme.

In his judgment, as reported in the newspaper, Clauson J. first referred to the fact that there was a body called the Boy Scouts Association, which was incorporated by royal charter, and which had general control over the Boy Scout movement. He added that "the Boy Scouts Association and Boy Scout movement "were clearly an educational organization and as such a charitable "organization in the technical sense."

The words there seem to me to be very near to the present words. Clauson J.'s apparent identification of "association" and "movement" seems to me to be so near to the present case that I should hesitate for a long time before I differed from his decision or even attempted to distinguish it. I am glad to know that the matter will be put beyond reasonable doubt, and that the Boy Scouts Association, the Boy Scouts movement, and the Boy Scouts organization, and the object and purpose for which the boy scouts exist, are again in this case held to be quite plainly within that department of charity which arises from the purpose being educational.

In answer to the question put to me in the summons, I shall declare that the direction contained in the will to devote income

therein mentioned to furthering the Boy Scouts movement by helping to purchase sites for camping, outfits, etc., constitutes a valid charitable trust.

Declaration accordingly.

Solicitors: *Freshfields; Taylor, Willcocks & Co.; Longbourne, Stevens & Powell; Treasury Solicitor.*

J. L. D.

[COURT OF APPEAL.]

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1954
Nov. 15, 16.
Evershed M.R., Jenkins and Birkett L.JJ.

* STOW BARDOLPH GRAVEL CO. LD. *v.* POOLE (INSPECTOR OF TAXES).

Revenue—Income tax—Capital or income expenditure—Gravel merchant—Cost of right to take gravel—Whether capital expenditure or expenditure on stock-in-trade—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case 1.*

A company of sand and gravel merchants, in consideration of a payment of £2,000, acquired the benefit of a contract to take a deposit of sand and gravel. They later exercised an option contained in the contract, under which they acquired for £2,250 a right to take a further deposit:—

Held, that the sums of £2,000 and £2,250 were not expended on the purchase of stock-in-trade, and were not therefore admissible as deductions in the computation of the company's profits for the purpose of Case I of Sch. D; for by the contract and option the company did not acquire any proprietary right in the deposits in situ but merely had the right to work them and to take away what was won; and the company had not, on the facts, purchased stock-in-trade readily identifiable as such from the moment of purchase but merely a means of getting gravel and sand which when excavated and taken into possession would be part of their stock-in-trade.

Golden Horse Shoe (New) Ld. v. *Thurgood* [1934] 1 K.B. 548; 18 T.C. 280 distinguished (but principle, as stated by Romer L.J. at p. 563, applied).

Decision of Harman J. [1954] 1 W.L.R. 1058; [1954] 2 All E.R. 661 reversed.

APPEAL by Crown from Harman J.[1]

By an agreement dated October 29, 1947, Luddington Estates Ld. (on whose land were considerable deposits of gravel) agreed to sell to Gorbould Bros., a firm of contractors, a deposit of gravel and sand ballast on approximately eight acres of their land for the sum of £2,000. The relevant terms of the agreement were as follows:

Clause 1: "The company [Luddington Estates Ld.] shall sell "and the purchaser [Gorbould Bros.] shall purchase the deposit

[1] [1954] 1 W.L.R. 1058; [1954] 2 All E.R. 661.

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"of gravel and sand ballast contained in and upon the land "coloured pink on the plan annexed hereto being an area of "8 acres"—or rather more—"forming part of the field numbered "102 on the ordnance survey sheet Norfolk LVII 10, . . . the "property of the company, at the price of £2,000 to be paid on "the signing hereof."

Clause 2: "The company shall allow the purchaser . . . free "access to the said land, with or without carts, lorries or other "vehicles, for the purpose of removing the said gravel and sand "ballast through" a specified gateway. It was provided that the purchaser should erect and maintain a proper gate.

Clause 4: "The purchaser shall have the right to take upon "the said land any portable machinery and haulage equipment "which may be required for the purpose of excavating and "carrying away the said gravel and sand ballast but no structures "or dwelling-houses of a permanent nature shall be erected "thereon, and no refuse, rubbish or spoil other than the excavated "top soil shall be deposited on the land."

By clause 5 the purchaser was made responsible for the rates, charges and so forth.

Clause 6 provided: "For the period of five years from the "date hereof the purchaser shall have the option to purchase "the additional deposit of gravel and sand ballast in and upon "the adjoining five acres of land coloured blue on the plan "annexed hereto at the price of £1,000 per acre where the deposit "shall be of a depth of 9 feet or more, provided that where the "deposit shall be found to be of a lesser depth than 9 feet the "purchase price shall be lessened by a proportionate amount as "shall be agreed between the company and the purchaser and "in default of agreement to be settled by arbitration in the "usual manner." There followed a proviso giving a further period for a further option.

By clause 8: "No legal estate in the lands hereinbefore "referred to shall be created or conveyed by virtue of this "agreement and no interests easements licences or rights of way "sporting or otherwise whatsoever except as herein expressly "agreed and declared shall be created or conferred or deemed "to be created or conferred hereby."

Gorbould Bros. did not work or excavate any part of the deposit of gravel and sand covered by the agreement, the benefit of which was acquired by the taxpayers, Stow Bardolph Gravel Co. Ld., who were sand and gravel merchants, in consideration of £2,000, under an oral agreement made with Gorbould Bros.

In 1949 the taxpayers, in exercise of the option contained in clause 6 of the agreement of 1947, obtained access on like terms to a further deposit of sand and gravel lying on an adjoining 2¼ acres of land at the price of £1,000 per acre, making a total of £2,250. On the exercise of that option the taxpayers became entitled to the further option exercisable within

five years over a third piece of land referred to in the proviso to clause 6.

The taxpayers claimed that in the computation of their profits for the purpose of Case I of Sch. D [2] to the Income Tax Act, 1918, they were entitled to deduct the sums of £2,000 and £2,250 paid respectively to acquire the agreement of 1947 and in the exercise of the first option under that agreement, on the ground that it was expenditure incurred in the acquisition of trading stock, or expenditure of a revenue character wholly and exclusively for the purpose of the company's trade.

The General Commissioners (for Freebridge Marshland in the county of Norfolk) held that the two sums in question were not admissible as deductions, but on appeal by case stated Harman J. held that they were legitimate deductions being expended for the purchase of stock-in-trade.

The Crown appealed.

Sir Lynn Ungoed-Thomas Q.C. and *Sir Reginald Hills* for the Crown.

Hilary Magnus for the taxpayers.

The following cases, other than those set out in the judgments, were cited in argument: *Smith (John) & Son* v. *Moore* [3]; *Moseley* v. *Geo. Wimpey & Co. Ld.* [4]; *Russell* v. *Scott* [5]; *Inland Revenue Commissioners* v. *Broomhouse Brick Co. Ld.* [6]; *Gowan* v. *Christie* [7]; *British Insulated and Helsby Cables Ld.* v. *Atherton* [8]; *Hughes* v. *British Burmah Petroleum Co. Ld.* [9]; *Sharkey* v. *Wernher* [10]; *Morant* v. *Wheal Grenville Mining Co.* [11]

EVERSHED M.R. The question raised in this appeal is whether the Stow Bardolph Gravel Co. Ld., to whom I will hereafter refer as the taxpayers, were entitled to bring into their trading and profit and loss accounts for the two years ended March 31, 1949 and 1950, by way of expenses and in reduction of the profits or gains in respect of which they were being assessed, an item representing the purchase of gravel made during the year in question, less any stock of gravel so purchased at the end of that year. It is necessary to make it clear that the taxpayers are admittedly being charged for tax in

[2] Income Tax Act. 1918, Sch. D, Case I, r. 3: "In computing the "amount of the profits or gains to be "charged, no sum shall be deducted "in respect of—(*a*) any disbursements "or expenses, not being money wholly "and exclusively laid out or expended "for the purposes of the trade, pro-"fession, employment, or vocation ". . . (*f*) any capital withdrawn from, "or sum employed or intended to be "employed as capital in such trade, "profession, employment or voca-"tion."

[3] [1921] 2 A.C. 13; 37 T.L.R. 613; 12 T.C. 266.

[4] 61 T.L.R. 411; [1945] 1 All E.R. 667; 27 T.C. 315.

[5] [1948] A.C. 422; 64 T.L.R. 297; [1948] 2 All E.R. 1; 30 T.C. 375.

[6] (1952) 34 T.C. 1

[7] (1873) L.R. 2 Sc. & Div. 273.

[8] [1926] A.C. 205; 42 T.L.R. 187; 10 T.C. 155.

[9] (1932) 17 T.C. 286.

[10] [1954] 3 W.L.R. 367; [1954] 2 All E.R. 753.

[11] (1894) 11 T.L.R. 67; 3 T.C. 298.

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respect of the gainful occupation or business of sand and gravel merchants. Therefore, prima facie it seems reasonable enough that in arriving at the taxable gains at the end of any given year the taxpayers should be entitled to deduct and to bring into account as an expense any sums laid out by them during the year in buying the stock-in-trade in which they dealt, namely, sand or gravel; but in fact when the matter is examined it is not quite so simple, for the alleged purchase of gravel represents what the taxpayers obtained under an agreement, made in October, 1947, not with them, but with a predecessor in title.

The Commissioners for the General Purposes of the Income Tax were of opinion that these claims to make deductions were not admissible, but Harman J. was of opinion that the deductions were admissible. I have myself reached a different conclusion from that reached by Harman J., and I have reached it, I confess, with some slight feelings of regret and misgiving on two grounds: first, I think the result bears a little hardly on the taxpayers for reasons which will, I think, emerge without any necessity for emphasis as I recite the facts; second, I am not for my own part satisfied that if close investigation were made of the method whereby the taxpayers and others in the same line of business carry on their businesses, it might not emerge—I say no more than that—that the commissioners would find as a fact that, notwithstanding the apparent legal consequences of the agreement to which I have referred, there was here in truth such a taking possession of the deposit of gravel in question that it could sensibly for tax purposes and rightly and fairly be said that once the consideration money had been paid under the agreement the deposit was in truth the stock-in-trade of the taxpayer. However, I have felt compelled to say that there is no finding of fact to support such a conclusion, nor indeed is there before us any evidence sufficient to warrant it. It is in that respect, I apprehend, that I find myself at variance with Harman J.

Having regard to the dates which I have mentioned, the Act which is relevant is that of 1918. The taxpayers having been assessed under Schedule D, their case, admittedly as I follow it, falls within the first two Cases. [His Lordship read rule 3 of the rules applicable to Cases I and II of Schedule D of the Income Tax Act, 1918, and continued:] If the question were asked, as a matter of what might be called business common sense, whether the sums which were paid under this agreement of October, 1947, were sums wholly and exclusively laid out or expended for the purposes of the trade as sand and gravel merchants, I think the answer would be that they were. But when their true nature is more closely examined in the light of the authorities which have been cited to the court, and bearing in mind also the prohibition in subparagraph (*f*) of rule 3, I think

that one comes in this case to a conclusion contrary to that which commended itself to Harman J.

The agreement is expressed to be made between a company called Luddington Estates Ld., who may be taken as owners of all the land which is relevant, and two persons then carrying on a partnership business, the interest of the second party to the agreement being admittedly now vested in the taxpayers. [His Lordship read the agreement of October, 1947, as set out above and continued:]

Certain matters may be mentioned, although they are perhaps obvious and elementary. The first is that this deposit which is "purchased" according to the terms of clause 1 is, of course, part of the land itself. The gravel in situ is the land. There is, therefore, a real, if narrow, distinction between what is expressed to be a purchase of gravel on the one hand and a purchase of something which may be growing on the land or be lying on the land, such as potatoes, truffles, a crop of apples, or the leaves of a tree, on the other hand. It is also to be noted that once the purchaser has paid the £2,000, he is under no particular obligation to work this gravel. Allowing for the period covered by the option, the term of this agreement might extend for about ten years; but, on the face of the document, there is no doubt that it purports to be a sale of the gravel and sand as such, and the terms of the final clause, clause 8, can be said to emphasise the fact that no other interests are created than those which are essential for the main purpose of the sale of gravel and sand.

Before I comment further upon the agreement, I must make one or two references to the case in which the facts are stated. I have already said that the practice of businesses of this kind is not really discussed. As a matter of fact, the only finding seems to be in paragraph 3 (*e*), where the commissioners state: "On acquiring the benefit of the said agreement in writing, "the appellant company proceeded to excavate the deposit of "sand and gravel hereinbefore referred to, and sold the same "in the course of trade." In view of what follows, I emphasise the word "excavate." The contentions of the taxpayers and of the Crown were then set out; and the commissioners stated their conclusion: "We . . . after hearing and considering the "evidence were of opinion that the above payments were not "admissible deductions for Income Tax purposes."

Harman J. apparently rested his conclusion on his acceptance of the literal fact of the first clause of the agreement, which has indeed underlaid the substance of the argument forcefully put before us by Mr. Magnus. In the report in the Weekly Law Reports [1] the reasoning of the judge is introduced by the simple formula, "Having stated the facts." That formula, however, does less than justice to what the judge stated at the

[1] [1954] 1 W.L.R. 1058, 1060; [1954] 2 All E.R. 661.

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beginning of his judgment, and I think it is necessary to refer to a line or two in the early part of his judgment. He said: "No estate or interest in the land was expressed to be given "to the so-called purchaser, nor is there any limit to the time "in which he must remove the sand and gravel; the only time "limit is the 5-year period within which he must exercise "the options. He is not the owner of the land obviously, "because he only has access to it by one road and the freehold "must remain, I take it, in the vendor. What he gets is, "apparently, a right of access not limited in time, coupled with "a profit à prendre, and for that he pays down his £2,000."

I respectfully agree with that summary of the rights granted by the document of 1947, and in the light of the authorities to which we have been referred I should have thought that that statement of the position led to a conclusion in favour of the Crown. But the judge avoided that conclusion by the emphasis he put, not on the legal effect of the document, but on the language used, particularly in the first clause. Thus he said [2]: "It is argued on behalf of the appellants"—that is the tax-payers—"that this is a mere purchase of stock-in-trade—their "stock-in-trade being sand and gravel—and that all they do is "to go on the land, shovel the sand and gravel into a lorry, and "sell it to their customers, so that it is as much their stock-in-"trade as any other article in which a trader might deal. It is "said on behalf of the Crown that the sand and gravel is not "a chattel detached from the soil, but something which has "to be worked as if it were in a mine or a quarry; and that "all that was bought under this contract was a capital asset, "namely, the right to go on the land and win the gravel and "the sand and to carry it away." I venture to think that in his recital of the argument of the Crown he might be said to be restating his own conclusion of the rights given by the agreement of 1947.

The judge, however, next referred to a case to which I must also presently allude, *Golden Horse Shoe (New) Ld.* v. *Thurgood*,[3] which admittedly on the facts is the closest authority to the present case. He then came back to the present case, and stated his conclusions thus [4]: "It is said here that the "opposite conclusion"—that is, opposite to the *Golden Horse Shoe* case [5]—"should be reached, and the reason in substance is "because this gravel had never been raked off the soil on which "it was lying. This is not a case where the gravel is in any true "sense 'won' from the soil; nor is any process applied to it. It "is not even suggested that a riddle or sieve is used; it is merely "shovelled up where it lies, put on a lorry and sold wherever it "can be sold."

I do not know whether those are, or are not, the facts; but

[2] [1954] 1 W.L.R. 1058, 1060.
[3] [1934] 1 K.B. 548; 18 T.C. 280.
[4] [1954] 1 W.L.R. 1058, 1062.
[5] [1934] 1 K.B. 548.

there is no finding to that effect. If the facts were as the judge intimated, the General Commissioners might find, and might justifiably find, that a case such as this is not really distinguishable as a matter of law and common sense from a sale of loose objects lying on the surface of the ground, such as windfalls from apple trees, or even from cases like those I have mentioned, which are concerned with crops or leaves growing on trees. But my difficulty is that I can find no justification for that conclusion in the material before us. I venture to think, with all respect to Harman J., that it neglects the introduction to his judgment, which is, in my opinion, a correct appreciation of the real rights given to the taxpayers under the agreement of 1947.

I come back to the question which is inherent in the judge's summary of the argument, and which seems to be fundamental to the decision of the present case. Can it be said on the facts which are proved, that from the moment when the purchaser paid his £2,000 this deposit which is identified by reference to a field on the map became the stock-in-trade of the gravel merchant? I have found it impossible to answer that question affirmatively.

I do not think that it is necessary to go at length all through the many cases which have been brought to the attention of the court. If I do not do so, I hope that I shall not be thought to have failed in appreciation of their significance, or have failed to do justice to the arguments put before us. The earlier cases, I think, are sufficiently exemplified by *Coltness Iron Co.* v. *Black* [6] and *Alianza Co.* v. *Bell*,[7] which may be said to be the foundation for what is said in the *Golden Horse Shoe* case.[8] The *Coltness Iron Co.* case,[9] as its name implies, was a mining case strictly so-called; that is to say, it concerned an iron mine, the getting of iron by mining operations. As Mr. Magnus observed, the business of mining has been the subject of special treatment in the Income Tax Acts, as may be seen on reference to Schedule A and the exceptions thereto.[10] In the *Alianza* case [11] also the business operation was that of turning to account a caliche mine in South America. But in that case, since the mine was out of the jurisdiction, the business, which was managed and controlled in the United Kingdom, could not be treated for tax purposes on the same footing as that of the owner of a mine situated in England. None the less the court held that the same principles applied.

Those cases laid down the principle that in all cases truly

[6] (1881) 6 App.Cas. 315; 1 T.C. 287.

[7] [1906] A.C. 18; 22 T.L.R. 94; 5 T.C. 172.

[8] [1934] 1 K.B. 548.

[9] 6 App.Cas. 315.

[10] Income Tax Act, 1918, Sch. A, No. III, rule 2: "In the case of "mines of coal . . . and other mines, "the annual value shall be under-"stood to be the average amount for "one year of the profits of the five "preceding years: Provided that— "(a) If any such mine has . . . so "decreased and is so decreasing in "annual value that an average of "five years will not give a fair esti-"mate . . . the general commis-"sioners . . . may . . . compute the "annual value on the actual amount "of profits of the last preceding "year . . ."

[11] [1906] A.C. 18.

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analogous thereto the costs of acquiring a mine, or the depreciation of a mine once acquired (which for accounting purposes is another way of saying the same thing), were not legitimate deductions as being expenses wholly and exclusively incurred for the purposes of the trade and not being sums employed as capital in the business.

The subject-matter of the *Golden Horse Shoe* case [12] was not a mine or underground minerals but dumps formed of tailings; that is, the refuse of the mine from which the best gold ore had already been extracted, analogous to the tips which are a familiar sight near coal mines in this country. The business operation of the company was extracting the gold ore, the gold metal, which admittedly still existed in some quantities in the tailings. The Golden Horse Shoe Co. had bought tailings (one of those dumps, it is stated, was about 250 feet high) and they were undoubtedly raw material from which, by appropriate manufacturing processes, the Golden Horse Shoe Co. extracted gold. The question was whether the costs of acquiring these tailings, which were severed from the earth, were legitimate deductions. This court came to the conclusion that they were, distinguishing the tailings lying heaped on the ground from, for example, the minerals which were still ungotten, and which had been the subject of *Coltness Iron Co.* v. *Black* [13] and earlier cases.

Romer L.J. said in the *Golden Horse Shoe* case,[14]: "Unfortunately . . . it is not always easy to determine whether a "particular asset belongs to the one category or the other." That is, whether it is in fact a capital asset or part of the stock-in-trade or raw material. "It depends in no way upon what may "be the nature of the asset in fact or in law. Land may in "certain circumstances be circulating capital. A chattel or a "chose in action may be fixed capital. The determining factor "must be the nature of the trade in which the asset is employed." He then illustrated the point he was making, and took by way of illustration the example of a man whose trade is that of a manufacturer and seller of gas, which is to be extracted, of course, from coal. "But now suppose" he continued,[16] "that "the gas manufacturer, instead of buying his coal from outside "sources, purchase a coal mine and produces the coal that he "requires by mining. The cost of extracting from the mine the "coal treated will, of course, be a permissible deduction in "ascertaining the profits of his business in the year. But he may "not debit his profit and loss account with the sum by which "the value of his mine has depreciated in consequence of the "extraction of that coal. For the mine is regarded as being "fixed capital:" There follows a reference to *Coltness Iron Co.* v. *Black* [17] and *Alianza Co.* v. *Bell.*[18] "If, on the other

[12] [1934] 1 K.B. 548

[13] 6 App.Cas. 315.

[14] [1934] 1 K.B. 548.

[16] [1934] 1 K.B. 564; 18 T.C. 280, 301.

[17] 6 App.Cas. 315.

[18] [1906] A.C. 18.

"hand, instead of buying the mine, the gas manufacturer had "bought a quantity of coal already extracted from the mine and "stacked on the surface, the price of the coal would have been "regarded as part of the circulating capital. The reason for this "distinction is not at first sight very easy to discover. It must, "as it seems to me, be found in this: that in the former case "the purchase of the mine is not a purchase of coal but a pur-"chase of land with the right of extracting coal from it. The "land is regarded merely as one of the means provided by the "manufacturer for causing coal to be brought in his gasworks, "and therefore as much part of his fixed capital as would be any "railway trucks or lorries provided by him for the same "purpose." Then, after a citation, Romer L.J. said [19]: "It "seems to follow from these considerations that the question to "be decided in the present case resolves itself into this: Are "the dumps the raw material of the appellants' business or "do they merely provide the means of obtaining that raw "material? In my opinion they are the raw material itself."

Harman J., applying that case to the present one, asked the question whether the sand and gravel here was subject to extraction. Since there was no processing, the raw material in this case was, he found, the stock-in-trade of the taxpayer's business, and he thought that there was in principle no distinction between the *Golden Horse Shoe* case [20] and the case before him. I have already quoted from his judgment [21]: "This is not a case where "the gravel is in any true sense 'won' from the soil . . . it is "merely shovelled up where it lies." It is on that matter, as I have said, that I find myself at variance with the judge. I find it impossible to resist the conclusion on the facts before us that, the rights under the agreement of 1947 being as the judge and I have stated them, the deposit where it lay under the top soil, under part of a field like any other part of the surrounding country, was not the stock-in-trade of this business and could not become such until it had been excavated. It has been the burden of Mr. Magnus's case that that is not right, and it is at that point that the ways part.

Mr. Magnus further contended that, even if it could not be said that the gravel was merely sold as a chattel or chattels and became, accordingly, the taxpayers' stock-in-trade, the nature of this agreement is such that the cost of acquiring the gravel, the contractual rights which the sum of £2,000 and the option price gave, were none the less matters which were properly to be brought into the income accounts for income tax purposes. I cannot accept that. I think that once it has to be conceded that there was no sale of the gravel in the way the judge said there was, then it must follow that what the company acquired was, to use

[19] [1934] 1 K.B. 548, 565; 18 T.C. 280, 301.

[20] [1934] 1 K.B. 548.

[21] [1954] 1 W.L.R. 1058, 1062.

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Romer L.J.'s language,[22] "the means of getting the gravel by "excavating and making it part of the stock-in-trade."

Other examples were quoted, and Mr. Magnus drew attention, among others, to cases of growing timber. On one side of the line was a Scottish case recently decided, *Murray* v. *Commissioners of Inland Revenue*,[23] where a Mr. Murray, having bought certain standing timber for about £1,000, was fortunately able to sell it later, still standing, for £14,000. The Inner House of the Court of Session decided the case, as I read their judgment, on this simple ground: that there was evidence justifying the commissioners' finding that the purchase and sale of that growing timber were transactions within the scope of the business activities of Mr. Murray as a timber merchant, and, therefore, that the difference between the two figures was taxable profit in his hands.

On the other side of the line was *Kauri Timber Co. Ld.* v. *New Zealand Commissioner of Taxes*,[24] which came to the Judicial Committee of the Privy Council from New Zealand. The appellant company had, like Mr. Murray in *Murray* v. *Commissioners of Inland Revenue*,[25] entered into a number of contracts or similar documents for acquiring rights over standing timber. The nature of the transactions which the Kauri Company entered into may be said to have been far more comprehensive in scope than Mr. Murray's transactions, but still I think that the principle was not very different. In that case, however, the Board came to the conclusion that the deduction of the sums paid by the Kauri Timber Company was not admissible. Reference was made to the other cases to which I have also referred. But Lord Shaw said[26]: "It appears to the Board that the present case "involves no refinement of distinction; for the transaction under "which these timber rights were acquired was not one under "which a mere possession of goods by a contract of sale was "given to the appellant company, but was one under which they "obtained an interest in, and possession of, land." If that test is applied to the present case, it seems to me that it produces the result which I have already indicated.

Finally, I refer to a case to which Jenkins L.J. drew our attention, which also came before the Privy Council: *Mohanlal Hargovind of Jubbulpore* v. *Commissioner of Income Tax, Central Provinces and Berar, Nagpur*.[27] In that case the taxpayer had entered into a series of contracts which entitled him to pick off and take away the leaves of trees known as tendu leaves, which were required for making into cigarettes. The question again was whether the sums spent in acquiring the leaves were properly deducted as being expenses which were exclusively incurred in the business, or whether they were in

[22] 18 T.C. 280, 301.
[23] (1951) 32 T.C. 238.
[24] [1913] A.C. 771; 29 T.L.R. 671.
[25] 32 T.C. 238.
[26] [1913] A.C. 771, 776.
[27] [1949] A.C. 521; [1949] 2 All E.R. 652.

truth in pari materia with the *Kauri Timber* case,[28] and, therefore, capital outlay. On the facts of that case the Board came to the conclusion that the sums were deductible, and the judgment of the Board, delivered by Lord Greene,[29] undoubtedly reflects, and reflects closely, the argument which Mr. Magnus has put forward in the present case for the sand and gravel company; so that if sand and gravel are substituted for tendu leaves one would be hearing an echo of the argument for the taxpayers in the present case. As Romer L.J. said in the *Golden Horse Shoe* case,[30] the distinctions are not always easy to discern or to expound, but I think that in the case of the tendu leaves Lord Greene undoubtedly emphasised the short-term nature of the contract and the fact that it gave nothing whatever to the taxpayer except the right to take the leaves off the trees, just as a man might acquire a crop of apples on the trees, with only the necessary rights to go and take them away. "In their Lordships' opinion" said Lord Greene,[31] "the High Court" [from which the appeal came] "has adopted an approach to the "question which has diverted its view from the real point and "has attached too much importance to cases decided on quite "different facts. Cases relating to the purchase or leasing of "mines, quarries, deposits of brick earth, land with standing "timber, etc., referred to in the judgment and relied on in the "argument before the Board do not appear to their Lordships "to be of assistance." It is obvious from the contrasted examples that the decision rested upon the particular circumstances of the case and upon the fact that the Board was able to say that from the moment the contract was entered into and before the leaves had actually been picked the tendu leaves were part of the raw material of the appellant. But I cannot say the same of the sand and gravel, part of the earth itself, which was the subject of the contract in the present case and which I think could only become part of the stock-in-trade of this gravel merchants' business when it had, in the true sense, been won, been excavated and been taken into their possession.

For these reasons, which I have stated at some length out of respect for Harman J.'s judgment, I would allow the appeal.

JENKINS L.J. I agree. Whether the decision in this case should be in favour of the Crown or the taxpayers, in my opinion the grounds which led the judge to decide in favour of the taxpayers cannot be supported. He treated the case as if the transaction evidenced by the agreement of October 29, 1947, was a sale of a chattel in the shape of gravel lying loose on the surface of the land. There is no finding of fact in the case stated to support the view that the gravel was lying loose. On the other hand, there are passages in the case stated and in the agreement which make it reasonably apparent that the

[28] [1913] A.C. 771.
[29] [1949] A.C. 521, 527
[30] [1934] 1 K.B. 548.
[31] [1949] A.C. 521, 528.

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subject-matter of the agreement consisted of a deposit of gravel of the usual kind lying some feet beneath the surface of the land and requiring to be won from the land by a process of excavation.

My Lord has referred to the passages in the judgment describing the gravel in effect as lying loose on the land. Harman J. said [32]: "It is said here that the opposite conclusion "should be reached, and the reason in substance is because this "gravel had never been raked off the soil on which it was lying. "This is not a case where the gravel is in any true sense 'won'." Then two lines further on: ". . . it is merely shovelled up "where it lies, put on a lorry and sold wherever it can be sold. ". . . I think that it is a distinction without difference to "suggest that, because nobody had ever before applied a rake "to this gravel, it should be treated as capital, whereas if some-"body had raked it into little heaps before the contract was "made, then its purchase would constitute a different form of "adventure. It is the same situation; it is no more and no less "attached to the land. . . . it would be to introduce only "another artificiality if I were to hold that the fact that this "gravel had not been moved made the expenditure upon it a "capital outlay, when the expenditure on it would have been a "trading cost had it been touched by a rake."

It is, to my mind, clear that the case should be considered on the footing that this was a deposit of gravel beneath the surface of the land which required winning from the land by operations in the nature of quarrying or excavation. On that footing, how does the matter stand? One starts with the well-known provisions of Schedule D and the rules applicable to Cases I and II. [His Lordship read rule 3 and continued:]

The two sums paid by the taxpayers under the agreement of October 29, 1947, that is to say, the initial sum of £2,000 which was paid by them to the original parties to the agreement from whom they took an assignment, and the further sum of £2,250 paid by them on the partial exercise of the first of the two options, were clearly sums laid out wholly and exclusively for the purposes of their trade. It remains to consider whether these two sums were in the nature of capital outlay or were expenditure on revenue account; for in order to be expenses properly deductible they must be of the latter description. To arrive at an answer, it is necessary to consider the nature of the rights taken by the taxpayers under the agreement of October 29, 1947. The agreement by clause 1 purports to affect a sale upon the deposit of gravel under the defined 8 acres of land. The agreement then provides by clause 2 for the necessary access to the land by the taxpayers, their servants and agents, for the purpose of removing the gravel, with certain limitations as to the way by which access is to be had. In clause 4 rights are given to take upon the land

[32] [1954] 1 W.L.R. 1058, 1062.

portable machinery, haulage equipment and so forth; but there is a prohibition against structures or dwelling-houses of a permanent nature, and a prohibition against depositing on the land any refuse, rubbish or spoil other than the excavated top soil. The two options to which reference has already been made are given by clause 6; the first is given for a period of five years from the date of the agreement, and the further option is given by a proviso to the same paragraph and is to be exercisable within a further five years from the date of the exercise of the first option, in the event of the first option being exercised. Finally, by clause 8: "No legal estate in the lands hereinbefore referred "to shall be created or conveyed by virtue of this agreement and "no interests easements licences or rights of way sporting or "otherwise whatsoever except as herein expressly agreed and "declared shall be created or conferred or deemed to be created "or conferred hereby."

What is the effect of that agreement, and in particular of clause 1, which contains the purported sale of the deposit of gravel contained in and upon the land coloured pink, in conjunction with clause 8, which states that no legal estate in the land is to be created or conveyed by virtue of the agreement? In my view, the effect of the agreement is to give the taxpayers, as assignees of the original parties, an exclusive right to win and carry away the deposit which is referred to. In view of clause 8, I do not think that the agreement should be regarded as conferring on the taxpayers any proprietary right in the stratum of the land containing the sand or gravel. In my view the taxpayers had an exclusive right to win the gravel, and when it had been excavated and won, it became their property; but in my view the taxpayers cannot be described as having had any proprietary right in that particular stratum of the soil or in the gravel while it lay in that stratum, except in so far as they had an exclusive right to win it. The effect of the agreement, therefore, in my view, was to give the taxpayers an interest in the land in the nature of a profit à prendre, so that if they availed themselves of the right granted, they would become the owners of any gravel excavated by them from this area of land.

Certain features of the agreement require special notice. First of all, it is unlimited in time, so that the taxpayers are allowed the right to excavate the gravel over an indefinite period. The taxpayers are under no obligation to work the gravel at all, and if any work is done it is for the taxpayers to decide at what rate excavation shall proceed. Secondly, the price in no way depends on the amount of gravel excavated or available. Thirdly, the taxpayers are given options of securing further reserves of gravel to be exercised during a period which may extend for as long as ten years from the date of the agreement. Those reserves, in the event of the option being fully exercised, would have comprised, I think, another 10 acres in addition to the 8 acres to which the right originally extended.

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Such being the nature of the rights, it remains to consider whether the money laid out by the taxpayers in purchasing those rights, in purchasing the rights originally granted and in purchasing part of the further rights comprised in the first option, was laid out by way of capital expenditure or by way of income expenditure in the course of the taxpayers' trade. Mr. Magnus for the taxpayers contended that the business of the taxpayers was the business of dealers in sand and gravel, and not the business of quarry owners. He said that the taxpayers' business was to buy and sell gravel, so that any expenditure necessary to the purchase of gravel must be a proper expense of the taxpayers' trade. In my view, that states the position too narrowly. I would say that the taxpayers carry on the business of dealers in sand and gravel, but I would say that one part of the business consists not merely in purchasing gravel but in obtaining gravel, and there may be expenditure necessary or desirable with a view to obtaining gravel which is, nevertheless, not the purchase price of gravel as stock-in-trade of the business.

Sir Lynn Ungoed-Thomas, on the other hand, contended for the Crown that it could not be said here that the taxpayers had purchased a quantity of gravel as part of the taxpayers' stock-in-trade. He said that the true view was, when the terms and effect of the agreement were examined, that the taxpayers had provided themselves with a means of supplying themselves with gravel which when procured would form part of their stock-in-trade. On that view of the agreement, Sir Lynn submitted that the expenditure of the taxpayers in obtaining the rights granted by the agreement was expenditure of a capital nature on the principles stated by this court, and particularly in the judgment of Romer L.J. in the *Golden Horse Shoe* case.[33]

The question is not free from difficulty. Is this a case of a purchase of the raw material of the trade, that is, the stock-in-trade in which a particular trader deals, or is it a case of a purchase of a capital asset from which the taxpayers will be able to derive raw material or stock-in-trade as and when the requirements of the taxpayers' business make it expedient to do so? In my view, the latter conclusion is the correct one, and I think that conclusion accords with the *Alianza* case[34] and the *Coltness* case,[35] and also with the observations of Lord Shaw in the *Kauri* case.[36] The distinctions drawn by the cases are not altogether satisfying to some minds. It may seem strange that a purchase of a heap of tailings, as in the *Golden Horse Shoe* case,[37] should be regarded as a purchase of raw material or stock-in-trade, whereas the sums expended in acquiring a quantity of caliche or nitrates embedded in a quarry, as in the *Alianza* case,[38] should be a capital expense; or again, which I think is the result in the

[33] [1934] 1 K.B. 548.
[34] [1906] A.C. 18.
[35] 6 App.Cas. 315.
[36] [1913] A.C. 771, 776.
[37] [1934] 1 K.B. 548.
[38] [1906] A.C. 18.

present case, that the right to obtain or win gravel lying in the soil should be a capital expense. But these matters of taxation must depend on the rules laid down by the relevant legislation by reference to which income for tax purposes is to be measured and under which capital expenditure is not deductible. In my view, when all the authorities are looked at, it is reasonably plain that an asset such as that acquired by the taxpayers in the present case must be regarded as a capital asset and not as so much stock-in-trade purchased by the taxpayers for the purposes of their trade.

Mr. Magnus invited us to distinguish the *Alianza* case [38] and the *Coltness* case [39] and other cases of that kind on the ground that these were either cases where there was a question of assessing the owner of a mine under No. III of Schedule A, or else cases in which, as in the *Alianza* case,[40] the appropriate schedule was Schedule D, but the question concerned the profit derived from mining or quarrying operations; and he said that those cases could not govern the present one, because here it was not sought to tax the appellants under Schedule A in respect of their operations in relation to these deposits of gravel. I cannot accept that argument. It seems to me to be reasonably plain from the cases which have been referred to, and in particular from the *Alianza* case [40] and the criticisms of *Knowles* v. *McAdam* [41] in the House of Lords in the *Coltness* case,[42] that there is here involved a general principle which is equally applicable whether the question concerns the ascertainment of the profits derived from a mine, or concerns the ascertainment of the profits of a trader or manufacturer under Schedule D. The question is the same in all these cases, and it is in effect whether a given expense, granted that it is wholly and exclusively for the purposes of the trade, is a capital expense or an income expense; and in deciding that question I think that the same principle must be applied whether the gainful activity concerned is the operation of a mine or a quarry or dealing in such a commodity as gravel.

For these reasons, I agree with the Master of the Rolls that this appeal should be allowed.

BIRKETT L.J. I am of the same opinion and I will, therefore, confine myself to a few words in stating why I feel that the judgment of Harman J. cannot be supported.

Many analogies have been discussed—potatoes, truffles, strawberries, apples, and all sorts of other commodities—in order to ascertain what is the true test to be applied to the particular facts of this case. For my own part, as the discussion has continued it has become clearer and clearer that the all-important matter is the true view of the facts. It is plain that Harman J. came

[38] [1906] A.C. 18.
[39] 6 App.Cas. 315.
[40] [1906] A.C. 18.
[41] (1877) 3 Ex.D. 23; 1 T.C. 161.
[42] 6 App.Cas. 315.

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to his decision on his particular view of the facts after hearing the authorities which have been cited to this court. Jenkins L.J. has cited several extracts from the judgment of Harman J. which, considered in the light of the evidence, such as it is, are very striking. I could have wished that when this case was before the commissioners the facts had been opened more elaborately, because the true position now has to be extracted from certain documents. For example, in the case stated, in paragraph 3 (*e*), it is said: "On acquiring the benefit of the said "agreement in writing, the appellant company proceeded to "excavate the deposit of sand and gravel," but the agreement itself, by clause 4, states: "The purchaser shall have the right "to take upon the said land any portable machinery and haulage "equipment which may be required for the purpose of excavating "and carrying away the said gravel and sand ballast." In clause 6, which is of some importance, it is provided: "For the "period of 5 five years from the date hereof the purchaser shall "have the option to purchase the additional deposit of gravel and "sand ballast in and upon the adjoining 5 acres of land coloured "blue on the plan annexed hereto at the price of £1,000 per acre "where the deposit shall be of a depth of 9 feet or more, provided "that where the deposit shall be found to be of a lesser depth "than 9 feet the purchase price" shall be adjusted.

Those matters are in striking contrast with some of the expressions which are to be found in the judgment of Harman J.[43] to which Jenkins L.J. drew attention: ". . . this gravel had "never been raked off the soil on which it was lying," which would make it a surface matter. "It is argued that what was "bought was a mere right to go on the land and win the gravel ". . . because nobody had ever before applied a rake to this gravel, "it should be treated as capital, whereas if somebody had raked it "into little heaps before the contract was made, then its purchase "would constitute a different form of adventure. . . . They did "not work it up or treat it as raw material or do anything with "it, so far as I am told, except to load it on a cart and take it "away, and it would be to introduce only another artificiality if "I were to hold that the fact that this gravel had not been "moved made the expenditure upon it a capital outlay, when "the expenditure on it would have been a trading cost had it "been touched by a rake."

Sir Lynn Ungoed-Thomas, when opening this appeal, referred to the fact that he thought the judge had decided this case wrongly, not upon any mistaken view of the law but on a mistaken view of the facts; and it appears to be the fact that the judge was not treating this matter as apparently the facts really warranted, as a deposit of gravel on this particular piece of land which had to be excavated and won.

[43] [1954] 1 W.L.R. 1058, 1062.

For that reason, I think that the judgment cannot be supported, because the cases which have been cited, and the judgments of Lord Hanworth and Romer L.J. which have been read, were, I gather, read to Harman J., and he considered the *Golden Horse Shoe* case,[44] indicating his view of the facts that coloured the whole situation. He said[45]: "... in effect, in "the *Golden Horse Shoe* case[46] what was bought was the licence "to go on the land and take away the 'tailings,' and I think "that it is a distinction without difference to suggest that, "because nobody had ever before applied a rake to this gravel," and so on. For my own part, I think that the passage which was cited to us by Sir Lynn Ungoed-Thomas at the outset of this appeal is really a governing consideration to be taken into account with the true facts. Said Romer L.J.[47]: "It seems to follow "from these considerations that the question to be decided in "the present case resolves itself into this: Are the dumps the "raw material of the appellants' business or do they merely "provide the means of obtaining that raw material?" His answer to that question was that they were the raw material itself. That was a decision on the facts of that case.

After listening carefully to the arguments that have been addressed to this court and applying the test which Romer L.J. laid down as the test which is to be applied, I think that although the first clause of the agreement states that the taxpayers purchased the deposit of sand and gravel, the true view is that they purchased the means of obtaining that raw material for the trade which they carried on, namely, the sale of gravel.

Finally, I observe that Harman J. said in his judgment that the appellants "were buying their stock-in-trade when they "bought the gravel." If this company unfortunately had gone into liquidation, and if the contract had not been performed, it might have been difficult to say that one asset, the stock-in-trade, lay below the surface of the ground on that particular plot of land. I should have thought that to describe that property as stock-in-trade would be quite inappropriate.

For these reasons, I feel that it is impossible to support the judgment of Harman J., and I agree with the judgments which have already been delivered.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Metcalfe, Copeman & Pettefar.*

E. D.

[44] [1934] 1 K.B. 548.
[45] [1954] 1 W.L.R. 1058, 1062.
[46] [1934] 1 K.B. 548.
[47] Ibid. 565.

[QUEEN'S BENCH DIVISION.]

1954
Dec. 3.

Devlin J.

* ORMAN BROTHERS LD. *v.* GREENBAUM.

Landlord and Tenant—Act of 1954—*Notice to quit—Validity—Notice given on August* 31, 1954, *expiring October* 4—*Act coming into force on October* 1—*Notice not in form prescribed by Act—Landlord and Tenant Act,* 1954 (2 *&* 3 *Eliz.* 2, *c.* 56), *s.* 24 (1) (3) (*b*). *Statute—Retroactive effect.*

By section 24 (1) of the Landlord and Tenant Act, 1954, "A "tenancy to which this Part of this Act applies shall not come "to an end unless terminated in accordance with the provisions of "this Part of this Act"; and by subsection (3) of that section: "Notwithstanding anything in subsection (1) of this section . . . "(*b*) where, at any time when a tenancy is not one to which this "Part of this Act applies, the landlord gives notice to quit, the "operation of the notice shall not be affected by reason that the "tenancy becomes one to which this Part of this Act applies after "the giving of the notice."

On August 31, 1954, landlords gave to a tenant one month's notice to quit business premises expiring on October 4, 1954. The notice was not given in accordance with the provisions of the Act. On October 1 the Act of 1954 came into operation:—

Held, that section 24 (1) was to be literally interpreted and, unless the notice was saved by subsection (3) (*b*), the tenancy was not terminated; that the object of subsection (3) (*b*) was to meet the situation where there was a change of user between the serving of the notice and its taking effect; that in applying the subsection one had to assume that the Act was already in force; and that, since on October 1, the notice did not comply with the requirements of the Act, the tenancy had not come to an end.

ACTION for possession.

By an agreement in writing dated December 7, 1953, between landlords, Orman Brothers Ld., and a tenant, Woolf Barnett Greenbaum, the landlords let to the tenant the top and second floor of factory premises at 167–173 Goswell Road, Finsbury, for one year certain from March 9, 1953, at a rent of £20 a week. The tenancy expired on March 9, 1954, after which the tenant continued in possession as a four-weekly tenant. By a notice in writing dated August 31, 1954, the landlords gave the tenant notice to quit the premises on October 4, 1954. On October 1, the Landlord and Tenant Act, 1954, came into operation. The tenant contended that, the tenancy being one to which the Act applied, and the notice to quit not being in the form prescribed under the Act, the tenancy, by virtue of section 24 (1),[1] was not terminated by the notice. The landlords contended that, the notice having been given before the Act came into operation, the Act was not retrospective so as to

[1] Landlord and Tenant Act, 1954, s. 24 (1): "A tenancy to which this "Part of this Act applies shall not "come to an end unless terminated "in accordance with the provisions "of this Part of this Act."

invalidate the notice; alternatively, that, even if section 24 (1) applied, the notice was still a good notice by virtue of section 24 (3) (*b*).[2]

Michael Sherrard for the landlords.
Charles Lawson for the tenant.

DEVLIN J. The Landlord and Tenant Act, 1954, came into force two months ago, so that very little time has been lost in the discovery of difficulties about its interpretation and application. It is an Act which is intended so far as Part II is concerned, and that is the only part that I have to deal with, to make certain provisions for security of tenure for business, professional and other tenants.

The defendant was a business tenant. He was granted, to operate from March 9, 1953, a lease for one year of the premises which are the subject-matter of this case for business purposes at a rent of £20 a week. His tenancy, therefore, expired on March 9, 1954, but he was allowed to hold over on the same terms until the landlords, the plaintiffs, decided on August 31 to give him a notice to quit which was to expire within four weeks from its service, and which did, therefore, in accordance with its terms, expire on October 4 of this year. Meanwhile, the Landlord and Tenant Act, 1954, had come into force. It was an Act which was passed by Parliament—and the date is important—on July 30, 1954, but which by section 70 (2), came into operation on October 1.

It is common ground that this was a tenancy of a class to which the Act applies, and one of the questions that I have to determine is whether it applies in this particular case. One of the provisions of the Act is with regard to the giving of notices to quit, and certain forms of notice to quit are prescribed. It is common ground that the notice which was given on August 31 did not comply with that requirement. The question, therefore, I have to determine is whether the notice to quit was a good one or not.

One naturally looks to see what provision, if any, has been made for the situation which was obviously bound to arise, that at the time when the Act came into force there might be notices to quit which had been served, but which had not yet taken effect. Here was a notice to quit served on August 31 to take effect on October 5, and on October 1 the Act comes into force. The notice does not comply with the requirements of the Act. What is the effect of the Act upon such a notice?

[2] S. 24 (3): "Notwithstanding "anything in subsection (1) of this "section . . . (*b*) where, at a time "when a tenancy is not one to which "this Part of this Act applies, the "landlord gives notice to quit, the "operation of the notice shall not be "affected by reason that the tenancy "becomes one to which this Part of "this Act applies after the giving of "the notice."

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One first looks to see what the Act says about notices that are not in accordance with its provisions. Section 24 (1) provides: "A tenancy to which this Part of this Act applies shall not come "to an end unless terminated in accordance with the provisions "of this Part of this Act." When one seeks to apply those words, Mr. Sherrard, for the landlords, argues that "terminated" means "terminated by giving a notice to quit"; in other words, the word is referring to the instrument or to the act which is the terminating factor and not to the effluxion of time. Mr. Lawson disputes that, but I think that Mr. Sherrard's interpretation is the better one, and I shall assume it to be right. The wording of the part of section 24 (1) which I have read appears to draw a contrast between a tenancy coming to an end and a tenancy being terminated. Accordingly, for "terminated" I shall read "notice "to quit has been given." On that basis, the operative part of the section reads: "A tenancy to which this Part of this Act "applies shall not come to an end unless notice to quit has been "given in accordance with the provisions of this Part of this Act."

If one applies that literally, the position is this: One has to ask oneself: On October 5 did this tenancy come to an end? The Act is then unquestionably in force. It is then a tenancy to which this part of the Act applies, because it is a business tenancy. Has it come to an end? It does not come to an end unless notice to quit has been given in accordance with the provisions of the Act, and notice to quit has not been given in accordance with the provisions of the Act and, therefore, the tenancy does not come to an end. That is the literal interpretation of the section.

But Mr. Sherrard argues, with a good deal of force, that that literal interpretation ought not to be given to the section; it ought not to be assumed that Parliament is in effect, though not in form, legislating retrospectively as to the contents of a notice to quit. Suppose, he says, a tenancy required a year's notice to quit and a notice is given which is in the usual form, and then a few days before the notice is due to expire, an Act of Parliament is passed which requires the notice to be in some special form. The consequence is, that when the notice would normally have taken effect a few days later it does not take effect at all. The parties may have made their arrangements on the basis that it was going to take effect; the premises may have been re-let; and it would be quite unreasonable, Mr. Sherrard argues, to give a meaning to this section which would put a landlord, who could not possibly have known what particular form Parliament was going to require, into such a position as that.

Of course, that is always an argument that has to be taken into consideration in the construction of the section, and it may sometimes be a good reason for not giving the words of the section the meaning that they literally bear, but it is not a conclusive reason, because, of course, Parliament can do what it likes. One wants to look at other provisions of the Act to see

whether Parliament has indicated one way or the other how it proposed to deal with such a situation.

Mr. Lawson, therefore, has referred me to the provisions of the Ninth Schedule, paragraph 1, as throwing some light upon Parliament's intention with regard to notices to quit that were served before the coming into force of the Act. Before I refer to that schedule, I must, so as to make it comprehensible, refer to section 66 of the Act itself, which, by subsection (1), provides: "Any form of notice required by this Act to be prescribed shall "be prescribed by regulations made by the Lord Chancellor by "statutory instrument."

What appears to be at first sight surprising, and is indeed surprising until one looks at the terms of the Ninth Schedule, is that although the Act did not come into force until October 1, regulations * were made on August 19 which purported to come into operation on August 27, over a month before the Act itself came into force. All that I need say about those regulations is that they contain a large number of notices and are clearly the sort of regulations that are contemplated by section 66 (1), where the Lord Chancellor is given power to prescribe the form of notice.

If one looks at the Ninth Schedule, paragraph 1, one sees why the regulations were made on that date. Paragraph 1 provides: "The power under section 66 of this Act to make regulations "prescribing forms of notices for the purposes of this Act may be "exercised at any time after the passing and before the com-"mencement of this Act"—that is, at any time after July 30 and before October 1—"so as to bring the regulations into "operation at any time after they are made; and where the date, "or the end of a period, specified by a notice which is given in a "form so prescribed falls after the time at which this Act comes "into operation the notice shall not be invalid by reason only "that it was served before that time."

This is a novel Parliamentary device which is to make the regulations made under the Act part of the law of the land before the Act itself becomes part of the law of the land. I am not, however, in the circumstances of this case, called upon to consider any large question of that sort. The effect of this may be one of two things: it may be that the Act becomes part of the law of the land for certain purposes, and for the purpose of making regulations in particular, on July 30, and that the provision that it does not come into operation until October 1 must be construed accordingly. In that event, the regulations become part of the law of the land on the date when they are brought into operation; that is, August 27. The alternative view is that that is not a possible construction of the Act and that if the Act itself does not come into operation until October 1, neither can the regulations.

* Landlord and Tenant (Notices) Regulations, 1954 (S.I. 1954, No. 1107).

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On that view, however, it seems to me to be plain from this paragraph that if they do not become part of the law of the land until October 1, on that date they become, by virtue of this paragraph, retrospectively law from August 27. That would mean that as between August 27 and October 1 they are not part of the law of the land, but on October 1 they become part of the law of the land retrospectively.

Those are both agreeable possibilities which, as I say, I am not called upon to determine. All that I have to consider is what light this paragraph throws upon the construction of section 24 (1). Does it help to show what Parliament's intentions were with regard to notices to quit served before the Act came into operation? Clearly it does. Clearly, whichever of the two views I have mentioned be the right one, Parliament intended that from and after August 27 notices to quit should comply with the forms that were set out in the regulations of that date; otherwise, there would have been no point whatever in prescribing such forms.

Mr. Sherrard has argued that that is not the true effect of paragraph 1. He says that paragraph 1 and the regulations that were made were intended to set out these notices before the Act itself came into operation so that landlords who desired to follow them could do so, but that, he says, there was nothing in the paragraph which necessarily compelled a landlord to use the notices prescribed by the Act before the Act came into force.

I think that the difficulty in that argument is the use of the word "only" in the last part of the paragraph. The paragraph reads: "where the date, or the end of a period, specified by a "notice which is given in a form so prescribed falls after the "time at which this Act comes into operation the notice shall not "be invalid by reason only that it was served before that time." That appears to me to carry with it the clear implication that it will be invalid if, for some other reason, it does not comply with the Act.

However, I have not got to consider paragraph 1 as if I were construing a paragraph which invalidated a notice which would otherwise be good; I have got to consider it simply in the light which it throws upon the construction of the Act itself, and it there, I think, makes it quite plain that Parliament did intend that the literal meaning should be given to those words. It intended that when the tenancy came to an end one should inquire "Has it been terminated?"—that is, "Has a notice to "quit been given in accordance with the provisions of this Act?" —and it made such provision as it thought was necessary (whether it is sufficient or not is not for me to determine) for giving landlords advance information of what notices they ought to use, so that they could bring themselves into conformity with the Act.

I therefore hold that section 24 (1) applies in this case, and that the tenancy has not come to an end because notice to quit has not been given in accordance with the provisions of the Act.

That is subject to Mr. Sherrard's alternative argument, which is, that if he is caught by subsection (1), then he is taken out of it by subsection (3). [His Lordship read subsection (3) (*b*) and continued:] I think the object of that subsection is clear enough. It is not intended merely as a transitional provision to cover notices to quit that are served before the coming into force of the Act; it is intended as a permanent provision of the Act, and its object is to meet with the situation in which there is a change of user between the serving of the notice and its taking effect, a change of user which might bring the tenancy within the Act. Thus, if instead of reading "tenancy is not one to which this "Part of this Act applies" I call it, not precisely but no doubt for general purposes sufficiently accurately, a "business tenancy," the subsection would read in this way: "where, at a time when "a tenancy is not a business tenancy, the landlord gives notice "to quit, the operation of the notice shall not be affected by "reason that the tenancy becomes a business tenancy after the "giving of the notice." That is a plain, simple and no doubt necessary provision.

But Mr. Sherrard argues that whatever the object of the subsection may be, the language is wide enough for his purposes and he can use it as, so to speak, a transitional provision. He seeks to apply it in this way: As to the first part of subsection (3) (*b*)—"where, at a time when a tenancy is not one to which this "Part of this Act applies, the landlord gives notice to quit"—he says the landlord gave notice to quit on August 31 and the tenancy, although a business tenancy, was not then one to which this part of the Act applied, because the Act did not apply to any tenancy at all, not having come into force until October 1. Accordingly, he comes within the subsection, and he then says: As to the second part of the paragraph—"the operation of the "notice is not to be affected by reason that the tenancy becomes "one to which this Part of the Act applies after the giving of "the notice"—the "becoming" in his case is the coming into force of the Act which affects the tenancy.

In my judgment, that is not a construction which it is reasonable to give to subsection (3) (*b*). I do not think that, if what had been meant was that notices to quit which were given before the coming into force of the Act were not intended to be affected, Parliament would have dealt with it in a way like that. The words "at a time when a tenancy is not one to "which this Part of this Act applies" clearly to my mind carry with them the implication that at the time when one is considering the matter the Act is in force. It is perfectly true, of course, that the Act does not apply to any tenancies before October 1, or, at any rate, before July 30, but that division in time is not what is intended by this subsection. The subsection intends a division in character, and I think Mr. Lawson is right in his argument when he says that when one is applying that subsection at a time

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when a tenancy is not one to which this Part of this Act applies, one has to assume that the Act itself is already in force and applying, and then consider whether in its terms it does or does not cover that particular class of tenancy. Accordingly, the argument based upon subsection (3) (*b*) fails and, therefore, I hold that notwithstanding the notice to quit, the tenancy has, by virtue of section 24 (1), not come to an end.

Judgment for the tenant.

Solicitors: *E. Kleinman; Tringhams.*

J. D. P.

[PROBATE, ETC., DIVISION.]

* FORBES *v.* FORBES.

1954 *Oct.* 6, 7, 8; *Nov.* 1.

Davies J.

Husband and Wife — Divorce — Desertion — Constructive desertion — Reasonable belief in adulterous association—Adultery not alleged in petition.

A husband who left his wife after she had told him that she was in love with another man, presented, in due course, a petition for divorce on the ground of desertion. He alleged that his wife had confessed to having an "affair" with the man, and had neither admitted nor denied adultery; and that on the belief that she had committed adultery he had thereupon left the matrimonial home, to which he never returned. He persistently refused his wife's subsequent requests for him to resume cohabitation with her. No positive confession of adultery was alleged to have been made and a specific charge of adultery was not contained in the petition. The wife also alleged desertion and prayed for a divorce:—

Held, (1) That a wife whose husband left her because she had induced a belief in her adultery would be guilty of desertion.

Baker v. *Baker* [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199 applied.

(2) That it must not, however, be assumed that, because at the date of the alleged inception of desertion a wife might have induced in her husband a belief that she had committed adultery, the husband was necessarily entitled without further inquiry, and by mere inactivity, to assert that such belief had subsisted throughout the relevant period up to his petition.

(3) That the fact that a petitioner had not made a charge of adultery might be a relevant matter for consideration when the court was asked to find that on reasonable grounds he believed, and had believed for three years preceding his petition, that the respondent had committed adultery.

(4) That the evidence in the present case did not establish that the husband had believed in the wife's adultery or, if he did, that he had reasonable grounds for that belief, and that in the circumstances the wife was entitled to a decree.

Defended petition for divorce, in which both parties prayed for a decree of divorce on the ground of desertion.

The husband was the petitioner, and it was common ground that he had left the wife in May, 1950. The nature of his allegation was pleaded in the petition as follows: "For many "years the petitioner and the respondent lived very unhappily "together. The respondent showed no interest in or affection "for the petitioner and in later years rarely spoke to him except "to criticize. In the summer of 1947, at a bungalow at Elmer "Sands, Sussex, after a violent quarrel the respondent said that "it was hopeless going on and that they should get a divorce. "On May 25, 1950, the respondent at 22 Lyndhurst Prior afore-"said, orally informed the petitioner that she was in love with "another man and had been having an affair with him and was "still in love with him. The respondent would neither admit "nor deny adultery. The petitioner believing that the respon-"dent had committed adultery thereupon left the matrimonial "home and has never since resumed cohabitation with the "respondent."

By her answer, the wife originally did no more than deny the alleged desertion, but by an amendment of June 9, 1954, she further alleged that her husband had deserted her; and she gave in her amended answer as particulars of this allegation "that "at or about Whitsun, 1950, the respondent told the petitioner "as was the truth that she was for the time being infatuated "with the neighbour; that the petitioner then said to the "respondent 'I shall leave you now but I will come back when "'you have got over this infatuation if it doesn't take you too "'long and I shall take Andrew [son of the marriage] with me "'as if I leave him you won't try' or used like words; that "in or about the month of January, 1951, following upon a "successful meeting between the petitioner and the respondent "at a party given by the firm which employed the respondent "the respondent asked the petitioner to meet her with a view "to discussing the whole situation between them; that the "petitioner met the respondent at lunch and said to her that "any discussion was useless as a reconciliation was out of the "question; that in or about August or September of the same "year in reply to a letter written by the respondent again "suggesting a meeting to discuss a reconciliation the petitioner "told the respondent that a reconciliation was impossible as he "was interested in another woman; that since the month of "January, 1951, the petitioner has never returned to live with "the respondent."

The parties were married in July, 1940, and there were two children, a boy born in February, 1944, who had been living with the father since the separation in May, 1950, and a girl born in March, 1947, who remained with the mother. The marriage was never a very happy one, the real trouble arising from difficulties on the physical side of the marriage; and by the spring of 1950 they were merely co-existing.

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In June, 1945, they took a flat, which was the only matrimonial home they had for any length of time, and where the wife was still living at the hearing of the suit. Living in a flat upstairs were one Weal and his wife, and their two children. Weal and Mrs. Forbes became close friends, and played tennis regularly together for a local club.

The first serious trouble between the parties arose in August, 1947, as a result of a quarrel between the wife and the husband's parents. The wife suggested a divorce or separation, but the husband said that they should keep together because of the children. In 1949 the husband spent some three evenings a week with the territorials, and he gave evidence that on one occasion he found his wife and Weal sitting together on a couch in his flat on his return. When asked what they were doing they told him that they were discussing lawn tennis and similar topics.

The court held upon the evidence that there was no doubt that from about the summer of 1949 Weal and the wife were completely infatuated with one another. Weal gave this evidence: "We first of all kissed in a party at my flat. It "could have been a year before 1950. We kissed again and "went on kissing. My feelings were bounded by the fact my "family life must not break up. I did not want my wife to "know about this. We confined our love-making to when we "were alone in the car and so on; perhaps in my flat when my "wife was not present; I do not know; it may have been in her "flat when the husband was not present."

The wife gave evidence to the same effect, and said: "I was "infatuated with Weal; I was completely in love with him. I "realized in September, 1949, I was in love. He reciprocated. "We kissed and embraced. I did not want my husband to "know; he [Weal] did not want his wife to know; we kept it "a secret."

The infatuation was kept secret from the respective spouses, and the husband remained unaware of it, although he knew that the wife and Weal were seeing a good deal of one another. He gave evidence that he saw nothing improper occur between them. The evidence of the details of the affair depended upon that given to the court by the wife and Weal. The wife, in her evidence, said that at the time of her friendship with Weal, Mrs. Weal was having an adulterous association with another man.

On Thursday, May 25, 1950, the wife admitted to the husband that she was in love with Weal. The husband gave this evidence in chief: "She asked me to come home early; she had something "important to tell me. After dinner, she said, 'I am in love "'with "Wally." We have been having an "affair."' I was "stunned at this and asked how long it had been going on. She "said, 'Since last summer.' I suggested to her it was since "Elmer Sands, that would be the summer before; she made no "reply. Then I said to her, 'Have you had intercourse with

"'him?' She did not reply; she did not look at me at all; she "was looking down and crying. I said to her, 'I cannot go on "'living here any more.' I was convinced that she had inter-"course. When I said I was going she said, 'You don't under-"'stand, you don't understand.' I asked her, 'Are you still in "'love with Wally?' She said, 'Yes.' 'Why are you telling "'me this now?' She said, 'Alice [Mrs. Weal] has found out "'and has threatened to tell you and I wanted to tell you first.'"

In cross-examination he said: "She said, 'I am in love with "'Wally.' She said, 'Alice has found out and is going to tell "'you.' She did not say that the Weals had told her not to "tell me. She said, 'I have been in love with Wally for some "'time.' She did not say, 'Perhaps that is the reason we have "'not been getting on.' She was not crying all the time. I "said nothing about adultery; what I said was 'intercourse.' "I did not ask her where or when it had taken place. She "neither admitted nor denied intercourse. She must have heard "my question."

The wife gave evidence to this effect: "I said to him that "I realized that things had been bad between us. I said that "I was in love with 'Wally'; that it was a most dangerous "situation and that I wanted him to help me to overcome this "feeling. He was extremely angry. I was frightened because "what had seemed a good idea to tell him and ask him for help "turned out not to have been such a good idea. He said he was "going away. He said he was not going away for good; he was "going away to see if I got over 'Wally'; if I did not take too "long over it he would come back. He said, 'I am taking "'Andrew because if I do not you will not have the same "'incentive to try.' There was no mention of adultery or inter-"course. He did not ask me about intercourse. He asked me, "'Why have you told me?' I said, 'Mrs. Weal has been to "'see me; things have blown up upstairs. We must do some-"'thing about it if we are going to straighten things out.'"

In cross-examination she said: "I did say 'I am in love "'with Wally.' I did not say I had been having an affair with "him. He asked me how long it had been going on; I said, "'Since last summer.' He did not ask about Elmer Sands."

On the following three days the parties had breakfast and dinner together; on the Saturday they took part in a family card party. The husband did not go to see Weal or Weal's wife, and on Monday, May 29, 1950, he left the matrimonial home. On May 31, 1950, Weal wrote to him to apologize for the distress which he had caused, and asked if they could meet; they had lunch together, but there was no reference to the question whether adultery had been committed. It was held that the lunch was a reasonably friendly one. No charge of adultery was made against Weal then or at any time.

Thereafter the wife frequently asked the husband to return to her, but he always refused. At Christmastime, 1950, he

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accepted her invitation to go to a party given by her firm and drove her home. They had lunch together on one occasion, but her requests for him to return were refused. In the summer of 1951 he told her that he wanted a divorce and admitted that there was another woman (whom he said at the hearing that he wished to marry). In November, 1951, the wife wrote to him by her solicitors to say that her affection for Weal had completely disappeared and again asking him to return. The husband's evidence that he did not receive that letter was not accepted. In December, 1952, she wrote: "Maybe, from a hard man's "point of view, you were justified in what you did to me, but "from no point of view can there be any justification for what "you did to [the daughter]. . . . I only hope you receive a "little more leniency for your mistakes than you handed out "to me for mine."

The husband presented his petition for divorce in July, 1953.

P. M. Wright Q.C. and *Roger Ormrod* for the husband.
Miss Morgan Gibbon for the wife.

The following cases were referred to in argument in addition to those cited in the judgment: *Wood* v. *Wood* *; *West* v. *West*.†

Cur. adv. vult.

November 1. Davies J. referred to the pleadings, and continued: The husband's case may be set forth in three sentences: "You made me by your conduct believe that you had committed "adultery. Therefore I left you. Therefore you have deserted "me."

A number of cases have been cited in the course of the argument. I think substantially all of the cases have been decided on what may, for convenience, be called the rule in *Glenister* v. *Glenister* [1] and its later developments. It is not, I think, necessary for me to refer to them all in detail before I turn to the facts. *Glenister* v. *Glenister* [1] was a case where the husband had withdrawn from cohabitation with his wife, and where it was held by the Divisional Court, reversing a metropolitan magistrate, that the husband, though he had failed to prove adultery (he had made a charge of adultery in that case) was entitled to rely on his belief, induced by her conduct, that she had been committing adultery, as constituting just cause for withdrawing from cohabitation with her and therefore providing an answer to her charge of desertion.

The next development in the rule was in the Court of Appeal in *Everitt* v. *Everitt*.[2] In that case it was the party who

* [1947] P. 103; 63 T.L.R. 450; [1947] 2 All E.R. 95.

† [1954] P. 444; [1954] 3 W.L.R. 163; [1954] 2 All E.R. 505.

[1] [1945] P. 30; [1945] 1 All E.R. 513.

[2] [1949] P. 374; [1949] 1 All E.R. 908.

withdrew from cohabitation who caused the suspicion of adultery, for there the husband withdrew from cohabitation with his wife in circumstances which made it reasonable to believe that he was committing adultery. When that apparently adulterous association ended, he asked her to take him back; but it was held that her belief in his adultery was just cause for her refusal to take him back, so that his desertion of her continued.

The most recent case on the subject, and the authority upon which this case turns, is the decision of the Divisional Court in *Baker* v. *Baker*.[3] The headnote to that case is in these terms: "If a husband deliberately induces in his wife the belief that he "is carrying on an adulterous association, and his wife leaves "the matrimonial home in consequence, he can be held to have "expelled her and, therefore, to have deserted her, even though "she fails to bring a charge, or to prove the fact, of adultery." Lord Merriman P., having set out the facts, said[4]: "What the "wife was in effect saying was that she had objected (and there "was evidence about this), in circumstances to which I will refer "more particularly in a moment, to what she believed to be an "improper association between her husband and this woman, "and that when it had been persisted in and lied about, as she "asserted, she had withdrawn from cohabition. The suggestion "was that she did so as the only thing a decent woman could do. "In my opinion the magistrate was justified in saying, as a "matter of law, that if a man (I am putting it hypothetically "now), deliberately induces the belief that he is carrying on an "adulterous association, and his wife leaves the matrimonial "home in consequence, he can be held to have expelled her, and, "therefore, to have deserted her, even though she fails to bring "a charge, or to prove the fact, of adultery." Lord Merriman P. went on to say that in the case which was then under consideration before the Divisional Court, there was a good deal of other evidence on which one could have come to the conclusion that the husband had been guilty of expulsive conduct, quite apart from this suspicion of adultery which he had occasioned, which in itself would have been sufficient to justify a finding of constructive desertion. That is really implicit when he says[5]: "I should be "prepared, on the evidence as a whole, to draw the inference "which the magistrate has not directly expressed, that this man "had been guilty of conduct which could fairly be held to have "expelled his wife from the home; but in justice both to counsel "and to the argument which has been addressed to us by Miss "Gibbon, I must also deal with the specific point on which the "magistrate decided this case, namely, that although he was not "satisfied that adultery had been proved, he found that the wife

[3] [1954] P. 33; [1953] 3 W.L.R. 857; [1953] 2 All E.R. 1199.

[4] [1954] P. 33, 35.

[5] Ibid. 38.

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"had reasonable ground for suspecting that her husband had com-"mitted adultery, and he based his decision on *Glenister* v. "*Glenister*."[6]

But the ratio of the decision of the court is summed up in the last main paragraph of his judgment[7]: "The magistrate has "used the decision that in such circumstances a spouse cannot "be held guilty of desertion so long as the belief in adultery "remains, to justify the proposition that the wife's charge against "her husband of desertion cannot be displaced so long as a "belief, induced by her husband's conduct, that he was com-"mitting adultery, held the field. In other words, he was saying "that their respective rights in relation to cross-charges of "desertion are regulated by the existence of the belief, a pro-"position which has twice been held by the Court of Appeal to be "right."

In my judgment, there is no doubt at all that *Baker* v. *Baker* is a direct authority in favour of the proposition of law which is advanced on behalf of the husband in the present case. But, as I think, it is most important to observe in all the decided cases the emphasis which has been laid upon the temporary effect of this doctrine of reasonable belief. For example, Lord Merriman P. himself, in *Everitt* v. *Everitt*,[8] when dealing with a state of affairs somewhat different from those with which I am concerned, said: "There might, however, come a moment when, in spite "of her confession, or indeed because of her oath that her "confession had been false, the new statement being supported "with equally circumstantial detail, a judge might hold that not "only was the charge of adultery not proved but that the wife "had not in fact committed adultery. From that moment the "fact has been ascertained and there is no longer any room for "the belief; but that does not act retrospectively or retroactively. "So long as the belief is reasonably and properly held, the "husband's conduct, and the parties' respective rights in relation "to cross charges of desertion are adjudicated on according to the "existence of the belief. There may come a moment beyond "which that is no longer possible."

Hodson L.J. in *Allen* v. *Allen*,[9] referred to that passage in Lord Merriman P.'s judgment in *Everitt* v. *Everitt*[8] in these terms[9]: "*Glenister* v. *Glenister*[10] was referred to by Lord Merri-"man, P., sitting as President of a division of this court in "*Everitt* v. *Everitt*,[11] and he there emphasised what is, in my "judgment, an essential feature of the defence which the husband "sought to raise in the present case, namely, its temporary "nature, because, although at one moment a person may be able "to say that he or she reasonably believes in a state of facts, "that reasonable belief may be dispelled at any moment. Nobody

[6] [1945] P. 30.
[7] [1954] P. 33, 40.
[8] [1949] P. 374, 381.
[9] [1951] 1 All E.R. 724, 728; [1951] W.N. 322.
[10] [1945] P. 30.
[11] [1949] P. 374.

"could give an exhaustive statement of the ways in which a "belief could be dispelled. The question in issue in the present "case is whether the husband's belief must be taken to have "been dispelled when a judgment of a court of competent juris-"diction has been given in favour of the wife to the effect that "the husband has failed to prove a charge of adultery against "her." Hodson L.J. later said [12]: "I do not think it is neces-"sary to express a view as to what the position may be if, in the "course of events as between man and wife, a belief by a "husband in his wife's adultery, may be held to be based on "reasonable grounds at one moment and not at another."

Lord Merriman P., in a passage to which I think that it is not necessary to refer in extenso, reiterated the same point in *Chilton* v. *Chilton*.[13]

It is plain, therefore, in my judgment, that it must not be assumed that because at the moment of parting, or at whatever other date it is alleged that desertion commenced, the respondent may have induced in the petitioner the belief that adultery had been committed, the petitioner is necessarily entitled without further inquiry and by mere inactivity to assert that such belief subsisted throughout the statutory triennium up to the presentation of the petition.

There is a further consideration which, in my view, is of importance. In *Barker* v. *Barker* [14] Bucknill L.J., in a passage which is obiter because the matter at issue in that case was the question whether a commissioner who heard an undefended petition was entitled to refuse to make an order for costs in favour of the husband petitioner, said this: "I wish also to say a few "words on the extension of the rule laid down in *Everitt* v. "*Everitt* [15] and the cases therein cited to the present case and to "cases like it. Where there is no doubt that the spouse has "committed adultery, but proof of it cannot be obtained, it seems "from the decision in *Everitt* v. *Everitt* [15] that the innocent "spouse may refuse to cohabit with the guilty spouse and may, "at the end of three years, petition for a divorce on the ground "of desertion. In such a case there is no room for the argument, "which was successful in *Pratt* v. *Pratt*,[16] that repentance and "a genuine wish to return home communicated to the deserted "spouse brings the desertion to an end. If this is the law surely "the court should require the deserted spouse to take all reason-"able steps to obtain proof of the adultery, and, if possible, "bring a petition on that ground, because adultery is the solid "basis of the decree. Constructive desertion in such a case is, "in my view, somewhat of a legal fiction. To take an extreme "case. The wife in a temper tells her husband that she

[12] [1951] 1 All E.R. 724, 729.

[13] [1952] P. 196, 199; [1952] 1 T.L.R. 1316; [1952] 1 All E.R. 1322.

[14] [1950] 1 All E.R. 812, 816; [1950] W.N. 158.

[15] [1949] P. 374.

[16] [1939] A.C. 417; 55 T.L.R. 910; [1939] 3 All E.R. 437.

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"committed adultery on one occasion with a man, now dead, and "then leaves the matrimonial home. The next day she implores "the husband to let her come back and persists in her entreaties, "but the husband refuses to do so or to have anything more to do "with her, and makes no independent inquiries as to the truth "of her statement. The husband waits for three years and then "petitions for a divorce on the ground of desertion. Assuming "that he satisfied the court that he honestly believed that his "wife had committed adultery, the principle, as stated in "*Everitt* v. *Everitt*,[17] should enable him to obtain a decree."

Finally, there is a passage in *Allen* v. *Allen*,[18] to which I have already referred, from the judgment of Evershed M.R., which, in substance, is to the same effect, though he was there dealing with a situation where there had been a finding of a competent court against a charge of adultery. Evershed M.R. said[19]: "Unless the result is as I have suggested it ought to be, the "position would be that a husband could successfully persist in "refusing to discharge the obligations which lie on him as a "husband by continuing to assert an honest and reasonable belief "(in the sense of its being a belief that is sensible and not the "result of caprice or stubborn and distorted judgment) in the "proposition that his wife is an adulteress, a proposition which "he has been, and continues to be, quite unable to prove in a "court of law."

In my judgment, the fact that a petitioner has not chosen to bring and does not now make a charge of adultery may well be a most relevant matter for consideration when the court is asked to find that the petitioner on reasonable grounds believes, and has believed for three years preceding the presentation of the petition, that the respondent had committed adultery. Of course, if at any time within the three years he had put the matter to the test by bringing a petition on the ground of adultery, and the court had decided against him on that issue, his belief would thereafter no longer avail him. That is the rule in *Allen* v. *Allen*.[19]

[His Lordship then stated the facts, observing that it was important to note that the husband had known nothing of the infatuation at the time, and that the evidence about its nature had come from the wife and Weal. Referring to the interview of May 25, 1950, his Lordship said:] I accept Mrs. Forbes' version of this interview. Whether or not it was because she thought Mrs. Weal was going to raise the matter—and it does not matter—I am satisfied that she was asking for help; that she was telling her husband about this and asking him for help, and what she got instead of help, perhaps not surprisingly, was anger.

With one small exception, which I will come to chronologically, that conversation is really the high-spot of the husband's case. His belief in the wife's adultery is substantially based on the

[17] [1949] P. 374.
[18] [1951] 1 All E.R. 724.
[19] Ibid. 731.

question which he says he asked her, and the fact that she "made no reply," as police officers so often are fond of saying.

But what followed? On the Friday, Saturday and Sunday, the husband, who says that he was satisfied that his wife had committed adultery from her failure to reply to that question which he says he put, and which I do not believe he did put, had breakfast and dinner with his wife. The matter was not discussed, save that on one occasion he said that he was going to his parents and taking the boy Andrew with him, he asked her no more questions. He does not suggest he did. On the Saturday evening there was a family card party at which this adulteress and outraged husband played their hands in the usual way. He did not go to see Weal; he did not go to see Mrs. Weal or make any inquiries of any sort or kind to anyone. He says that he did not want to believe that his wife had committed adultery. I am bound to say there is extremely little evidence from his conduct of that disinclination. One is irresistibly, I think, reminded of a sentence in the judgment of Willmer J. in *Beer* v. *Beer*[20]: "The rapidity with which he jumped to his conclusion lends some "support to the wife's case that he had already made up his mind "to desert, and was only seeking a plausible excuse."

On the morning of Monday, May 29, 1950, he left. And there is another interesting fact which I think is not without importance when one is trying to find out what was his state of mind. When he left, he left his wife in his flat with his three-year-old daughter and, for aught he knew, if in fact she had (which I do not accept) impliedly, by silence, admitted adultery, she might have continued this adulterous association with the man upstairs, with this three-year-old baby girl in the flat. I do not believe that if he really believed she had committed adultery he would have left that little child there in her care.

[His Lordship referred to the letter of apology written by Weal, and continued:] As a result of that letter a meeting was arranged between this "outraged husband" and "adulterer." I put both of those in inverted commas because there is no charge of adultery here at all. They meet; they have lunch together; not a word is said by either of them upon this subject of whether or not adultery had taken place, and Mr. Forbes does not even know who paid for the lunch. I find it impossible to believe, even in 1954, when it is fashionable to be modern and civilized about these things, that if the husband really believed that adultery had taken place some reference of some kind or another would not have been made at that interview. There was none. It was a reasonably friendly lunch. It is said on the other side: "Why did not Weal proffer an assurance that adultery had not "taken place?" One answer to that (and, as I have already said, he must have had it in mind, though he said he had not) is the old adage, "One who excuses himself is accusing himself."

[20] [1948] P. 10, 15; 63 T.L.R. 606; [1947] 2 All E.R. 711.

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At any rate, no charge was made then or at any time by the husband against Weal.

There is no doubt that thereafter, both by letter and orally when they met, Mrs. Forbes was constantly asking her husband to return to her. He always refused. He says on more than one occasion he gave as a reason her unfaithfulness. I think it is impossible for me to accept that that word was used in the sense of adultery.

But the matter does not stop there. At the end of 1950, some Christmas party was being given for the staff of the firm where the wife was working. She asked him whether he would go with her; she wanted to put a face on things because everyone in the firm knew she was a married woman. She wanted to produce a husband. He went. Would he have gone if he believed she committed adultery? They had a very pleasant evening and she says he drove her home in the evening, he went in to see baby Hilary and kissed her very affectionately on parting. I think he did. I do not believe that the husband would have gone to that party if he had believed that his wife was an adulteress. They did in fact on one occasion have lunch together: nothing transpired there. She was still asking him to come back. Her hope that he would come back had been raised a little by his conduct on the evening of the staff party, but he was still adamant.

Later in 1951 she asked him if he had found somebody else, and he said, "Yes." It is the fact that in 1951 he had met a woman whom he now wants to marry. I accept the wife's evidence that at the end of the summer of 1951 the husband said that he wanted a divorce. I have no doubt that that is true, although he denies it. He told me in evidence that he did not think in 1951 it was possible to get a divorce. I fail to understand that, if he thought his wife had admitted adultery to him. It is true he had only got her word for it or, rather, her silence for it, on his version of the story; but I should have thought he might have tried to persuade her to make some further and better confession of adultery if he wanted a divorce, or tried to get her to tell him how he could get evidence; but he does not suggest that that happened; indeed, he denies there was any conversation about divorce.

[His Lordship referred to the letter written by the wife's solicitors, and to her letter of December, 1952, and continued:] It does not seem to me possible to construe that letter [of December, 1952] as an admission of adultery; I think it is merely an admission of wrong-doing. Of course, she had behaved extremely badly by allowing herself to fall in love and have this improper affair behind her husband's back with Weal.

That is the end of the case. I am wholly unsatisfied that the husband believed that the wife had committed adultery. I am quite satisfied that if he did, in the circumstances, he had no reasonable grounds for that belief. It is, I think, impossible to

resist the conclusion that he took advantage of his wife's confession of her love for Weal to put an end to a bond that was irksome and intolerable to both of them. That, of course, means an end of the husband's allegation that his wife deserted him.

On one possible construction of the answer as it is framed, I think there is an allegation that desertion by the husband did not begin until January, 1951, and, if that were my finding, that date might not be sufficiently early for the purposes of pronouncing a decree on the answer; but it seems to me that it is open to me to hold on the answer that when the husband left the matrimonial home in May, 1950, he deserted her. It seems to me that it would be wholly wrong and unrealistic to hold that because a wife comes to a husband and confesses that she is and has been for some time in love with another man and wants his help, as I think this wife did, to put an end to the situation, that that would amount to just cause for the husband to leave her. On the contrary, I should have thought that that would be an occasion when it was a husband's duty to afford his wife all the help he possibly could that she was asking for.

In all the circumstances, therefore, if it had been necessary to give leave to the wife to file a cross-petition I would have done so, but it seems to me unnecessary. I find and hold that when the husband, on May 29, 1950, left the matrimonial home at Lyndhurst Prior, he did so without just cause and that he therefore deserted his wife. In all the circumstances, the prayer in the petition will be rejected and, on the amended answer, I pronounce a decree nisi.

Decree nisi on prayer of answer.

Solicitors: *F. J. Stewart & Co.; Copley, Singleton & Billson.*

J. B. G.

[PROBATE, ETC., DIVISION.]

* ROBERTSON *v.* ROBERTSON.

1954
Oct. 5.
Barnard J.

Husband and Wife—Divorce—Practice—Answer—Amending to allege desertion by way of cross-petition—Three years not completed at date of original answer.

A wife presented a petition for divorce on the ground of cruelty. The husband filed an answer in January, 1953, consisting of a bare denial. On an application at the hearing to amend the answer by adding a prayer for divorce on the ground of desertion since April, 1950 (namely, within three years of the date of the original answer), "by way of cross-petition":—

Held, that the court had jurisdiction to allow such an amendment and, in view of the evidence, to pronounce a decree upon the prayer of the answer as amended.

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Pickett v. *Pickett* (*orse. Moss*) [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614 applied.

Defended petition for divorce.

The wife left the husband in April, 1950, and subsequently filed a petition for divorce on the ground of cruelty. The husband filed an answer in January, 1953, consisting of a bare denial; but he applied at the beginning of the hearing for leave to amend the answer and to add to it a cross-petition for divorce on the ground of desertion.

Counsel for the wife consented to the application and intimated that his client did not wish to proceed with her petition if that course were thought proper in the circumstances.

October 5, 1954. *Jonathan Sofer* for the husband applied for leave to make the amendment.

[Barnard J. You have not got three years' desertion.]

Sofer. It is submitted that as the answer contains only a bare denial and does not contain a cross-prayer for relief, the date of that answer is not material for the purposes of the three-years' requirement in respect of any cross-petition.

[Barnard J., referring to *Pickett* v. *Pickett* (*orse. Moss*)[1]: I think that there is some point in your argument. It seems to me somewhat theoretical that I should strike out that part of your amendment which is a cross-petition, when you can file a separate document as a cross-petition.]

Sofer. My main endeavour in this case, in which both parties are assisted persons, is to save costs and avoid the expense of filing a cross-petition and then consolidating the petitions. To save such costs I ask leave to file the answer as amended and achieve the same result in that way.

His Lordship asked counsel for the wife about his position.

Norman Lermon, for the wife, said that the allegation of cruelty fell into two parts, namely, of excessive drinking and keeping her short of money, and of excessive intercourse and one or two attempts at sexual malpractices, of which there was virtually no corroboration. The wife had received no maintenance nor had she asked for any since she left her husband, and

[1] [1951] P. 267; [1951] 1 T.L.R. 585; [1951] 1 All E.R. 614, in which Barnard J. held: "It has been the "established practice of the court for "a respondent to a nullity suit to put "forward a charge of a matrimonial "offence by way of a separate "petition; but in order to save "expense, an answer and cross-"petition may be contained in one "and the same document."

there were no children. If she failed to substantiate the allegations the husband would undoubtedly be entitled to a decree. In the circumstances, the wife did not feel inclined to proceed with her petition, and he (counsel) apprehended that at the end of her case, if she were to proceed, the court might not be satisfied that the charges had been made out.

[BARNARD J. There is no affidavit in support of the proposed amendment, but that difficulty might be overcome if the husband were put in the witness-box. Have you an affidavit?]

Sofer. It has been prepared but has not been sworn.

BARNARD J. You can put the extra questions to your client in the witness-box. By consent I give the husband leave to amend the answer.

Evidence was then called, the court was satisfied as to the allegation of desertion, and a decree nisi pronounced on the prayer of the answer as amended.

Decree nisi on prayer of amended answer.

Solicitors: *Bower, Cotton & Bower; H. E. Thomas & Co., Woolwich.*

J. B. G.

END OF VOLUME 1.

BIBL. LONDIN. UNIV.